

Abbott Australasia Pty Ltd>> v Human Rights & Equal Opportunity Commission & Ors [1998] FCA 1770
(31 July 1998)

Last Updated: 1 June 1999

FEDERAL COURT OF AUSTRALIA

HUMAN RIGHTS - SEX DISCRIMINATION - complaint referred to the Human Rights & Equal Opportunity Commission but complainant died before the hearing - power of the Commission to join parties to the complaint - standing to make an application for parties to be joined - power of Commission to join a representative of deceased complainant as a party - substitution of third party as complainant where the original complainant is deceased - whether the substituted complainant must be the executor of the probated will of the deceased complainant - sex discrimination complaints distinguished from general law matters regarding the prosecution of actions in which the original complainant is deceased

Sex Discrimination Act 1984 (Cth)

Administration Decisions (Judicial Review) Act 1977 (Cth)

Judiciary Act 1903 (Cth).

Wills Probate & Administration Act 1898 (NSW)

Andrews v Hogan (1952) 86 CLR 223

Bone v Commissioner for Stamp Duties (1974) 132 CLR 38

Ainsworth v Criminal Justice Commission [1992] 175 CLR 564

Stephenson v Human Rights & Equal Opportunity Commission & Anor (1996) 68 FCR 290

BMI <<Ltd v Federated Clubs Union [1983] 76 FLR 141

Ex p Newland Bros Pty Ltd; Re Kenniff [1956] SR (NSW) 35
Ex parte Callan; Re Smith [1968] 1 NSWLR 443.

Corporate Affairs Commission v Transphase Pty Ltd>> [1988] 15 NSWLR 605

Marshall v D G Sundin & Co <<Ltd>> (1989) 16 NSWLR 463

Darrington v Caldbeck (1990) 20 NSWLR 212

Daemar v Industrial Commission of NSW [1990] 22 NSWLR 178

Webb v Adkins (1854) 14 C.B. 401

Tarn v The Commercial Banking Company of Sydney Limited (1884) 12 Q.B.D. 294

Russian Commercial & Industrial Bank v British Bank for Foreign Trade <<Ltd [1921] 2 AC 438

Long (Fred) & Son Ltd v Burgess [1949] 2 All ER 484

ABBOTT AUSTRALASIA PTY>> LIMITED v HUMAN RIGHTS AND EQUAL OPPORTUNITY
COMMISSION & ORS

NG 476 of 1997

EINFELD J

31 JULY 1998

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

NG 476 of 1997

BETWEEN:

<<ABBOTT AUSTRALASIA PTY>> LIMITED

Applicant

AND:

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

First Respondent

ALYSCHIA DIBBLE

Second Respondent

LYDIA STEPHENSON

Third Respondent

ST VINCENT'S HOSPITAL SYDNEY LIMITED

FOURTH RESPONDENT

JUDGE:

JUSTICE EINFELD

DATE OF ORDER:

31 JULY 1998

WHERE MADE:

SYDNEY

THE COURT ORDERS THAT:

1. The time in which an application can be made for review of the first respondent's decision to join the applicant as a party to the complaint is extended to 19 June 1997.
2. The applications for review of the decision of the first respondent to join
 - (a) the applicant as a party to the complaint; and
 - (b) the third respondent as a party to the complaintare dismissed.

3. The time in which a cross-application can be made for review of the first respondent's decision to join the third respondent as a party but not as the complainant and to limit the declaratory relief available on the determination of the complaint is extended to 22 August 1997.

4. The cross-application by the third respondent for review of the decision of the first respondent to join the third respondent as a party and not as the complainant is allowed.

5. It be declared that the deceased second respondent is no longer the complainant and that the third respondent be joined to the inquiry of the first respondent as the complainant.

6. The cross-application by the third respondent for review of the first respondent's decision to limit the declaratory relief available on the determination of the complaint is dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

NG 476 of 1997

BETWEEN:

<<ABBOTT AUSTRALASIA PTY>> LIMITED

Applicant

AND:

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

First Respondent

ALYSCHIA DIBBLE

Second Respondent

LYDIA STEPHENSON

Third Respondent

ST VINCENT'S HOSPITAL SYDNEY LIMITED

fourth respondent

JUDGE:

JUSTICE EINFELD

DATE:

31 JULY 1998

PLACE:

SYDNEY

REASONS FOR JUDGMENT

FACTUAL BACKGROUND

In 1990 the late Alyschia (Alice) Dibble, who was born on 22 June 1944, was diagnosed HIV positive. Her condition worsened in 1993 and 1994 and in May 1994 she was informed by Professor David Cooper of St Vincent's Hospital, to whom she had been referred by her treating doctor, that she may be able to participate in the trial of a drug known as ABT 538. Professor Cooper had advised her that no other treatment options were open to her. She immediately underwent tests to determine her suitability for the drug, the test results being that she had good prospects for inclusion in the trial.

Shortly after her participation was approved in June 1994, Ms Dibble was informed by Professor Cooper that she was ineligible to participate in the trial because she was still menstruating and there was therefore a risk of pregnancy. Ms Dibble denied any such risk as she was homosexual and had not engaged in sexual activity with men for many years. She offered to have a tubal ligation to ensure that pregnancy was impossible so that she could participate in the drug trial, but refusal was maintained.

On 23 November 1994 she lodged a claim with the Human Rights and Equal Opportunity Commission (the Commission) of discrimination on the ground of sex, contrary to section 22(1) of the Sex Discrimination Act 1984 (Cth) (the Act). In accordance with the Act, the matter was passed to the Sex Discrimination Commissioner for investigation and possible conciliation. The only respondent named was St Vincent's Hospital Sydney <<Ltd (St Vincent's) whose defence of 20 December 1994 stated that the exclusion of Ms Dibble was solely because of her child bearing capacity in accordance with the clinical protocol for the drug issued by its U.S. manufacturer (Abbott Laboratories). St Vincent's said that it was not permitted to vary any provisions of the protocol, and that although it had tried to persuade Abbott >> Laboratories to permit Ms Dibble's inclusion, it had refused.

During the investigation of the claim by the Sex Discrimination Commissioner, Ms Dibble's condition worsened such that in late 1994 and early 1995, she was given only two to three months to live. She therefore asked for an immediate hearing. The matter was thereupon referred to the Commission for inquiry by the Sex Discrimination Commissioner but Ms Dibble died on 5 March 1995 before a hearing could take place. Lydia Stephenson, as executor of Ms Dibble's estate, sought to continue the complaint. There had, and has, been no grant of probate in the estate.

HISTORY OF PROCEEDINGS TO DATE

On 29 May 1995, the then President of the Commission, Sir Ronald Wilson, determined that Ms Dibble's complaint did not survive her death and that it could not be pursued by Ms Stephenson: [1995] EOC ¶ 92-702. On 13 June 1995 Ms Stephenson sought judicial review by this Court of Sir Ronald's determination but on 15 December 1995 Justice Beazley, then a member of this Court, dismissed the application: [1995] 61 FCR 134. On appeal from her Honour's decision on 26 July 1996, a Full Court of this Court (Jenkinson, Wilcox and Einfeld JJ) declared that Ms Dibble's complaint did not lapse on her death: [1996] 68 FCR 290. It appears that the Full Court was not informed that Ms Stephenson may not be entitled to probate of the estate and that probate had not been taken out.

A hearing of the complaint was then fixed by in the Commission for 22-24 April 1997 but on 25 February 1997, a lawyer stating that she appeared for the late Ms Dibble, whose entitlement to be heard at all was not explained, asked the Commission to join <<Abbott Australasia Pty Ltd (Abbott), the Australian office of Abbott Laboratories, as a party to the inquiry. On 7 March 1997, the Commission asked Abbott to show cause why it should not be joined and gave it one week to make written submissions on the matter. On 13 March, Abbott's solicitors applied for an extension of time for the submissions and a telephone hearing was held by the Hon Elizabeth Evatt as Inquiry Commissioner (the Commissioner) appointed pursuant to section 57A of the Act. In an extraordinary proceeding which, amongst other things, took place one day before the expiry of the time allowed for submissions on the matter, the application for an extension of time, although repeated by Abbott's lawyer several times, was actually ignored and an order was made that Abbott "be joined as a party to the proceeding", as the Commissioner held, under sections 62 and 77 of the Act. Thereafter Abbott >> has been referred to as a respondent to the complaint.

<<Abbott then applied for an adjournment of the April hearing. This application was opposed by the lawyer for the late Ms Dibble, then claiming to appear for "the complainant" (whoever that was), and

deferred. "The complainant" was ordered to deliver the "statement of claim" to Abbott within 14 days, Abbott >> was ordered to reply 14 days after that and the parties were ordered to exchange documents a week later or by the end of the first week in April.

At the direction of the Commission, Points of Claim were filed on behalf of "the complainant" on 24 March 1997 seeking:

(18) A finding pursuant to s81(1)(b) that the complaint is substantiated and:

a declaration that by excluding women of child bearing potential from the study, the Hospital and <<Abbott have engaged in conduct rendered unlawful by the Act;

a declaration that the Hospital and Abbott >> should not repeat or continue such unlawful conduct in relation to that study or other studies; and

a declaration that the Respondents should pay damages by way of compensation for loss and damages suffered by reason of the conduct.

(19) Costs.

On 16 April a hearing was convened by Commissioner Evatt in Sydney in what she announced as "the matter of the Estate of the late Alyschia Dibble against St Vincent's Hospital and <<Abbott Australasia Limited" to consider Abbott's application for an adjournment. The same lawyer as previously announced her appearance "for the complainant" to oppose the adjournment, but Abbott >> argued that there was no complainant. The adjournment was granted but the lawyer "for the complainant" foreshadowed an application to have Ms Stephenson joined as a party to prosecute the original complaint. Accordingly, 23 April was retained as a date for hearing on the questions of the standing of Ms Stephenson to participate in the proceedings and of the relief which she could seek if joined.

On 23 April 1997, that hearing took place and on 23 May 1997, Commissioner Evatt's decision was given. She concluded that joinder of Ms Stephenson would assist the Commission in reaching its determination and therefore joined her, under section 62 of the Act, "as a party to the inquiry to represent the interest of the deceased complainant Ms Dibble". The Commissioner held that:

1. the deceased "remained the complainant to this complaint" and that "no other person could be joined as a complainant in respect of her complaint";
2. Ms Stephenson could seek a declaration "that by excluding Ms Dibble from the study, [St Vincent's] and <<Abbott >> have engaged in conduct rendered unlawful by the Act";
3. she could not seek a declaration in similar terms in relation to the exclusion of other persons from the trial for the same or similar reasons as given to Ms Dibble;
4. there was "little if any scope" for any declaration, as sought in the Points of Claim, that St Vincent's and <<Abbott >> not repeat or continue such unlawful conduct; and
5. the claim for damages in the Points of Claim would be dealt with "in the course of the inquiry".

By an amended application for an order of review dated 18 July 1997 (the original application was filed on 19 June 1997), <<Abbott >> challenged both of Commissioner Evatt's decisions on joinder on the grounds of:

(a) lack of jurisdiction

(b) no evidence to justify the decisions

- (c) errors of law
- (d) lack of statutory authority for the decisions
- (e) improper exercise of statutory power
- (f) their being otherwise contrary to law

By an application of 4 August 1997, <<Abbott>> sought an extension of time to file the application for judicial review so far as it involved the first joinder decision of 13 March 1997. The extension application was opposed but as its resolution required a consideration of the substantive issues, I ordered that it be dealt with concurrently with the application for judicial review of the Commissioner's decisions.

On 22 August 1997, Ms Stephenson filed a cross-application for judicial review of the Commissioner's decisions:

- (a) to join her as a party and not a complainant
- (b) to limit the declaratory relief to unlawful conduct towards the late Ms Dibble and not to include other persons who may have been refused participation in the drug trial for the same or similar reasons as applied to Ms Dibble.

The grounds were given as errors of law, no statutory authorisation and improper exercise of the statutory power. Ms Stephenson also sought an extension of time for her cross-application. Both the application and the cross-application rely on the Administration Decisions (Judicial Review) Act 1977 (Cth) (the Judicial Review Act) and section 39B of the Judiciary Act 1903 (s39B).

UNLAWFUL DISCRIMINATION

Section 22(1) defines the relevant unlawfulness for this matter:

It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, marital status, pregnancy or potential pregnancy:

- (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;
- (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
- (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

The concept of discrimination is relevantly described in section 5(1) of the Act:

For the purpose of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the Aggrieved person) on the ground of the sex of the aggrieved persons if, by reason of:

- (a) the sex of the aggrieved person;
- (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or

(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

LEGISLATIVE PROCEDURES

The first step in a complaint of sex discrimination to the Commission is, by section 50(1), the lodging with the Commission of a complaint in writing alleging that a person has done an act that is unlawful under the Act. This complaint may be made by "a person aggrieved by the act, on that person's own behalf" or it may be a class or representative complaint made on behalf of several persons aggrieved by the act. It can also be lodged by a trade union of which the aggrieved persons are members on behalf of those persons.

Once a complaint is lodged, the Sex Discrimination Commissioner is, by a combination of sections 48(1)(a), 49(1) (there is no other subsection of section 49), and 52(1), required to inquire into the complaint "and endeavour by conciliation to effect a settlement" of the matter alleged. By section 57(1), the Sex Discrimination Commissioner must refer the case to the Commission if she believes that it cannot be settled by conciliation, whether without or after an effort to do so, or is of such a nature that it should be so referred. The referral is to be accompanied by a report. By section 58, the responsible Minister, who is the Attorney General, may also refer matters to the Commission for inquiry.

The provisions of the Act in relation to inquiries by the Commission into complaints of sex discrimination are found in Division 3 of Part III which by section 59(1) requires the Commission to hold an inquiry into any matter referred to it by the Minister or the Sex Discrimination Commissioner. Section 62 then provides:

Where, before the holding of an inquiry, or at any stage during the holding of an inquiry, the Commission is of the opinion that a person ought to be joined as a party to the inquiry, it may, by notice in writing given to that person, join that person as a party to the inquiry.

Section 64 states:

The parties to an inquiry shall be the complainant, the respondent, any person joined by the Commission as a party to the inquiry and any person to whom the Commission grants leave to appear as a party to the inquiry.

The "respondent" is defined by section 4, in relation to a complaint, as "the person who is, or each of the persons who are" alleged to have done the act to which the complaint relates.

Section 51 makes provision for the referral by the Minister or by the Sex Discrimination Commissioner to the Commission for inquiry of matters which came before her otherwise than by a section 50(1) complaint. Section 51 then enacts, in respect of such referrals and inquiries, that:

...for the purpose of any inquiry into the matter by the Commission, this Act has effect as if:

(c) the matter had been the subject of a complaint;

(d) the reference to the complainant in section 64 were a reference to the Commissioner; and

(e) a reference to the respondent were a reference to the person who is, or each of the persons who are, alleged to have done the act to which the matter relates.

Each party is by section 65 bound to appear at the inquiry, and in certain circumstances may do so by a lawyer or agent. By section 63(1)(b), each party to an inquiry is required to be given:

...reasonable opportunity to call or give evidence, examine or cross-examine witnesses and make submissions to the Commission.

Section 77 provides:

(1) For the purposes of an inquiry, the Commission:

(a) is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit; and

(b) shall conduct the inquiry with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Commission permit; and

(c) may give directions relating to procedure that, in its opinion, will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters of issue between the parties; and

(d) may give such directions as to procedure as it considers are appropriate or necessary to ensure that justice is done.

(2) The member presiding at an inquiry shall determine any question relating to the admissibility of evidence and any other question of law or procedure.

Section 81 states:

(1) After holding an inquiry, the Commission may:

(a) dismiss the complaint the subject of the inquiry; or

(b) find the complaint substantiated and make a determination, which may include any one or more of the following:

(i) a declaration that the respondent has engaged in conduct rendered unlawful by this Act and should not repeat or continue such unlawful conduct;

(ii) a declaration that the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;

(iii) a declaration that the respondent should employ or re-employ the complainant;

(iv) a declaration that the respondent should pay to the complainant damages by way of compensation for any loss or damage suffered by reason of the conduct of the respondent;

(v) a declaration that the respondent should promote the complainant;

(vi) a declaration that the termination of a contract or agreement should be varied to redress any loss or damage suffered by the complainant;

(vii) a declaration that it would be inappropriate for any further action to be taken in the matter.

(2) A determination of the Commission under subsection (1) is not binding or conclusive between any of the parties to the determination.

(3) The Commission may, in the making of a determination under subsection (1), state any findings of fact upon which the determination is based.

(4) The damage referred to in paragraph (1)(b) includes injury to the complainant's feelings or humiliation suffered by the complainant.

(5) A determination by the Commission under subparagraph (1)(b)(iv) on a representative complaint:

(a) may provide for payment of specified amounts or of amounts worked out in a manner specified by the Commission; and

(b) if it provides for payment in accordance with paragraph (a), must make provision for the payment of the money to the complainants concerned.

(6) If the Commission makes a determination under subparagraph (1)(b)(iv) on a representative complaint, the Commission may give such directions (if any) as it thinks just in relation to:

(a) the manner in which a class member is to establish his or her entitlement to the payment of an amount under the determination; and

(b) the manner for determining any dispute regarding the entitlement of a class member to the payment.

(7) In this section: "complainant", in relation to a representative complaint, means the class members.

Section 84D states:

(1) If a determination to which this Division applies that is made under section 81 includes a declaration that the respondent should pay damages to the complainant, the complainant is entitled to be paid the amount specified in the declaration.

(2) If the respondent is a Commonwealth agency that has the capacity to sue and be sued, the amount is recoverable as a debt due by the agency to the complainant. In any other case, the amount is recoverable as a debt due by the Commonwealth to the complainant.

(3) In this section: "complainant", in relation to a representative complaint, means a class member.

A number of other provisions in the Act refer to the complainant or the person who has made the complaint into which the Commission inquires. Two of them, sections 83A and 83D, also define the term "complainant" when the complaint is a representative one and add a definition when the complaint is made by a trade union. The implication is that each complaint inquired into must have a complainant.

Section 105 expands liability for unlawful conduct under the Act to any person "who causes, instructs, induces, aids or permits another person to do an" unlawful act.

<<ABBOTT'S ARGUMENTS

Abbott's submissions on the application to extend time and on the substantive questions may be summarised as follows:

A. JOINDER OF ABBOTT

Natural Justice

1. The hearing at which the order for joinder was made took place without adequate notice to Abbott.

2. Abbott was given inadequate information as to the basis of the application for joinder or the standing of the person making the application. This person was a lawyer stating that she represented "the complainant" who at that stage was, and as the Commissioner subsequently held still is, the late Ms Dibble.

3. Abbott was not heard or given an opportunity to make submissions on the question of its joinder.

4. It only discovered that no probate had been granted of Ms Dibble's will after the hearing and it raised the lack of standing in any person to represent the deceased as soon as possible thereafter.

Representation of the deceased estate

5. At the time of the application for joinder, the complainant had been dead for 2 years and probate of her will had not been taken out.

6. An executor named in a will not probated cannot issue proceedings on behalf of the estate or take any steps in existing proceedings.

7. The deceased's property did not vest on her death in the named executor but in the Public Trustee by virtue of section 61 of the Wills Probate & Administration Act 1898 (NSW).

8. Neither the deceased nor the executor had standing to make application for Abbott's joinder. The lawyer claiming to appear for the complainant could have had no instructions in the matter.

Statutory power to join Abbott

9. The only statutorily permissible respondents to an inquiry are persons against whom a complaint has been lodged and referred to the Commission for inquiry: see also s.51(e).

10. No complaint of unlawful conduct by Abbott was made by the deceased and none was therefore inquired into by the Sex Discrimination Commissioner. There was no attempt to settle any such complaint by conciliation, no referral of any such complaint to the Commission, and no mention of Abbott in the report accompanying the referral of the complaint against St Vincent's.

B. JOINDER OF MS STEPHENSON

Standing

1. The only parties to an inquiry should be persons whose personal interests are affected by the inquiry.

2. Ms Stephenson is not such a person.

No evidence

3. There was a complete lack of any evidence before the Commission:

(a) of Ms Stephenson's entitlement to represent the interests of the estate, or even of her consent to do so

(b) of her willingness or ability to assist the Commission

(c) of the will or of its validity

(d) of whether any other person was claiming to represent the estate

4. Ms Stephenson had no authority or entitlement to lodge a complaint against Abbott and has not attempted to do so.

5. As the deceased made no such complaint, Ms Stephenson could not seek to be joined as a complainant of such a complaint or to represent the estate in any such complaint.

6. Section 62 does not permit the Commission to join, as a party to an inquiry into a complaint of a person since deceased, a person who is not the legal personal representative of the deceased.

Irrelevant considerations

7. Ms Stephenson had no standing in the Federal Court proceedings.

8. The fact that Ms Stephenson was recognised by the Federal Court both at first instance and on appeal, which was taken into account by the Commissioner, is irrelevant as the Federal Court was not told that she had not been granted probate of the deceased's will.

Relevant considerations ignored

9. The matters set out in 1 to 6 were relied on as particulars of the Commissioner's failure to take relevant considerations into account.

C. AVAILABLE RELIEF

10. As there is no effective contradictor to Abbott, the Court should not make any declarations as they would serve no purpose.

11. If Abbott succeeds, St Vincent's will face an order for Abbott's costs.

D. CROSS-APPLICATION

12. Abbott adopted the submissions of St Vincent's on the cross-application.

RESPONSE BY MS STEPHENSON

Ms Stephenson filed some detailed written submissions on the issues raised by these proceedings, but subsequently determined on a submitting appearance because she did not wish to expose herself to the risk of an adverse costs order and no undertaking was forthcoming from Abbott or St Vincent's that it would not seek costs if successful. Although, as is customary, the Commission sought also to submit to any order the Court might make, it has responded to the Court's request that it appear in a modified amicus curiae role in an effort to provide the Court with at least a nominal form of contradictor. In the public interest, I intend to deal with Ms Stephenson's written submissions even though there was no one actually arguing to support them.

A. JOINDER OF ABBOTT

1. An extension of time to file the application for review of the decision of 13 March 1997 should not be granted as the 3 months delay cannot be regarded as a "reasonable time" within section 11(4) of the Judicial Review Act.

2. The decision to join Abbott clearly arose from and was justified by the clinical protocol of Abbott Laboratories and the agreement between Abbott and St Vincent's. In any event, the matter of joinder turns on the "opinion of the Commission" which was that Abbott should be joined.

3. An application for joinder does not have to be made by a person with standing.

4. The joinder of Abbott is not judicially reviewable because it is not a final binding decision (s.81) but an act done preparatory to the making of the ultimate decision as to whether there has been unlawful conduct.

5. There was no breach of natural justice because Abbott was given time after it was joined to put further submissions on joinder which might then be reconsidered. No such submissions were ever made.

B. JOINDER OF MS STEPHENSON

6. The decision to join her is reviewable because if she had not been joined, her statutory rights would have been finally determined.

7. The Act does not limit the power of the Commission to add parties to people who can establish special criteria for doing so. The matter is discretionary and the sole criterion is the Commission's opinion that the person ought to be joined. There is no requirement that all possible parties be named in the original complaint or the referral report.

8. It is irrelevant that probate has not been granted because standing in inquiries by the Commission into allegations of sex discrimination by deceased persons is not dependent on legal principles governing the administration of deceased estates. Ms Stephenson's entitlement to participate arose because she was named as executor in the deceased's will.

9. A complaint of unlawful sex discrimination does not involve real or personal property rights. It is a statutory right not dependent on a prior grant of probate. It can be made by anyone with an interest, such as a relative or friend, or for example a representative of an organisation opposing discrimination against women.

C. MS STEPHENSON AS A COMPLAINANT

10. Commissioner Evatt's view that "Ms Dibble remains the complainant to this complaint" is legally erroneous as it is not possible for a deceased person to have standing as or be a party to an inquiry under the Act.

11. The Act implies that there needs to be at least one complainant and one respondent, otherwise there is no complaint into which an inquiry can be held.

12. Once there is jurisdiction to hold an inquiry, additional complainants, respondents and other parties can be joined.

13. The Commission's decision not to add Ms Stephenson as a complainant leaves the deceased's complaint without a complainant. Amongst other things, this result impedes the granting of relief under section 81(1), much of which relates specifically to the complainant.

14. To give effect to the Full Court's decision that the complaint survives the death of the original complainant, and to the fact that the deceased cannot herself be the continuing complainant, it is appropriate that the Commission join as a complainant the person legitimately seeking to represent the estate of the deceased.

SUBMISSIONS OF ST VINCENT'S

A. JOINDER OF ABBOTT

1. No submissions were made in respect of the decision to join Abbott.

B. JOINDER OF MS STEPHENSON

2. It was correct for the Commissioner to join Ms Stephenson as a party as she represents Ms Dibble's interests.

3. The failure to obtain a grant of probate is not a relevant consideration.

C. MS STEPHENSON AS COMPLAINANT

4. Ms Stephenson cannot be joined as a complainant as she has not lodged a complaint under section 50(1) and no complaint of hers has been referred to the Commission for inquiry. Ms Stephenson is not "aggrieved" by any unlawful conduct towards Ms Dibble.

D. AVAILABLE RELIEF

5. No wider relief than that proposed by Commissioner Evatt can be granted as sought by Ms Stephenson because the relief can:

(a) not exceed the terms of the complaint

(b) only be based on the precise and narrow wording of the section 22(1) discrimination relied on

(c) only be granted for the unlawful conduct of St Vincent's being inquired into

6. Even the declaration proposed by Commissioner Evatt should not be made because it will have no practical effect.

7. Damages can only be granted to the complainant and she is deceased. She cannot give any evidence of her loss and no one may do so in her name.

8. The cross-application should be dismissed.

CONCLUSIONS

1. ABBOTT>> AS A PARTY/RESPONDENT

1.1 As determinations of the Commission are not binding yet are apparently judicially reviewable, the non-binding nature of the decision on joinder cannot be relevant to the availability of judicial review. Although this joinder would be reversible if the Commission changed its mind, the decision to join should be taken as a final decision on this question.

1.2 I am therefore of the opinion that the joinder of <<Abbott is judicially reviewable and that Commissioner Evatt was correct to join it as a party. She clearly formed the opinion that Abbott>>'s position as in substance the alleged discriminator under section 22(1), made it a desirable even necessary respondent. It does not seem to me that the Act requires an application to join a party at all, or that an application can only be made by an aggrieved person or by someone with standing based on a legal interest. All it demands is an opinion of the Commission that the party should be joined.

1.3 The hearing at which the joinder was ordered was quite unsatisfactory, perhaps because it was held on the telephone. But the Commission's procedures are intended to be informal and quick and there were ample opportunities both during and after the 13 March 1997 hearing for <<Abbott to seek reconsideration of its joinder had it sought to do so. Nevertheless, the confusion of that hearing justified the delay in seeking review of the decision to join. I therefore extend the time for filing the application to review the decision of 13 March 1997 to join Abbott >> as a party/respondent but dismiss the application for review.

2. STEPHENSON AS A PARTY, NOT A COMPLAINANT

2.1 In my opinion, a complaint inquired into by the Commission must have a complainant. Otherwise there will be no one to pursue it and it will have to be dismissed: *BMI <<Ltd v Federated Clubs Union* [1983] 76 FLR 141 at 154-5; *Corporate Affairs Commission v Transphase Pty Ltd* [1988] 15 NSWLR 596 at 605; *Daemar v Industrial Commission of NSW* [1990] 22 NSWLR 178 at 187; *Russian Commercial & Industrial Bank v British Bank for Foreign Trade Ltd*>> [1921] 2 AC 438 at 448.

2.2 With respect Commissioner Evatt was not correct to hold that the deceased was and remains the only complainant. I can see nothing in the statutory scheme or in the Full Court's judgment to suggest that a deceased complainant can be a party to an inquiry.

2.3 Nor do I believe that only an executor granted probate was in the Full Court's mind when it held that the complaint survived Ms Dibble's death. Speaking for the Court, Wilcox J said in this respect at 298E:

If a complainant dies and the matter is revived by the Commission under s 52(1)(b), or the Minister under s 58, it is, in law, a new proceeding. The statutory procedure must be commenced afresh. Particularly where the original complaint had reached an advanced stage of investigation before the complainant dies, a recommencement would involve wastage of time, effort and cost. It may require recalling witnesses, visiting upon them not only personal inconvenience but also the strain of repeating evidence about sensitive matters. And, there being no provision for the use at the second inquiry of the evidence taken from the complainant at the first, except by consent the second inquiry might be deprived of the evidence of the most important person in the case; and this notwithstanding that she or he was fully cross-examined at the first inquiry.

These factors continue to make it likely that second inquiries will be rare and, if instituted, relatively unsatisfactory. A rule that forces a choice between the dropping of a matter or a relatively unsatisfactory consideration of it, is not conducive to the attainment of the objects of the Act.

2.4 His Honour also said at 299D:

Whilst the death of the complainant may create practical difficulties, especially if she or he has not yet given evidence, these difficulties will be no greater than those which courts routinely face when death removes a party or important witness. The absence of a party or witness does not derogate from the substance of the complaint.

2.5 His Honour's conclusion was expressed this way at 300B:

The appropriate order, as it seems to me...is that it be declared that the complaint made to the Commission by Ms Dibble did not lapse by reason of her death. It may be assumed that this declaration will suffice to cause the Commission to conduct an inquiry. It could, if it thought proper, join Ms Stephenson as a party to the inquiry: see s 62.

2.6 Where probate of a will has not been granted, the named executor cannot sue for debts owed to the estate or for damages: *Bone v Commissioner for Stamp Duties* (1974) 132 CLR 38 at 46; *Marshall v D G Sundin & Co <<Ltd* (1989) 16 NSWLR 463; *Darrington v Caldbeck* (1990) 20 NSWLR 212 at 218; *Webb v Adkins* (1854) 14 C.B. 401; *Tarn v The Commercial Banking Company of Sydney Limited* (1884) 12 Q.B.D. 294.

2.7 But in my view pursuing a complaint of unlawful sex discrimination which survives the death of the complainant is not covered by the principles found in those cases. Nor are such principles consistent with the views expressed by the Full Court.

2.8 Section 3 states the objects of the Act. These are:

(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women; and

(b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and

(ba) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities; and

(c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and

(d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

2.9 The primary purpose of the Act is therefore the elimination of discrimination on the grounds of sex. Although there are private consequences from inquiries into discrimination complaints, the essential objects are public and societal. The Act is not merely vindicatory and compensatory. It is intended to be an agency for educative and attitudinal change. As Sir Ronald Wilson said in his decision in this case (at page 2):

Given the objectives of the SDA, a hearing into a complaint like the present could still serve a useful public purpose in advancing those objectives notwithstanding that there could be no personal benefit to the claimant.

2.10 Except in the specific cases referred to earlier, the term 'complainant' is not generally defined in the Act. As I read it, the context and content of the Act suggest 2 meanings:

(a) the person(s) aggrieved or a trade union under section 50(1), the Sex Discrimination Commissioner or the Minister under section 51(d), and the Minister under section 58 -- of which only aggrieved persons or the members of a class of aggrieved persons can be direct beneficiaries of relief under section 81(1)

(b) the party who prosecutes the complaint and bears the onus of establishing an unlawful act, who need not be the initial prosecutor if the Commission has joined someone else as complainant.

2.11 In my opinion any person who can legitimately pursue the complaint is empowered to seek a mandate to continue it. This person may be anyone who can prove a sufficient connection with the deceased including the executor named in the deceased's will. The pursuit of Ms Dibble's sex discrimination complaint did not vest in the Public Trustee upon her death. In my view the Public Trustee could not have been joined as a party to protect and advance the surviving complaint: *Andrews v Hogan* (1952) 86 CLR 223; *Ex p Newland Bros Pty Ltd*; *Re Kenniff* [1956] SR (NSW) 35; *Long (Fred) & Son Ltd v Burgess* [1949] 2 All ER 484; *Ex parte Callan*; *Re Smith* [1968] 1 NSW 443.

2.12 The delay in making the cross-application is, in the circumstances, understandable. The matter has been attended by significant procedural uncertainties and legal difficulties, including on the question of Ms Stephenson's possible liability for costs. The late filing of the cross-application caused no relevant prejudice as the case was proceeding anyway with the late Ms Dibble as complainant. I extend the time for filing the cross-application.

2.13 I declare that Ms Stephenson is entitled to and should be joined as the complainant in place of Ms Dibble.

3. RELIEF

In my view the only relief that Ms Stephenson can obtain is a declaration that Abbott >> and St Vincent's discriminated against Ms Dibble on the ground of sex by excluding her from the drug test on the ground that she still possessed child-bearing potential. No wide declarations are appropriate and damages cannot be awarded: *Ainsworth v Criminal Justice Commission* [1992] 175 CLR 564 at 582. See also 84D.

I certify that this and the preceding twenty one (21) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Einfeld

Associate:

Dated: 31 July 1998

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Lynn Boyd

Date of Hearing:

13 October 1997

Date of Judgment:

31 July 1998