FEDERAL COURT OF AUSTRALIA

Thomson v Orica Australia Pty Ltd [2002] FCA 939

HUMAN RIGHTS – sex discrimination – maternity leave – different position with lesser status offered upon return to work – unlawful discrimination – s 46PO Human Rights and Equal Opportunity Commission Act 1986 (Cth) – subs 14(2), 5(1) and 7(1) Sex Discrimination Act 1984 (Cth) and constructive dismissal

CONTRACT - EMPLOYMENT – constructive dismissal

Human Rights and Equal Opportunity Commission Act 1986 (Cth) ss 3, 46PH, 46PO, 46PR
Sex Discrimination Act 1984 (Cth) ss 5, 7, 8, 9 and 14
Industrial Relations Act 1988 (Cth) s 170DF
Industrial Arbitration Act 1940 (NSW) s 153 N
Industrial Relations Act 1996 (NSW) s 66

Australian Iron & Steel Pty Ltd v Banovic (1989) 168 CLR 165 referred to
Thomson v Orica Australia Pty Ltd (No 2) [2001] FCA 1563 referred to
Re Wakim; Ex parte McNally (1999) 198 CLR 511 referred to
Qantas Airways Limited v Christie (1998) 193 CLR 280 applied
Illawarra County Council v Federated Municipal & Shire Employees' Union of Australia (1985) 11 IR 18 applied
Burazin v Blacktown City Guardian (1996) 142 ALR 144 applied
Daw v Flinton Pty Ltd (1998) 85 IR 1 referred to
Blaikie v South Australian Superannuation Board (1995) 65 SASR 85 referred to
Easling v Mahoney Insurance Brokers Pty Ltd [2001] SASC 22 applied
Byrnes v Jokona Pty Ltd [2002] FCA 41 referred to
Riverwood International Australia Pty Ltd v McCormick (2000) 177 ALR 193 referred to
Bear v Norwood Private Nursing Home (1984) EOC 92-019 referred to
Marshall v Marshall White & Co Pty Ltd (1990) EOC 92-304 referred to
Birmingham City Council v Equal Opportunity Commission [1989] 1 AC 1155 referred to
James v Eastleigh Borough Council [1990] 2 AC 751 referred to
IW v City of Perth (1997) 191 CLR 1 referred to
Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd (1993) 46 FCR 301 applied
Waters v Public Transport Corporation (1991) 173 CLR 349 referred to
Gibbs v Australian Wool Corporation (1990) EOC 92-327 applied

THOMSON v ORICA AUSTRALIA PTY LIMITED
N 1051 of 2000

ALLSOP J
30 JULY 2002
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 1051 of 2000**

BETWEEN:	**CYNTHIA THOMSON** **APPLICANT**
AND:	**ORICA AUSTRALIA PTY LTD** **RESPONDENT**

JUDGE:	**ALLSOP J**
DATE OF ORDER:	**30 JULY 2002**
WHERE MADE:	**SYDNEY**

THE COURT:

1. **ORDERS** that pursuant to Order 29 rule 2 of the Federal Court Rules the decision of the questions raised by the application and points of claim, other than the nature and extent of relief to be granted (but including the making of declaratory relief and the making of orders for costs in respect of the proceedings to this point), be heard and determined separately before any further trial in the proceedings.

2. **DECLARES** that in the circumstances that have happened:
   (a) the respondent, in breach of contract, wrongfully dismissed the applicant in or about April 2000; and
   (b) the respondent engaged in unlawful discrimination under pars 14(2)(a), (b), (c) and (d) and 7(1)(b) of the *Sex Discrimination Act 1984* (Cth) and thereby s 46PO of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

3. **ORDERS** that the motion brought by the respondent by notice of motion dated and filed 23 February 2001 for summary dismissal of the proceedings be dismissed.

4. **ORDERS** that the respondent pay the applicant's costs of the proceedings to date including the costs of the motion referred to in order 3 above.

5. **ORDERS** that the proceedings stand over to a date to be fixed for hearing of the matter in so far as the applicant claims damages and relief under s 46PO of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

6. **ORDERS** that the proceedings stand over to a date to be fixed for directions in relation to the matter referred to in order 5 above.

7. **ORDERS** that neither party enter these orders for a period of seven (7) days, in order to permit either party, should it or she so wish, to apply to the Court to be heard on the form of these orders.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 1051 of 2000**

BETWEEN:	**CYNTHIA THOMSON** **APPLICANT**
AND:	**ORICA AUSTRALIA PTY LTD** **RESPONDENT**

JUDGE:	**ALLSOP J**
DATE:	**30 JULY 2002**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

Introduction and Statutory Background

1 The applicant, Ms Cynthia Thomson, sues the respondent, Orica Australia Pty Limited (Orica), under s 46PO of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act), alleging discrimination on the grounds of sex and pregnancy. A claim alleging discrimination on the grounds of family responsibilities was abandoned in written submissions after the hearing. Ms Thomson was an employee of Orica. From 12 April 1999 she ceased work at Orica, taking maternity leave. She intended to return to work at Orica on 10 April 2000. She claims that she attempted to return to work, but that the circumstances of her return were such as to amount to the repudiation of her contract of employment and to unlawful discrimination under ss 5, 7, and 14 of the *Sex Discrimination Act 1984* (Cth) (SD Act). Ms Thomson seeks various remedies including damages and compensation.

2 It is necessary to set out some procedural history of the matter and to explain the statutory foundation of the jurisdiction of the Court invoked by the applicant.

3 On 3 October 2000 Ms Thomson made an application to the Court in a form provided for by O 81 r 5 and Form 167 of the Federal Court Rules. It was an application made under s

46PO of the HREOC Act. It was not a pleading.

4 Part IIB of the HREOC Act (ss 46P to 46PV) provides for redress for 'unlawful discrimination' as defined in the HREOC Act. Division 1 of Part IIB of the HREOC Act (ss 46P to 46PN) provides for conciliation by the President of the Human Rights and Equal Opportunity Commission (the Commission); Division 2 of Part IIB of the HREOC Act (ss 46PO to 46PV) provides for proceedings in the Federal Court and the Federal Magistrates Court.

5 The phrase 'unlawful discrimination' is defined in s 3 of the HREOC Act as meaning:

> *any acts, omissions or practices that are unlawful under:*
>
> *(a) Part 2 of the* Disability Discrimination Act 1992*; or*
> *(b) Part II or IIA of the* Racial Discrimination Act 1975*; or*
> *(c) Part II of the* Sex Discrimination Act 1984*;*
>
> *and includes any conduct that is an offence under:*
>
> *(d) Division 4 of Part 2 of the* Disability Discrimination Act 1992; *or*
> *(e) subsection 27(2) of the* Racial Discrimination Act 1975; *or*
> *(f) section 94 of the* Sex Discrimination Act 1984.

6 Relevant for these proceedings is Part II of the SD Act and, so, par (c) of the above definition. Section 94 of the SD Act is irrelevant for these proceedings.

7 Ms Thomson made a complaint to the Commission on 8 May 2000. The complaint was terminated by a delegate of the President of the Commission on 6 September 2000 under par 46PH(1)(i) of the HREOC Act, which is in the following terms:

> *The President may terminate a complaint on any of the following grounds:*
> ...
> *(i) the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation.*

8 If a matter is terminated under subs 46PH(1), the President is to notify the complainant in writing of that decision: subs 46PH(2). That was done here.

9 The termination of the complaint and the notification of the termination to the complainant are preconditions to the entitlement of the complainant to invoke the jurisdiction of the Court: subs 46PO(1). Section 46PO is in the following terms:

Application to court if complaint is terminated

(1) If:

(a) a complaint has been terminated by the President under section 46PE or 46PH; and

(b) the President has given a notice to any person under subsection 46PH(2) in relation to the termination;

any person who was an affected person in relation to the complaint may make an application to the Federal Court or the Federal Magistrates Court, alleging unlawful discrimination by one or more of the respondents to the terminated complaint.

(2) The application must be made within 28 days after the date of issue of the notice under subsection 46PH(2), or within such further time as the court concerned allows.

(3) The unlawful discrimination alleged in the application:

(a) must be the same as (or the same in substance as) the unlawful discrimination that was the subject of the terminated complaint; or

(b) must arise out of the same (or substantially the same) acts, omissions or practices that were the subject of the terminated complaint.

(4) If the court concerned is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or any order to a similar effect:

(a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;

(b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;

(c) an order requiring a respondent to employ or re-employ an applicant;

(d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;

(e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;

(f) an order declaring that it would be inappropriate for any further action to be taken in the matter.

(5) In the case of a representative proceeding under Part IVA of the Federal Court of Australia Act 1976*, subsection (4) of this section applies as if a reference to an applicant included a reference to each person who is a group member (within the meaning of Part IVA of* the Federal Court of Australia Act 1976*).*

> *(6) The court concerned may, if it thinks fit, grant an interim injunction pending the determination of the proceedings.*
>
> *(7) The court concerned may discharge or vary any order made under this section (including an injunction granted under subsection (6)).*
>
> *(8) The court concerned cannot, as a condition of granting an interim injunction, require a person to give an undertaking as to damages.*

10 No issue as to the proper invocation of federal jurisdiction arose. No issue arose as to whether the requirements of subs 46PO(3) had been satisfied.

11 The word 'discrimination' is defined in s 3 of the HREOC Act for the purposes of contexts other than Part IIB of the HREOC Act. For the purposes of an action in the Court and for the understanding of the phrase 'unlawful discrimination' in s 46PO one turns to the SD Act by reason of the definition of that phrase in s 3 of the HREOC Act. (See [5] above.)

12 Part II of the SD Act (ss 14 to 47) deals with prohibition of discrimination. Division 1 of Part II (ss 14 to 20) is entitled 'Discrimination in Work'.

13 It was put in opening by Ms Eastman, who appeared for Ms Thomson, that this was a case of 'direct' discrimination not 'indirect' discrimination. These words do not form part of the textual fabric of the SD Act, though they appear in the heading to s 7B of the SD Act. The characterisation of the case as one of 'direct' discrimination directs attention to subss 5(1) and 7(1), and not subss 5(2) and 7(2) or s 7B of the SD Act.

14 Section 14 of the SD Act deals with discrimination in employment or in superannuation. It being agreed that the proceedings involved a question of 'direct discrimination' (as to which phrase see *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 175) it was common ground that subs 14(2) was relevant. It provides as follows:

> ***Discrimination in employment or in superannuation***
>
> ...
>
> *(2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, marital status, pregnancy or potential pregnancy:*
>
> *(a) in the terms or conditions of employment that the employer affords the employee;*
>
> *(b) by denying the employee access, or limiting the employee's access, to*

opportunities for promotion, transfer or training, or to any other benefits associated with employment;

(c) by dismissing the employee; or

(d) by subjecting the employee to any other detriment.

15 Discrimination on the ground of sex is dealt with by s 5 of the SD Act. Subsection 5(1) is in the following terms:

> ***Sex discrimination***
>
> *(1) For the purposes 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 person 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.*

16 Discrimination on the ground of pregnancy is dealt with by s 7 of the SD Act (which also deals with potential pregnancy). Subsection 7(1) is in the following terms:

> ***Discrimination on the ground of pregnancy or potential pregnancy***
>
> *(1) For the purposes of this Act, a person (the* discriminator*) discriminates against a woman (the* aggrieved woman*) on the ground of the aggrieved woman's pregnancy or potential pregnancy if, because of:*
>
> *(a) the aggrieved woman's pregnancy or potential pregnancy; or*
>
> *(b) a characteristic that appertains generally to women who are pregnant or potentially pregnant; or*
>
> *(c) a characteristic that is generally imputed to women who are pregnant or potentially pregnant;*
>
> *the discriminator treats the aggrieved woman less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not pregnant or potentially pregnant.*

17 I proceed on the basis that the use of 'by reason of' in s 5 (and s 6) of the SD Act and 'because of' in s 7 is not intended to create a substantive difference in meaning and effect. No difference in approach was suggested in argument.

18 Section 106 of the SD Act deals with vicarious liability. It is in the following terms:

Vicarious liability etc.

(1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:

(a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or

(b) an act that is unlawful under Division 3 of Part II;

this Act applies in relation to that person as if that person had also done the act.

(2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.

19 Section 8 of the SD Act deals with acts being done by reason of more than one matter, that is where an act can be explained by a discriminatory and a non-discriminatory reason. It is in the following terms:

Act done for 2 or more reasons

A reference in subsection 5(1), 6(1) or 7(1) or section 7A to the doing of an act by reason of a particular matter includes a reference to the doing of such an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act.

20 Though s 8 does use the phrase 'by reason of', I take it to be intending to refer also to 'because of' in subs 7(1). No submission to the contrary was put by either Ms Eastman or Ms Ronalds, who appeared for the respondent, Orica.

21 In relation to the application of the SD Act, subss 9(10), (11), (12), (13), (14), (17) and (18) of the SD Act are in the following terms:

Application of Act

…

(10) If the Convention is in force in relation to Australia, the prescribed provisions of Part II, and the prescribed provisions of Division 3 of Part II, have effect in relation to discrimination against women, to the extent that the provisions give effect to the Convention.

(11) The prescribed provisions of Part II have effect in relation to discrimination by a foreign corporation, or a trading or financial corporation formed within the limits of the Commonwealth, or by a

person in the course of the person's duties or purported duties as an officer or employee of such a corporation.

(12) The prescribed provisions of Division 3 of Part II have effect in relation to acts done, by a person who is an officer or employee of a foreign corporation, or of a trading or financial corporation formed within the limits of the Commonwealth, in connection with the person's duties as such an officer or employee.

(13) Without prejudice to the effect of subsection (11), the prescribed provisions of Part II have effect in relation to discrimination by a trading or financial corporation formed within the limits of the Commonwealth, or by a person in the course of the person's duties or purported duties as an officer or employee of such a corporation, to the extent that the discrimination takes place in the course of the trading activities of the trading corporation or the financial activities of the financial corporation, as the case may be.

(14) Without prejudice to the effect of subsection (12), the prescribed provisions of Division 3 of Part II have effect in relation to acts done, by a person who is an officer or employee of a trading or financial corporation formed within the limits of the Commonwealth, in connection with any of the person's duties as such an officer or employee that relate to the trading activities of the trading corporation or the financial activities of the financial corporation, as the case may be.

...

(17) The prescribed provisions of Part II have effect in relation to discrimination in the course of, or in relation to, trade or commerce:
(a) between Australia and a place outside Australia;
(b) among the States;
(c) between a State and a Territory; or
(c) between 2 Territories.

(18) The prescribed provisions of Division 3 of Part II have effect in relation to acts done in the course of, or in relation to, trade or commerce:
(a) between Australia and a place outside Australia;
(b) among the States;
(c) between a State and a Territory; or
(d) between 2 Territories.

22 In particular, the terms of subs 9(10) may, in any given case, provide assistance as to the proper construction of the extent of the provisions of Part II of the SD Act.

23 The 'Convention' is the Convention on the Elimination of All Forms of

Discrimination Against Women (done at New York on 18 December 1979 and which entered into force in Australia on 27 August 1983). The Convention, as so identified in s 4 of the SD Act, is contained in a schedule to the SD Act.

24 The orders available to be made, upon the Court being satisfied that the respondent has engaged in unlawful discrimination, are wide: subs 46PO(4). In this regard, and in relation to the conduct of proceedings under Division 1 of Part II of the HREOC Act, the Court, subject to, and within the confines of, Ch III of the Constitution, is not bound 'by technicalities or legal forms': s 46PR.

The Claims of the Applicant

25 As I said earlier, the proceedings were begun by an application in the form prescribed by Form 167 of the Federal Court Rules. That form did not, and does not, provide for any pleading. It largely comprises a series of questions requiring answers to be given by ticking one or more of the alternatives given in boxes. The nature of the relief claimed is disclosed in the answer to question 13, which enquired what remedy the Court was being asked to give. Ms Thomson ticked boxes labelled 'Apology from respondent' and 'Compensation'. She also attached an annexure which set out her claimed remedies more fully as follows:

Particulars of Remedy Sought

13.1 Compensation

Loss of earnings calculated on the respondent's redundancy package	*$85,100.00*
Payment in lieu of notice as per contract – 4 weeks	*$ 5,400.00*
Loss of company car for paid out long service leave and annual leave periods of approximately 15 weeks at $100 per day	*$20,400.00*
Loss of company superannuation contributions over 12 months	*$33,000.00*
Loss of company sponsored life assurance	*$ 1,900.00*
Loss of bonus for year ending December 2000	*$ 2,500.00*
Loss of the respondent's gap plan for medical expenses	*$ 1,900.00*
Child care expenses	*$33,400.00*
General damages for pain and suffering	*$40,000.00*
Grand Total	***$223,600.00***

13.2 Other Remedies Sought

In addition to an apology and compensation, the applicant is seeking the following further remedies:

- *Insert in the internal Orica 'Circle' magazine apologising to the*

applicant and publishing the resolution of this issue.

- *Access to the applicant's personnel and medical records kept by the respondent.*
- *An order that all middle managers of the respondent attend a course outlining their responsibilities under the legislation that deals with discrimination and in particular sex and pregnancy discrimination.*

26 The hearing before me, and so the orders and reasons, only deal with the question of liability. As I indicate later, it is appropriate to make an order under O 29 of the Federal Court Rules for the separate determination of questions.

27 The nature of the case was illuminated by the letter of complaint of Ms Thomson to the Commission. The nature of the case was also illuminated by the affidavit sworn by Ms Thomson on 29 September 2000 and filed in compliance with O 81 subr 5(2) of the Federal Court Rules.

28 Orica then filed a defence to the application together with an affidavit in support, as provided for by O 81 r 7. Notwithstanding the appellation 'defence', the document filed did not set out any assertions in defence of the respondent's position. It was framed in accordance with Form 168. However, a perusal of the affidavit made clear the fundamentals of the version of events contended for by the respondent.

29 The docket judge handling the matter in late 2000 and early 2001 directed that Ms Thomson file points of claim. She did so on 18 April 2001. This document comprised twenty four paragraphs. Paragraphs 1 to 11 set out a skeleton of factual and other matters. Thereafter the pleader turned to the various provisions of the SD Act. Paragraphs 1 to 11 were in the following form:

1. *The Applicant is a woman.*
2. *The Applicant was employed by the Respondent between January 1989 and 20 April 2000.*
3. *The Respondent is and was at all material times a corporation and liable to be sued in and by its corporate name and style.*
4. *The Respondent is responsible for the conduct and acts of its employees and agents undertaken in the course of their employment.*
5. *From December 1998 to April 1999, the Applicant was employed as*

an Account Manager in the Chemnet Division of the Respondent.

Particulars

1. *The Applicant was responsible for Chemnet customers.*
2. *The Applicant had direct personal sales contact with customers.*
3. *The Applicant had specialist knowledge about particular Chemnet products.*
4. *The Applicant reported to Mr Majer.*

6. *On 12 April 1999, the Applicant took 12 months maternity leave.*
7. *The Applicant's position as the Account Manager in the Chemnet division was temporarily filled by Ms Ferro, while the Applicant was on maternity leave.*
8. *On 10 April 2000, the Applicant returned to her employment with the Respondent but to different duties and responsibilities to those performed prior to her maternity leave.*

Particulars

1. *The Applicant was told on 11 January 2000 that a job would have to be found for her.*
2. *The Applicant was told on 24 February 2000 that she would be performing a hybrid role looking after Chemnet and Spectrum.*
3. *The role would be about two-thirds phone contact.*
4. *The role would involve market research.*
5. *The role would involve finding information about purchasers for a new product.*
6. *The Applicant no longer had direct personal sales contact with clients for the Chemnet products.*
7. *The Applicant no longer reported to Mr Majer but to Mr Cavanagh.*

9. *On the Applicant's return to work with the Respondent, Ms Ferro remained in the same position.*
10. *The Applicant was not permitted to return to her former duties which were being performed in whole or in part by Ms Ferro.*

> *11. On 20 April 2000, the Applicant accepted the Respondent's repudiation of her contract of employment and treated her employment with the Respondent as terminated.*

30 Paragraph 11 plainly identifies a case about an alleged serious breach of contract. After the taking of evidence in this matter, a question arose as to whether the applicant's case was solely to be found in the proceedings and remedies provided for by s 46PO of the HREOC Act, or whether within the proceedings before me was a simple breach of contract case and a claim for damages. At the conclusion of the case, the applicant contended for the latter. There was some dispute about this, which I resolved in a body of reasons given on 26 October 2001 (*Thomson v Orica Australia Pty Ltd (No 2)* [2001] FCA 1563). I do not propose to repeat again what I said there. Particulars of [11] of the points of claim were sought and provided, and the respondent expressly declined (by letter dated 23 November 2001) the invitation that I extended to it in [41] of the reasons of 26 October 2001.

31 Thus, the matter (that is, the controversy between the parties) is comprised of the claims for remedies under s 46PO of the HREOC Act and for damages consequent on the acceptance by the applicant of what she claims was the repudiation of her contract by Orica. There is no dispute that the contractual claim arises out of the identical substratum of facts as gives rise to the federal claim under s 46PO. In that sense, there can be no doubt (and no argument was put to the contrary) that the contract claim is in the accrued jurisdiction of the Court: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [136] to [150].

32 The originating process provided for by O 81 of the Federal Court Rules is less than perfect for the raising of such claims in the accrued jurisdiction of the Court. A statement of claim, defence and (if necessary) a reply could have been required to be filed; they were not. A document styled 'points of claim' was. Notwithstanding the hybrid state of the originating process and surrounding court documents, the issue is now thrown up with sufficient clarity as to avoid unfairness. No suggestion is made to the contrary. In making these comments I intend no criticism of the parties, their legal representatives or the docket judge. Rather, they are made to point out one difficulty which I perceive with the required forms in circumstances where there is also a claim in the accrued jurisdiction.

33 I have already referred to the terms of [1] to [11] of the points of claim. The essence of the complaint was encapsulated by a paragraph in submissions filed on behalf of the applicant:

> *In April 1999, Ms Thomson commenced maternity leave for a period of 12 months. She returned to work with the Respondent on 10 April 2000. She expected that she would resume her former duties. She was not advised prior to April 1999 that her duties would change on her return. It was not until a few days before her return to work was* [sic] *she told that she would be performing new duties. However, when she returned to work, the Respondent refused to allow Ms Thomson to resume her previous job which she understood to be temporarily filled by another employee. Ms Thomson alleges that the changes to her job resulted in her being demoted. She believed that the Respondent's actions amounted to a constructive dismissal and she accepted that Respondent's repudiation of her employment on 20 April 2000.*

34 Paragraphs 12 to 22 of the points of claim set out the applicant's case under subss 7(1) and 14(2) of the SD Act ([12] to [16]), and subss 5(1) and s 14(2) of the SD Act ([17] to [22]). These paragraphs identify the respects in which it is claimed that the various types of discrimination occurred. Reliance was placed on pars 7(1)(b) and 5(1)(b) and (c).

35 The position of the respondent was that the applicant's claims were baseless. Indeed, the respondent filed a notice of motion for summary dismissal of the application. This application by motion was listed for hearing before me at the same time as the substantive hearing. Perhaps oversimplified, the respondent's position was that it complied with all its obligations in contract and under statute; that it offered Ms Thomson, on her return, the identical 'position' and an equivalent 'job' to that which she previously occupied before taking leave; that there was in fact created for her a new job of significant responsibility and importance for Orica which called for her experience and skill; and that Ms Thomson had unreasonably refused to return to work, thereby abandoning her employment.

36 The resolution of these competing contentions and the proper application of the law, both statute and common law, requires in large part the resolution of what really did happen between late 1998 and mid 2000 in connection with Ms Thomson's employment at Orica.

Facts

37 Orica is a chemical company which operates in approximately thirty countries. In

Australia there are four aspects of Orica's business: mining, agriculture, consumer products and chemicals. The chemicals business in turn operates through four divisions: Chemnet, Chlor-Alkali, Adhesive and Resins and Mining.

38 Orica employs approximately 840 people in the chemicals group in Australia across the four divisions. In 1999 and 2000, the 'Chemnet business' operated throughout Australia.

39 There was a degree of confusion in the evidence about one aspect of the organisation of Orica's business. At all relevant times in late 1998, and until her departure on maternity leave in April 1999, Ms Thomson worked in the Chemnet section of Orica's business. At least from late 1998 she was one of three so-called account managers or 'key' account managers (in effect sales representatives) handling the accounts of Chemnet in New South Wales. There were eight or nine Chemnet account managers in Australia. From late 1998 to mid-2000 they all reported to Mr Merrick Majer. It is unnecessary to be precise about what each of these Chemnet account managers did. It is sufficient to understand the nature of Ms Thomson's duties, tasks and responsibilities at about the time of her taking maternity leave in April 1999. There was no suggestion in the evidence that Ms Thomson's position was atypical of New South Wales or Australian Chemnet account managers.

40 In April 1999 Ms Thomson's job involved handling in the order of seventy to eighty accounts in amounts which would vary from time to time, but which were in the order of millions of dollars. For a clear understanding of the nature of this account manager work, the evidence of Ms Ferro referred to below is illuminating.

41 In April 1999, and indeed until a reorganisation of Orica in July or August 2000, there was another part or division of Orica's chemicals business known as 'Spectrum'. During the course of the evidence a clearly articulated distinction between the Chemnet business and the Spectrum business eluded most witnesses. However, looking past some of the more formulaic responses of some of the witnesses, the following appears to be clear. First, until July or August 2000, by way of organisation, the Spectrum account managers did not report directly or indirectly to Mr Majer. In New South Wales they reported to Mr Cavenagh who, in turn, reported to someone other than Mr Majer. In the reorganisation of July or August 2000 all Australian Spectrum account managers (not just in New South Wales) reported to Mr Cavenagh, who in turn came to report to Mr Majer. Nevertheless, prior to July or August

2000 Chemnet and Spectrum were, organisationally, quite separate parts of Orica's business. According to Mr Majer, generally, though not always, Spectrum account managers had responsibility for the lower revenue generating clients.

42 Secondly, the nature of the differences between Chemnet and Spectrum is apparent from the evidence of Ms Ferro, which, with one minor exception referred to below, I accept. She was a Spectrum account manager in April 1999. When Ms Thomson left for maternity leave at that time, Ms Ferro took over Ms Thomson's job – her customers, tasks, responsibilities and duties. Before moving across to Chemnet to do Ms Thomson's job, Ms Ferro, at Spectrum, managed 450 customers for a total 'patch value' of $5m. (The word 'patch' was used in the evidence to refer to the customers that were the responsibility of the account manager.) Ms Ferro said that she was moved from this Spectrum job to Ms Thomson's 'patch' which had just over seventy customers with a total 'patch value' of $25m. That last estimate of $25m by Ms Ferro may have been inaccurate in that it probably exceeded the annual value of Ms Thomson's 'patch', but the point she was making was that she was moving from a job requiring her to take responsibility for a very large number of customers with a modest total value in sales ($5m), to one requiring her to look after a much smaller number of customers with a much larger total value in sales (some millions of dollars in excess of $5m, even if $25m was somewhat inaccurate). This had a number of advantages which Ms Ferro perceived. It was a significant increase in responsibility – it was a 'real step up' in the organisation: in effect the equivalent to a promotion by being given a more responsible position. She perceived (wholly sensibly, it seems to me) that the revenue of a customer in a 'patch' was an important factor in looking at that customer's 'strategic position in the company'. Also, apart from dealing with larger value customers, Ms Ferro saw the move as an opportunity to move away from what she described as 'transactional selling', that is 'based on price rather than any strategy or formulation'. She saw it as advantageous to be able to work with customers to develop a strategic plan for them and to involve herself in the business of the customer. Ms Ferro said that she was excited about the new position. When asked how she would view going back to Spectrum now, she said that she would not be 'too thrilled about the idea because at the moment I'm looking after some strategic customers and I wouldn't have the opportunity to look after those strategic customers if I moved back to Spectrum'. Mr Majer, in his evidence, attempted to limit Ms Ferro's 'promotion' to the fact that she was to be upgraded from 'J/G 32' to 'J/G 33'. However, it was plain from Ms Ferro's evidence, and how she gave it, that it was the nature, quality and value of the work

that she saw as more responsible and more exciting.

43 The above evidence was given on the basis that the Spectrum customers that Ms Ferro previously had (approximately 450 totalling about $5m) were a mixture of customers, some being only a few hundred or a few thousand dollars a year, up to some customers being one hundred thousand dollars or more a year.

44 It is unnecessary to deal with all the evidence on Spectrum and what distinguished it from the features of Chemnet. This snapshot gives a clear picture of the two businesses, at least as handled by the account managers. Plainly the Chemnet account manager's job was, and was reasonably viewed as, more challenging and responsible than a Spectrum account manager's job, and one which concerned strategic customers for the business of Orica. The move from the latter to the former was rightly viewed by Ms Ferro as a promotion. The Chemnet account manager's job was a position viewed as more valued and valuable in the organisation – this is so irrespective of pay. It was, and was seen as, a more serious job than the Spectrum account manager's job. This may perhaps explain why Chemnet account managers were called 'key' account managers, at least in parlance (and at times by Mr Majer in his evidence), even if that was not a recognised grade in the so-called 'career ladder' (which was a matrix of managerial skills expected of employees at different grades).

45 Returning to the chronology, Ms Thomson, who had tertiary qualifications in engineering, commenced her employment with ICI Australia Pty Limited (ICI) (the predecessor of Orica) on 1 January 1989. She was employed as a chemical engineer at ICI Specialty Chemicals at the Rhodes site. She worked in this position between January 1989 and June 1991. In June 1989, Ms Thomson was relocated to another office. In early 1991, Ms Thomson approached the Human Resources Manager at the Rhodes site to investigate the possibility of other positions. In June 1991, she successfully applied for a Project Engineer role with ICI Watercare. In January 1992, she started working in the position of an account manager for Watercare. Her responsibilities were to service the New South Wales local council market, Pacific Power and all other non-Sydney Water Board business. She worked as an account manager at Watercare until April 1994. During 1992 to 1993, ICI Specialty Chemicals and ICI Industrial Chemicals groups merged to become ICI Chemicals. The two New South Wales sales forces were consolidated and the new structure was organised along industry lines. In April 1994, Ms Thomson had decided to move to the national sales force in

order to increase her level of responsibility and experience. She remained an account manager.

46 On 1 August 1995 Ms Thomson's job grade was denoted as 'J/G 33'. This was apparently a grade or level standardised by reference to the international character of ICI's then business. The appellation of 'J/G 33' involved no change to Ms Thomson's conditions of employment. During 1999 and 2000 she retained this job grade.

47 On 18 October 1996 Ms Thomson commenced maternity leave for four months. In February 1997 she returned to her previous job as account manager for the food and pharmaceutical industries. Her customer list had not changed over the period during which she had been on maternity leave. She resumed her previous duties without any problems.

48 In 1998, ICI changed its name to Orica Australia Pty Limited. In February 1998, the ICI Chemicals Group became known as the Orica Chemicals Group.

49 In early December 1998 Orica implemented a restructure. The national sales force split into a set of divisional (product-focused) sales forces. Mr Merrick Majer was appointed the National Sales Manager for the 'Chemnet team'. He became the direct line manager for all the Australian Chemnet Account Managers, including Ms Thomson. At that time, there were three Chemnet account managers in New South Wales. From this point, until July or August 2000, Chemnet and Spectrum were organised separately, as described above. The reorganisation in December 1998 led to a change in customers who were in Ms Thomson's 'patch'. Of the customers she left in April 1999, a good number (it being hard to be precise) had only come to her with the reorganisation in December 1998.

50 Ms Thomson's personnel file was put into evidence. It is unnecessary to refer to it in any detail. It is sufficient to say Ms Thomson had generally been rated 'good' in staff reviews. This was short of other achievement levels of 'outstanding' or 'excellent'. However, there was no suggestion in any of the evidence that any decision taken by the respondent concerning Ms Thomson, having any connection with the controversy before the Court, was guided or influenced in any way by any lack of competence in Ms Thomson. She was viewed as a valued and skilled employee, fully capable of satisfactorily discharging her duties as a Chemnet key account manager.

51 In early February 1999 Ms Thomson (who was located in Sydney) rang Mr Majer (who was located in Melbourne) to tell him that she intended to take maternity leave in April 1999. There is a dispute about what was said. Ms Thomson said Mr Majer shouted over the telephone and said that he 'would never employ a female again' and that 'there's laws against this' and that 'now I've got *three* women on maternity leave'. Ms Thomson says that Mr Majer's outburst reduced her to tears. Mr Majer had a different version. He denied shouting at Ms Thomson. Mr Majer took some umbrage at the evidence of Ms Thomson. Whilst I think that at times Ms Thomson gave her evidence with some exaggeration, I reject Mr Majer's evidence that he did not display anger on this occasion and I accept in substance Ms Thomson's version of the exchange. Ms O'Donoghue was called by the respondent to rebut some evidence given by Ms Thomson. When called, she qualified some of her affidavit evidence by changing denials of certain conversations (as expressed in the affidavit) to not recalling them. She also said that in February 1999 Mr Majer was upset with Ms Thomson and that he could well have been in a bad mood. She did not recall whether Mr Majer was saying 'horrible things' about Ms Thomson. However, she accepted that it was a possibility that he spoke badly of Ms Thomson. She also said that she was aware that Ms Thomson and Mr Majer had a personality clash and he was clearly upset after speaking with Ms Thomson. I refer in this regard to [64] to [67] below.

52 This episode is important for two reasons. First, it buttresses a view that I had on viewing Ms Thomson and Mr Majer that, despite an occasional tendency to exaggerate, Ms Thomson was the more reliable witness. As will become more apparent later in these reasons, I am unwilling to rely on significant parts of Mr Majer's evidence, when it is in contest. He was often evasive and unresponsive in his answers and whenever questioning may have led to answers which might have been unfavourable, he resorted to formulaic and undifferentiated repetition to forestall a direct answer in plain English. At times I simply do not accept him. On this question, I find that he was angry with Ms Thomson, that he expressed that anger, that he spoke harshly to her and that an exchange took place substantially as recounted by Ms Thomson.

53 The second reason why I think that this episode is important is that it explains, at least in part, or perhaps gives a clue as to, why Ms Thomson was treated as she was in 2000. I deal later with the events of 2000. Suffice it to say at this point about the events of April 2000, that I find that Ms Thomson was offered duties and responsibilities of significantly

reduced importance and status, of a character amounting to a demotion (though not in official status or salary). I will deal with this in more detail later, but at the bottom of the conduct are a number of facts which I think, at least partly, explain what occurred. Mr Majer and Ms Thomson had a 'personality clash'. That was a euphemism used by Ms O'Donoghue. They didn't like each other. So much was tolerably plain to me in Court; although I would accept that the litigation has probably added a dimension to the dislike. At some point after February 1999, Mr Majer decided that Ms Thomson would not return to her old job in which she reported directly to him. She was, in effect, to be moved to Spectrum to report to Mr Cavenagh. For the reasons which I later give I do not accept the evidence, principally of Mr Majer, as to why Ms Thomson was not given back her previous position. There is no suggestion in the evidence that Mr Majer would have moved Ms Thomson if she had not become pregnant and taken maternity leave. Indeed, he accepted that he would not have moved her had she not become pregnant and taken maternity leave. Ms Thomson having done so, he (I think it was principally a matter for him) decided not to allow her to return to her old job. That had the result of Ms Thomson no longer reporting directly to Mr Majer. I will return to these matters in due course, but for the moment it is sufficient if I simply describe the events of February 1999 and Ms O'Donoghue's evidence as illuminating.

54 In January 2000 Ms Thomson rang Mr Majer to let him know that she was returning to work. The precise terms of the conversation were in dispute, but it is clear that at that time Mr Majer had not taken any steps in preparation for Ms Thomson's return. It is also clear that Ms Thomson's expectation was that she would simply retake the job Ms Ferro was, and had been, doing: in language used in the evidence – take back her 'patch', which, in large part, had been hers prior to her taking leave.

55 In this conversation, or in conversations slightly later in January 2000, Ms Thomson raised the question of a company car before returning on 10 April, on the basis that from 6 March her absence would be on annual leave and not maternity leave, and the question of a salary increase. A modest salary increase was negotiated. Arrangements were made for a car. If there were any defects in these arrangements, to which I do not think it is necessary to descend, they are not of sufficient seriousness to provide a basis for a claim of discrimination or breach of contract.

56 On 28 January 2000 Ms Thomson wrote Mr Majer a letter. That letter was in the

following terms:

> *As discussed with you on the 11th of January, I am writing to confirm that I am returning to work on April 10th, 2000.*
>
> *As I indicated, my annual leave begins on the 6th of March, so I would appreciate access to a company vehicle from that date.*
>
> *Additionally, I expect that you will organise something with regards to a pay increase for this year and* ***would appreciate receiving something in writing with regards to this, as well as details of my next job role (including job description).*** [emphasis added]
>
> *Please feel free to call me on* [telephone number provided] *to discuss any matters. I am looking forward to returning.*

57 It is clear that Ms Thomson was keen to understand what her 'next job role' was. She asked for something in writing. She did not receive such a document. It is fair to say that Ms Thomson began to become insistent as to the matters requested in her letter of 28 January 2000. In late February, Ms Thomson once again rang Mr Majer. He was unable at the time to speak with her. Ms Thomson said that he spoke gruffly. Mr Majer denied this. It matters not.

58 A conversation took place on 24 February 2000. By this time, it is clear that Mr Majer had decided upon the outline of at least some aspects of Ms Thomson's job. There was a conflict in the evidence about the precise terms of this discussion. Before dealing with that conversation, I set out the terms of a letter dated 28 February 2000 sent by Mr Majer to Ms Thomson, shortly after the conversation in question. Ms Thomson says she received it on 7 March 2000.

> *Thank you for your letter advising of your date for return to work. I hope that you* [sic] *maternity leave has gone well and you are looking forward to your return to work.*
>
> *Orica has certainly changed in the time you have been away and I look forward to bringing you up to date with these changes.*
>
> *In relation to the specifics of your return, I can confirm that you will return to an Account Management role with the same conditions of employment as when you commenced maternity leave.*
>
> *J/G 33.*
> *Job Description is as per the career ladder.*

Salary $63,580 p.a.
Tool of Trade vehicle to be provided.
Job Location is currently Chesterhill but there is a strong possibility we will have to move elsewhere within 6 months.

With regard to the objectives of your work, we want you focused on increasing customer coverage as well as supporting the Chemnet Growth Strategy across both Chemnet and Spectrum customers.
The work will require a high proportion of telephone contact.
The position will report into [sic] *Tony Cavanagh.*

We will agree specific objectives and targets upon your return.

In the meantime I have arranged for the return of a car for early March and will contact you when it has arrived in NSW.

Trusting this letter answers the questions asked but please do not to [sic] *hesitate to contact me if there are more.*

59 Distilled from the different versions, and resolving some of the disputes, I find that the essence of the conversation of 24 February 2000 to have been as follows. First, it was plain that Ms Thomson was not to resume the 'patch' currently being handled by Ms Ferro. Secondly, no explanation was given as to why that would not occur. Thirdly, she was told that she would be attending to Spectrum and Chemnet accounts. Fourthly, she was told that she would be involved in significantly more telephone work than previously. I find that Mr Majer said that at least two thirds of her work would be on the telephone. Fifthly, he said that this was part of (as he often said in evidence) the 'growth strategy' of the company. Sixthly, he said that they wanted to try an experiment with her. Seventhly, he said that he wanted market research done, especially on a new product, sodium metasilicate. This was to be done on the telephone, at least initially. The focus of this was to find information about previous purchasers of sodium metasilicate and to see if they would recommence purchasing. Mr Majer said that he also raised a job responsibility for another product, PET resin. Ms Thomson's evidence was that only sodium metasilicate was raised on this occasion. I prefer her evidence. During his examination Mr Majer said that the so-called 'growth strategy' which he discussed with Ms Thomson related to sodium metasilicate and PET resin. In his evidence he did not categorise the Spectrum customer base as part of this 'growth strategy'. In order to clarify his evidence about the 'growth strategy' I asked him some questions:

His Honour *Well, let us just stop there for a minute, so I understand, and so we don't lose this. Your understanding of the growth strategies was around two products?*

Mr Majer *No, these two elements. There were many other works going on in addition, but the two that we wanted Ms Thomson to focus on initially ---*

His Honour *Well, once again? You wanted her to focus on the growth – the aspects of the proposal from Ms Thomson that involved the growth strategy – your evidence is that PET resin, sale and the sodium metacylicate subject matter?*

Mr Majer *Yes*

His Honour *Using those things broadly. They were the two aspects of the growth strategy of the tasks to be given to her?*

Mr Majer *That would be one element of ---*

His Honour *Well, I am trying to understand your evidence, and you indicated a moment ago in your own words that the two aspects of the growth strategy for her were, sodium metacylicate and PET?*

Mr Majer *Yes*

His Honour *And as I understand it, that is the extent of what you would then categorise as the growth strategy to be given to Ms Thomson to undertake?*

Mr Majer *Yes.*

60 As I said above, I reject Mr Majer's evidence that he discussed the PET resin product development on this occasion. Mr Majer said that by this time the decision concerning Ms Thomson's position was a 'calculated and thought through business decision made by not only myself, but the entire Chemnet management team in the need to develop growth and essential for that was to utilise an extra resource, that of an account manager and… Ms Thomson fitted that bill down to a tee.' I reject this evidence. Mr Cavanagh said that Ms Thomson moving into 'his area' was not his initiative. He also said that he had no need of an extra account manager in Spectrum. He said:

Ms Eastman *And the first you knew that Ms Thomson may be reporting to you was as a result of this inquiry by Mr Chesterfield and/or Mr Majer?*

Mr Cavenagh *Yes, that was when we would have had a conversation sometime and Merrick would have mentioned that, and that was confirmed with the copy of the letter that was sent.*

61 While I accept that Mr Majer may have consulted others, it is tolerably plain that this was principally his decision. Precisely why it was made (in the sense of subjective motive) is unclear. As discussed below, the justifications put forward for it in evidence do not withstand scrutiny.

62 Mr Majer denied that he said in this conversation of 24 February 2000 that Ms Thomson would not be managing customers. I accept that denial, in so far as he did say that she would have customers: Spectrum and Chemnet customers. However, I find that he did convey that she would not have customers to manage as she had done so before: that is, that she was to have a significant number of customers who would not be 'managed' in the way she had previously done and in the way that made Ms Thomson's job so attractive to Ms Ferro.

63 Upon receiving the letter dated 28 February 2000 and having the conversation of 24 February 2000, Ms Thomson knew that she would not be retaking her 'patch'; that she would be reporting to Mr Cavenagh; that she would have a mixture of Spectrum and Chemnet customers; and so, from her reporting position and the nature of her customers, she was substantially being moved to Spectrum; that the greater proportion of her time would be spent on the telephone; that she would be doing transactional selling; that she would not be managing existing strategic customers as she had previously; that she would be trying to resuscitate former customers and sell them sodium metasilicate which would require finding old files and doing telephone 'cold calling'; and that this work on sodium metasilicate was part of a 'growth strategy' (whatever that otherwise might mean). Ms Thomson was anxious and unhappy about this. She had reason to be. Unless the part of the new job to do with sodium metasilicate or such other Chemnet customers as she received was sufficient to outweigh it, she was being given a job at Spectrum reporting to Mr Cavenagh. Based on the evidence of Ms Ferro and considering that she would be spending up to two thirds of her time telephoning customers, she could reasonably anticipate that she was being effectively demoted in job status. Such outline as she had of working up customers for sodium metasilicate can hardly have alleviated her concern.

64 In March Ms Thomson spoke to a number of people at Orica: Ms O'Donohue, Ms Hodder and Ms Travaglia. I accept that she spoke to these people. She rang them in order to

ascertain how other people had been treated in situations similar to her own. I have referred earlier to Ms O'Donohue's evidence. She withdrew her denial in her affidavit that Mr Majer was 'bad mouthing' Ms Thomson to others in the Melbourne office in early 1999. She said she could not recall that matter. She said, in chief:

Ms Ronalds *...To the best of your recollection, did you make the comment there, ascribed to you with the (a)?*

Ms O'Donohue *That Merrick is in a foul mood. I really can't recall. I recall that Merrick was upset with Cynthia and could well have said that he was in a bad mood. Again, I don't recall whether Charles* [Charles Tulloch – another employee] *had told me that Merrick was saying horrible things about Cynthia, so I can't say for certain that I said that.*

Ms Ronalds *So you have no recollection of saying that?*

Ms O'Donohue *Not really*

Ms Ronalds *As his Honour was putting to you, is it likely it was the sort of thing you would have said?*

Ms O'Donohue *Well, the difficulty that I have is that I don't believe that I would have said something quite like this because I worked very closely with Cynthia and I knew that Cynthia and Merrick, they had a bit of a personality clash, and I had also worked for Merrick and had like working for him and found him a good manager, and I recall in my conversations with Cynthia that I took a more conciliatory tone. If she was upset with Merrick, I would try to explain where I thought he was coming from.*

His Honour *You wouldn't necessarily fan any fire?*

Ms O'Donohue *Yes, and that's why I find it hard to believe that I would have put it in these terms but I can't recall.*

65 She went on to say the following:

Ms Ronalds *Do you recall Ms Thomson saying, 'It's not very nice that he's discussing me like that in Melbourne, it's not professional'?*

Ms O'Donoghue *I don't recall the specific words but I do recall her saying something along those lines.*

Ms Ronalds *The next comment from you, 'I agree, I think he's stressed out with all the changes'?*

Ms O'Donoghue *I may have said that, I wouldn't deny it.*

66 I referred Ms O'Donoghue to a later affidavit of Ms Thomson which had Ms O'Donohue participating in the following conversation with Ms Thomson:

A [Ms O'Donoghue]	*Merrick is in a foul mood. Charles [Tulloch – a Product Manager] told me that Merrick is saying really horrible things and bad-mouthing you. I think he's not coping well.*
C [Ms Thomson]	*What else?*
A	*He's saying he's got three women on leave and he's never going to employ a female again and from now on will only employ someone with the name of 'Jack', 'Fred' or 'John'.*
C	*It's not very nice that he's discussing me like that in Melbourne – it's not professional.*
A	*I agree. I think he's stressed out with all the changes.*
C	*Still… it's no reason to lash out at me.*
A	*I know.*
C	*I'm really upset I don't know what to do. He's being really silly. It's not as if there is no time to get someone in to fill my shoes and, to top it all off, I was going to suggest Katie as a suitable 'temp' replacement. What do you think?*
A	*Good idea*

67 In discussing this evidence of Ms Thomson the following exchange took place:

His Honour	*If you go to the top of page 8 again, you were asked some questions about that first paragraph and correct me if I'm wrong but this is how I understand your evidence, that you recall that conversation* [that is a conversation with Ms Thomson] *but I think the gist of it is, you think it unlikely that you would've said it, not likely to have said it because of the reason we discussed?*
Ms O'Donoghue	*Yes*
His Honour	*Let me put this to you and I'd like your comment on it: you don't say to me that it's unlikely that you said it because in*

your experience you wouldn't have thought it likely that Merrick Majer might have said those things, do you understand what I mean?

Ms O'Donoghue *Could you repeat it, please?*

His Honour *Yes. Ms Thomson says in this affidavit that you said, Charles Tulloch told me that Merrick is saying horrible things and bad mouthing him?*

Ms O'Donoghue *Yes.*

His Honour *You can't recall that?*

Ms O'Donoghue *Yes.*

His Honour *But you think it unlikely that you said anything like that and the reason we discussed earlier, that logically you think that is right is because you've worked closely, as I understand it, you like Cynthia, you thought that they had a personality clash and you had worked with Merrick Majer and you had enjoyed working with him, you thought he was a good line manager?*

Ms O'Donoghue *Yes*

His Honour *In that sense you had a reasonable relationship with both?*

Ms O'Donoghue *Yes.*

His Honour *For that reason, to use my words, you didn't like to fan the flames?*

Ms O'Donoghue *Yes*

His Honour *Your words, you were conciliatory if there was a problem. But as I understand your evidence, you don't give as a reason for the lack of likelihood of saying this, that you don't think that that's the sort of thing that Merrick would've done? Do you see my point?*

Ms O'Donoghue *Yes, I can see what you are saying. He was upset at the time*

His Honour *He was upset at the time?*

Ms O'Donoghue *Yes and he may have said ---*

His Honour *You don't have to speculate but that is not one of the reasons you give for thinking it unlikely*

Ms O'Donoghue *No*

His Honour *That is all I'm asking you?*

Ms O'Donoghue *Yes, that's correct.*

68 This is the evidence assisting the finding which I made in [51] above.

69 As to Ms Hodder, Ms Thomson gave evidence that Ms Hodder said that what was being done to Ms Thomson was what had been done to her after returning from maternity leave – that Ms Thomson was being offered a 'shit kicker's' role beneath her (Ms Thomson's) status. Ms Hodder denied this. I accept Ms Hodder. I think that this was one area of exaggeration by Ms Thomson. However, much of Ms Hodder's oral evidence confirms that Ms Thomson was very disgruntled at the time about what Mr Majer had said to her, in a way conformable with Ms Thomson's evidence.

70 Ms Thomson also spoke to a Ms Travaglia about the latter not having received back her 'patch' after maternity leave. Ms Travaglia could not give evidence because of personal circumstances. In significant part because of Ms Thomson's exaggeration in respect of Ms Hodder, I propose to place no weight on Ms Thomson's evidence in [45] of her affidavit of 22 December 2000 about Ms Travaglia, without the benefit of Ms Travaglia's evidence.

71 After receiving the letter of 28 February 2000 Ms Thomson attempted to call Mr Majer. She rang him on four or five occasions on the day she said that she received it, 7 March. Unable to speak with him, she rang Mr Cavenagh, to whom she had been told she would be reporting. She said the following about his telephone call:

> *On 7 or 8 March 2000 I contacted Tony Cavenagh – Manager, Spectrum NSW Sales, who was supposedly going to be my new line manager. I thought that he might have more information. He said he and Majer had not finalised 'anything'. He commented that they were keen on more 'coverage', and said they 'want more phone orientation to increase coverage'. He said there was to be less customer responsibility in the role than my previous one. He stated that, with respect to what they wanted me to do, they had 'not put pen to paper' yet. He said they need to operate 'more like the competitors' i.e. lots of low-cost phone contact.*

72 Mr Cavanagh denied saying there was to be less customer responsibility in the

proposed role than in Ms Thomson's previous role. He did say that he said there would be more telephone coverage of customers. I find that in this conversation with Ms Thomson, Mr Cavanagh did say something that led Ms Thomson reasonably to believe that she would have far less customer responsibility in the sense that she had undertaken such responsibility prior to taking maternity leave. This conforms with the type of customer responsibility he did in fact plan for her. It is unclear when this conversation took place. Ms Thomson said 7 March. Mr Cavanagh said it was probably later. In March 2000 Mr Cavanagh began to prepare the Spectrum part of Ms Thomson's proposed 'patch'. He prepared a spreadsheet of customers of Spectrum account managers – Ms Toyne, Mr Donohoe and Ms Kostovska. He extracted a group of customers from these spreadsheets for, as he said, 'the purposes of Ms Thomson's *partial* proposed customer patch'. (Mr Cavenagh no doubt was aware that she would have some Chemnet customer responsibility as well, and he may have been aware of the 'growth strategy' in relation to sodium metasilicate.) He did not send this Spectrum 'patch' to Mr Majer until 8 April 2000, when he did so by email. I will deal with this list now because it is ample foundation for the finding that Mr Cavenagh said something such as that recalled by Ms Thomson about customer responsibility in the conversation in early March just referred to. It does not, perhaps, matter when the list was created, but Mr Cavenagh in [19] of his affidavit of 22 May 2001 swore that he extracted the customers in March. I infer that this formed the substance of what he sent to Mr Majer on 8 April.

73 The covering email of Mr Cavenagh to Mr Majer on 8 April 2000 was in the following terms:

'As per attached file. Proposed customers for coverage by Cynthia.'

74 The enclosed file contained two lists of Spectrum customers. The first was a list of 303 customers from the 'patches' of the three account managers referred to in [72] above, ranked largely in order of value of sales from December 1998 to December 1999. There was no identification of when the sales took place. Some of the customers may not have bought products since before March 1999 and so could be described as 'dormant', using Orica's classification system. The highest sales value for the 1998-1999 year was $8,152. However, this was atypical and out of order in the list. The next highest was $4,983. Some had $0 attributed to them. The lowest sales value greater than $0 was $49. The total value of these customers was $452,115. The second list was of 126 customers who had no value attributed

to them. They were dormant customers.

75 Quite plainly, the first list was a collection of the lower end (in value) of each of the three account manager's patches. It will be recalled that Ms Ferro stated that her Spectrum 'patch' (not said to be atypical) was about 450 customers with a total value of about $5m. Also, Mr Majer in particular was at pains to say that many Spectrum customers were substantial in value. This would account for the (presumably typical) size of Ms Ferro's Spectrum 'patch'. What is quite clear from Mr Cavenagh's list is that he proposed a usual number of Spectrum customers (over 400) with a total value of under $500,000, nearly a third of which were dormant. The list covered customers all over New South Wales. Plainly it was a 'patch' which involved predominantly telephone calling, transactional selling and much 'cold-calling' to resuscitate dormant accounts.

76 Whilst I have rejected Mr Majer's evidence that Ms Thomson's new role was a considered business decision of relevant management, the evidence concerning Mr Cavanagh's preparation of the list of customers enables me more easily to infer that he and Mr Cavenagh spoke in March about the Spectrum list being formulated by Mr Cavenagh and which was contained in Mr Cavenagh's email of 8 April 2000.

77 If this was the sort of work and customer list anticipated to be assigned to Ms Thomson, as in fact it was, and if Mr Cavenagh and Mr Majer were aware of that, as I find they both were in March, then it is likely that it informed what they said to Ms Thomson about her new job, unless they intended to mislead her.

78 It is necessary to return to March 2000 in the chronology. After the conversation with, and letter to, Ms Thomson of 24 and 28 February 2000, respectively, Mr Majer sought advice from those responsible at Orica for staff matters, in particular for the legal obligations of Orica to staff. One of those persons would appear to have been involved in drafting the letter of 28 February. On 20 March 2000 Mr Majer sent the following email to Ms Donnellan and Mr Day at 'Human Resources':

> *Have you been able to make progress. Here is my view*
>
> *Here is the relevant piece of our HR policy*
> ***'All employees granted entitled family leave have the right to return to their previous position, or if this no longer exists, to a comparable position if***

available.'

There are a logical sequence of questions that need to be determined, namely

1. *Does the words 'previous position' mean the exact customer patch for which she was Account Manager*

My view is her previous position was Account Manager (the customer patch is incidental and are reshuffled regularly as a normal course of work), therefore as long as we offer an Account Management role (which we are, albeit with a high degree of telephone contact)) [sic] *she is returning to her previous position. Situation: No argument.*

2. *If the interpretation is that we are* ***not*** *offering 'their previous position', then we ask*
   Does the returning role meet the requirement of the 'comparable position if available'

My view would be a YES, as J/G, salary, car, PD all remain unchanged…Situation: No argument

3. *If the interpretation of the returning position is that it is* ***not*** *comparable with the previous position. We have no position and either an alternative position is found or redundancy applies.*

Your speedy reply appreciated as Cynthia is looking for resolution…mm
[emphasis in original]

79 Incidentally, it is important to note that in this email Mr Majer said that customer patches are reshuffled regularly as a normal course of work. The importance of this statement will be evident in due course.

80 The email reflects an assertion then being made by Ms Thomson with which, to a degree, she persisted: that is that Orica, in order to comply with its obligations to her, *must* return her to her old 'patch'.

81 On 24 March 2000 Ms Thomson wrote to Mr Majer in the following terms:

Following various communications with you since January this year, I would like to put in writing statements I have made to you concerning my return to work on April 10th 2000.

Firstly, I expect to return to my previous job as Account Manager for Chemnet, taking responsibility for the same set of customers I serviced prior to going on maternity leave. I understand that, as that job still exists, it is automatically mine to reoccupy.

Secondly, I fully expect you to implement Orica's previous promise of a job

grade increase, to the equivalent of the old Grade 9. As advised, while a previous manager authorised and implemented the appropriate step-up in my salary, he did not follow through with the appropriate steps for management approval of a Grade increase, contrary to indicating otherwise as early as 1992, the result being I am still a Grade 8 employee in the Orica HR system.

Thirdly, I cannot accept that the new position, reporting to Tony Cavenagh, which you stated you expect me to occupy from the date of my return, is an equivalent position to the one previously held. My understanding is that there will be no accounts to manage, that the position will require far less technical, sales and negotiating skills than I was successfully employing in my Account Manager role, and that telemarketing and telephone sales will be a large portion of the job. These aspects are far removed from the role I previously occupied.

I would appreciate a response to this letter prior to the end of March, and expect that we can resolve the issue prior to my return.

82 The first point made by her is the assertion, to which I referred in [80] above. The third point made by her substantially reflects the substance and effect of what she had been told. These words may not have been those of Mr Majer, but what he said to her reasonably led her to understand what she there wrote. She had also been told of a 'growth strategy', which involved her undertaking the tasks referred to in [59] above in promoting sodium metasilicate.

83 Mr Majer sent this letter off to Mr Day for advice. A letter in response was then drafted by Mr Day and amended by Mr Majer. That letter was dated 5 April 2000. It was signed by Mr Majer. It was given to Ms Thomson on 10 April when she saw Mr Majer on her return, in circumstances described in [89] to [95] below. The letter in its final form was in the following terms:

Thank you for your letter of 24 March 2000, and the opportunity to respond to your concerns.

I confirm our understanding that on Monday 10th April 2000, you will return to work with Orica as an Account Manger. We look forward to rejoining our team [sic].

We confirm that (consistent with Orica's Family Leave Policy) upon your return, your position will remain the same as it was prior to your absence on Family Leave. However, you will not be resuming responsibility for the same set of customers whom you serviced previously. That is to say, while your 'job' will be different, your position remains the same.

We note that you state in your letter 24 March 2000 that you cannot accept that that job (reporting to Tony Cavanagh) is an equivalent position to the one which you previously held. The position is an equivalent position, notwithstanding that specific objectives and targets will be agreed upon your return. It is not uncommon for adjustments to be made to the job specifications for Account Managers (in Orica or elsewhere).

Orica considers you to be a valuable employee and the new job planned for you is consistent with the position of Account Manager for Chemnet. Furthermore, aspects of your remuneration, including salary, tools of trade, and motor vehicle entitlements will be unchanged. The nature of the position of Account Manger is a generic one and your career from Orica's perspective will be treated in the same way as if there had been no adjustments whatsoever.

Orica realises that there may be some adjustments to your job specifications, and acknowledges that this may necessitate a 'transitional period' upon your return to work. Orica will support you through this time and do everything possible within its means to make this transition as easy as possible for you.

In relation to the 'previous promise of job grade increase' as contained in your letter of 24 March 2000, we have not been able to find any reference to such in our records. We would be interested to review any personal records that you may have on this issue. In the absence of any further records, the Career Ladder is the process by which Account Mangers may pursue job grade changes.

Once again, we look forward to seeing you on 10th April 2000, and hope that this letter has resolved any outstanding issues which you had.

84 On 6 April 2000 Mr Majer sought Mr Day's advice again. The email sent to Mr Day on 6 April was as follows:

Thank you for this letter and it appears from its content that we are operating within both Orica's and NSW policies…Please confirm

I can confirm that we move account managers [sic] *patches around for a number of reasons..equalisation of work loads, optimise Account Manager expertise in a particular market sector, customer restructures where decision maker is moved to another site/state and often patches are shuffled when I take on a new Account Manager.*

I have confirmed with Cynthia that neither Orica nor she has any record of the promised job grade change and she agrees that she will have to pursue the career ladder process..I will modify your letter to reflect this.

Unless I hear otherwise, I will present this letter to Cynthia personally on Mon next.

85 Again it should be noted that Mr Majer stated that account manager patches are moved around for a number of reasons.

86 Just as Ms Thomson's asserted position had, to a degree, a rigidity of approach in requiring her old 'patch' back, so too did Orica's position. It was evident from the letter of 5 April and from much of Mr Majer's evidence that it was his and Orica's view that if Ms Thomson kept her formal grade in the progression of the 'career ladder' and her salary and attendant aspects of remuneration, she could not really complain. This approach laid no emphasis upon the content of the tasks being required of her. It led to some examination of Mr Majer in which (in a manner that can be described as stubbornly formulaic) he would not recognise the word 'position' as having any context other than the so-called career ladder, which was only a matrix of skills, saying little or nothing about duties and responsibilities.

87 Meanwhile, during March, Ms Thomson spoke to Mr Majer, who at that time said he was waiting for advice from Human Resources. This delay during March clearly frustrated Ms Thomson and it provoked in her a level of anxiety which was understandable, given what she had been told.

88 On 5 April 2000 Mr Majer and Ms Thomson spoke over the telephone. Some aspects of the conversation were in contest. To the extent any aspect of that dispute is important, I prefer Ms Thomson's evidence. As I have said, I found Mr Majer to be a less than impressive witness. He resorted to formulaic repetition to evade direct answers. He was stubbornly repetitive and, as far as I could see, was anxious to avoid directing his attention to questions, the straightforward answering of which might apparently harm Orica's case. I deal later with other aspects of his evidence, some of which I do not think was frank, and some of which was quite unacceptable.

89 Ms Thomson returned to work on 10 April 2000. She met Mr Majer for three hours. It is important to understand what was said at this meeting, though it is also important to realise that much had already been conveyed, as I have described earlier. Ms Thomson commenced her affidavit evidence about the meeting with what I accept to be an accurate statement of her primary position at that meeting:

> *On 10 April 2000 I had about a 3 hour meeting with Majer at Chester Hill, and restated my case. I stated that as my position existed, I was entitled to*

resume it on my return as per Orica policy and the law. I stated that Katie had been told she was a temporary maternity leave replacement employee, and that, accordingly, she would need to move out on my return.

90 Part of the conversation was taken up with detail of work and work tools including car, computer, work area, facsimile access and like considerations.

91 There was a dispute in the evidence as to what was said about the nature of the proposed job. I find that Ms Thomson was insistent on taking back Ms Ferro's 'patch', that Mr Majer refused this, that Mr Majer insisted, by reference to the 'career ladder', that Ms Thomson was receiving an account manager role and, *ipso facto*, was receiving an equivalent position, that Mr Majer said that Human Resources were of the view that Orica was complying with its obligations and that Ms Thomson indicated that Orica had breached its legal obligations by not returning to her Ms Ferro's 'patch'.

92 Ms Thomson deposed to the following exchange:

C *So, why have I not been given my job back and Katie the new role you propose for me?*

M *That won't happen. The Account Manager position is the same, your entitlements are the same, it's just that some specifics have changed. The patch is different, and you also have Tony Cavenagh as a line manager, no different to Western Australia where other people have hybrid roles.*

C *I'm not interested in WA – besides the situation is different in WA with not many sales people for a large state and low sales dollars. The job you are offering is not comparable.*

M *We are working from the Career Ladder.*

93 I accept this evidence.

94 Mr Majer deposed that he explained why Ms Thomson could not have Ms Ferro's 'patch' back as follows:

CT *'Can I have Katie's customer patch back?'*

MM *'No, because Katie's customer patch is different to the one that you left 12 months ago. The position we want you to come back to is an Account Manager role identical to the one that you left, albeit with*

> *different customers. There is no value in disrupting the customers again with a change in Account Managers when we have an Account Manager role there for you.'*

95 Ms Thomson denied that he said this, saying he simply said no in the way set out above. I accept Ms Thomson. Before me, various explanations were given as to why Ms Thomson was not returned to her old 'patch' which I will deal with presently. None withstands scrutiny. I find that Mr Majer decided to use the opportunity of the maternity leave to move Ms Thomson from her position at Chemnet to one where she would report to someone else. I accept the evidence of Ms Thomson that the following exchange took place between them:

> *C* *I totally disagree with what you are doing. I am entitled to my previous role. You have breached your obligations. You should have told Katie she is a replacement employee. If I had not gone on maternity leave I would still have that role. I am giving you the opportunity to reconsider what you are doing because what you are doing is in breach of the law. I have seen a lawyer too, and my lawyer said that the simple way of looking at the situation is as follows: You ask the question: 'If you had not gone on maternity leave would you still be doing that job?' and the answer is 'Yes', hence I should be doing the job that I did before maternity leave, the one Katie is doing now. Do you agree that would have been the case?*
>
> *M* *Yes.*

96 Ms Thomson was being told, in effect, that she was moving to Spectrum, with some Chemnet customers, with responsibility for resuscitating customers for sodium metasilicate, in a context in which her old job was available, it having been filled casually pending her return, with no explanation being given to her for why she could not do her old job and why Ms Ferro's role could not be limited in the way originally proposed (that is as a temporary replacement); all this in a context in which Mr Majer agreed that had Ms Thomson not gone on maternity leave, she would not have undergone any such change. Even without the evidence referred to in [95] above, there was no evidence that any such change would have occurred, and I would have inferred that fact in any event.

97 Notwithstanding that her job grade and remuneration remained the same, in the light of the communications since January 2000 and the behaviour of Mr Majer in January 1999, Ms Thomson was entitled to feel (as was the case) that she was being treated somewhat

arrogantly and shabbily by Mr Majer and Orica.

98 At this point, it is necessary to understand the explanation and justification given in evidence for the way Ms Thomson was treated. First, it is appropriate to know what was not put forward. There was no suggestion of any inadequacy on Ms Thomson's part to retake her job. There was no suggestion, save for one reference in the evidence referred to at [99] below, that Ms Ferro was better at the job than Ms Thomson. There was no suggestion that the customers had not been told that Ms Ferro was only temporary. Indeed, Ms Ferro said she told the customers that. There was no suggestion that any customer would have been surprised or angry at losing Ms Ferro. Indeed, neither Mr Majer nor Mr Cavenagh made any enquiry at all of the customers about the matter. There was no suggestion that the personality clash between Mr Majer and Ms Thomson made working together impossible.

99 Turning to the explanations in the evidence, Mr Majer said the following:

(a)

Ms Eastman *That as at January 2000, it was open to you to say to Ms Thomson, well I'll get the ball rolling in terms of you coming back to the, if we call it the chair that Katie Ferro was occupying. That's what you could have said to her?*

Mr Majer *What my recollection is that I would get the ball rolling in terms of the return to an account management position.*

Ms Eastman *Well, had changed in your mind between writing the email to Katie Ferro on 18 March 1999 and 11 January 2000, in relation to Katie Ferro being the temporary employee?*

Mr Majer *What had changed in that time was a number of things, if you'll bear with me.* ***One was the business direction of the company had changed and there was a massive growth initiative being initiated, requiring extra sales resource and we saw Ms Thomson as being integral in developing that resource because of her experience as an account manager and particularly some of her experience as business development in her previous role with ORICA****. So we were welcoming in that opportunity. The second part was that* ---
[emphasis added]

(b)

Mr Majer *...I had sanction by this time, since Ms Thomson's return, to increase the number of account managers in the New South Wales – extra resource.* ***That resource, that extra resource, would be put into freeing up, or developing time to develop***

some of these growth opportunities that had been identified...
[emphasis added]

(c)
Mr Majer *...The second aspect was that* ***customers don't like disruption.***
[emphasis added]

(d)
Mr Majer *The second aspect was that I looked at the state of the existing business and* ***it was quite evident to me that Katie Ferro had been looking after the current customer base very well indeed.*** *In fact, one of the largest customers, and this is most unusual, one of the largest customers, SmithKline Beecham, indicated to me that they were extremely happy with Katie Ferro's performance. That was on a visit, an unusual visit, and yet I had to go there by myself. Katie Ferro wasn't available to go with me, which is the normal practice.* ***So I knew that the patch was performing very, very well under Katie's wing. The third part was that half of the existing customer base that Ms Ferro was looking after, were new to Ms Thomson. Ms Thomson only assumed responsibility for them 16 weeks prior to going to*** ---
[emphasis added]

100 Four elements can be discerned. First, there was the 'growth initiative', which I accept was promulgated by the board. However, this (whatever its precise meaning) did not require Ms Thomson to be told what she was about her likely tasks; it did not require her to come back to a plainly substantially inferior body of customers, tasks and responsibilities. I reject the proposition that Ms Thomson, with her considerable experience, was somehow better suited than say, Ms Ferro, or someone else, to attend to what Mr Cavenagh and Mr Majer contemplated for Ms Thomson. No particular skill was required to explore dormant customers and seek to develop sodium metasilicate. To the extent that Mr Majer said that he raised with Ms Thomson the development of a market opportunity for PET resin, I have already rejected that. Some such opportunity may have existed at some point concerning PET resin. No documentary material was produced to support it and no mention of it was made in the affidavits. I find that it was a reconstruction after the event, and that Mr Majer's evidence in this regard is unacceptable. Nor was it apparently the exciting and valuable opportunity to be grasped by the experienced employee, as Mr Majer's evidence would have it. After Ms Thomson went home on 10 April it became evident within a matter of one to two weeks that there was a serious dispute with her and she may not return. No attempt was made to put

anyone else onto the PET resin project and the opportunity evaporated later that year.

101 Secondly, the fact that Mr Majer may have received approval for an additional account manager (which he did not say in his affidavit) does not explain why he treated Ms Thomson in the way he did.

102 Thirdly, whilst as a matter of general proposition it could be legitimately said that customers do not like disruption, there was no suggestion here of any disruption to customers. All had been told of the position and would have expected Ms Ferro to hand over to Ms Thomson. The evidence was littered with references to the commonplace occurrence of changes to 'patches' and the re-shuffling of 'patches'. I have earlier referred to written references by Mr Majer in that respect. No investigation was made of customers by Mr Majer or Mr Cavanagh about this.

103 Fourthly, Ms Ferro was doing a good job – no doubt. She struck me as capable and personable. In no affidavit material or elsewhere in the evidence and in no contemporaneous document is there any suggestion that Ms Ferro was handling the 'patch' better than Ms Thomson. This was not put to Ms Thomson between January and April 2000. It was not said in the justificatory correspondence from Orica's solicitors in April and May 2000. I accept that Ms Ferro was competent and acquitted herself (to use Mr Majer's words) 'very, very well'. However, given the lateness of this assertion, I do not accept that it was the only reason for so acting.

104 After the 10 April 2000 meeting Ms Thomson went home with a migraine. On 19 April solicitors for Ms Thomson wrote a forceful letter complaining about Orica's treatment of their client, which concluded with the following paragraph;

> *Given that Orica has persistently refused to allow Ms Thomson to return to her former position of Account Manager for Chemnet and is persisting with its ridiculous suggestion that there is a position on offer to Ms Thomson which is the same or equivalent to the position previously occupied by Ms Thomson, even though Orica has had 3 months to produce a job description and customer list in respect of the alleged position and has not been able to do so, Ms Thomson has instructed us that unless some satisfactory proposal is put forward by midday tomorrow,* ***Thursday, 20 April 2000,*** *she will have no option but to treat Orica's actions as amounting to a constructive dismissal of her employment and will resign on that basis.*
> [emphasis in original]

105 No such offer was forthcoming.

106 Orica led evidence that Ms Thomson first saw her solicitors about this matter on 3 March 2000. There was a meeting and there were three phone calls prior to 10 April 2000. It was said that this exhibited a desire not to remain at Orica, in a sense, before she had anything to complain about. I reject this. It was plain, at least by late February, what was facing Ms Thomson. I do not think anything that happened on 10 April came as any surprise to her.

107 There was a dispute in the evidence as to whether Mr Majer sent an email to Ms Thomson on or about 11 April 2000. Mr Majer said that he sent this email after his meeting with Ms Thomson. He said he sent it twice. Ms Thomson said she did not receive it. There appears to be a business record addressed to 'Cynthia'. It is unclear whether Mr Majer did send it. I accept Ms Thomson's evidence that she did not receive it. Mr Majer's evidence that he sent it and Ms Thomson's evidence that she did not receive it is perhaps best explained by a failure of technology. In any event, if Ms Thomson had received it, it would hardly have led her to any revision of her views. It would only have reinforced her views about what she was being offered. The email included the following:

> *Cynthia,*
> *Here is the first cut of customer in distribution channel 00 that we wish to transfer. There are likely to be more and importantly there will be new market sectors that we wish to enter but do not enjoy current sales.. ie growth.*
> ***Tony has a separate list.***
> *The timing of the transfer needs to be agreed with Tony and the other Account Managers.*
> [emphasis added]

108 There followed on the same page of the email a list of Chemnet customers, some with amounts of money next to them, which would apparently be for Ms Thomson. There was also included in the email the list of 303 Spectrum customers referred to in [74] above.

109 Mr Majer attempted to say in evidence that this was simply the universe from which customers would be taken. His own language in this email betrays that proposition. It was the first cut of customers 'that we wish to transfer'. Mr Cavanagh's words in his email to Mr Majer of 8 April ([73] above) also make plain that this was not a list for discussion, but for

transfer. The plural used in the first paragraph by Mr Majer in his email of 11 April ([107] above) of 'new market sectors' may support the proposition that PET resin was in his mind at this time. However this does not change my view that the finding I should make about this is, as I have referred to at [59] and [60] above.

110 A number of further matters need to be dealt with before turning to the law. First, Mr Chesterfield in a late affidavit sworn on 29 August 2001 sought to describe the growth strategy by reference to small customers. This was directed, no doubt, to the very large number of Spectrum customers of extremely low value which were proposed to be given to Ms Thomson. Mr Majer in his oral evidence was clear, and was specifically directed to the point, that the 'growth strategy' he was talking about (so he said) was the sodium metasilicate and PET resin. I place little reliance on this part of Mr Chesterfield's affidavit evidence. This incantation of 'growth strategy' was used by witnesses in an attempt to present a package of hundreds of customers with less than $500,000 in sales per annum, as some opportunity in the organisation for Ms Thomson to show and display her skills in 'growing' the value of these customers. The fact is that she was being given the smallest and least valuable customers in terms of revenue of all customers in Spectrum. It may be that some of them had a high gross margin. However, I find the commonsense and straightforward evidence of Ms Ferro compelling in this regard. What was proposed for Ms Thomson was a clear demotion in status by presenting her with a large number of customers of little present sales value to Orica. I also find that no one with any experience in the organisation of Orica could have realistically or rationally thought otherwise. Thus, I find that Mr Majer was fully aware of how Ms Thomson could reasonably view what he was offering as in accordance with Ms Ferro's evidence. The incantation of 'growth strategy' was 'window dressing' in the evidence in an attempt to make the customer 'patch' proposed for Ms Thomson appear less unappealing, than it reasonably appeared to Ms Thomson contemporaneously.

111 Some further evidence of Mr Chesterfield contained in his affidavit of 21 May 2001 should be noted. In [37] of that affidavit he said the following:

> *Generally speaking, it is Orica's practice to find a replacement employee for an Account Manager who takes 12 months or more family leave. On the return of an Account Manager from family leave of 12 months or more, it is usual practice that the Account Manager will not be realigned with the customer patch serviced prior to taking family leave. This general practice is due to commercial imperatives including the need to minimise the disruptions*

> *to the relationship between customers and Account Managers. It is Orica's usual practice to create a customer patch for the account manager returning from maternity leave of 12 months or more by taking parts of customer patches from a number of other Account Managers. This minimises disruption to customers as entire customer patches are not realigned, merely parts of customer patches.*

112 At no time did Mr Majer say anything of the kind to Ms Thomson. It does not appear in the Orica 'Family Leave Policy'. This was said to be because it was a practice and not a policy. Mr Chesterfield was questioned about it. It was plain on receiving his answers and observing the confusion experienced by him upon being questioned about [37] of his affidavit that there was no such practice which could be so clearly defined. I think this evidence reflects badly upon Mr Chesterfield and I reject it in the terms in which it was given. I return to one aspect of it below.

113 It was put to me on behalf of the applicant that I could conclude that upon Ms Thomson's return to work there was no 'real' position for her. The 'position' was never advertised and no other person was considered for the position in April 2000. The evidence reveals that nothing was done by Mr Majer or Mr Cavenagh before or after 10 April 2000 to prepare a job description or finalise duties to be performed. No one took up the PET resin opportunity. None of the Spectrum or Chemnet customers was transferred to a new account manager. No account manager took on the responsibility for identifying potential customers with respect to sodium metasilicate for a discrete customer patch. The above matters, which are born out in the evidence, reinforce my conclusion that Ms Thomson was, in substance, being sent to Spectrum, as well as being given a patchwork of other responsibilities in order to make less unappealing that apparent demotion. Another way of putting it is as I am urged to: that there was in fact no 'real' position.

114 The above does not exhaust the factual material which needs to be discussed. It is convenient to deal with legal issues in the case, which will involve some further factual analysis.

the statutory claims: ss 14, 5 and 7 of the SD Act

115 The claims of the applicant are in respect of sex discrimination and pregnancy discrimination. It is necessary to read subss 14(2), 5(1) and 7(1) of the SD Act together to

ascertain the necessary elements of the impugned conduct, if it is to be found to be unlawful so as to found relief under s 46PO of the HREOC Act. First, it is unlawful for an employer to discriminate against an employee on the grounds of sex or pregnancy. Secondly, the unlawful discrimination just described is limited to certain circumstances, which relevantly here are those set out in pars 14(2)(a), (b), (c) and (d). Thirdly, the notion of discrimination against an employee on the grounds of sex or pregnancy is given statutory content by, relevantly here, subss 5(1) and 7(1), respectively.

116 I will first deal with the question of pregnancy discrimination.

117 In respect of the alleged pregnancy discrimination, the pleading identifies par 7(1)(b) of the SD Act as the reason for the discriminator's treatment: a characteristic which appertains generally to pregnant women. The relevant characteristic identified was the taking of a period of leave before and following the birth of a child. See [12] of the points of claim.

118 What then has to be shown is that Orica, by reason of Ms Thomson's taking maternity leave, treated Ms Thomson less favourably than, in circumstances that are the same or are not materially different, Orica treated or would have treated someone who was not pregnant (see subs 7(1)) in respect of the circumstances set out in pars 14(2)(a) to (d).

119 The pleader of the points of claim, having identified the characteristic which appertains to pregnant women in [12], pleaded the less favourable treatment and pregnancy discrimination in [13], as follows:

> *The Respondent treated the Applicant less favourably than it treated or would have treated someone who did not take maternity leave in the same or similar circumstances in relation to the terms and conditions of her employment.*

120 The pleading makes the comparison called for by the phrase 'less favourably than', by comparing Ms Thomson, who did take maternity leave, with someone who did not take maternity leave, in the same or similar circumstances. That may not be what the SD Act calls for. The comparison called for is between the treatment of Ms Thomson and the treatment of someone who is not pregnant, in circumstances the same or not materially different. From that comparison there must be a conclusion of 'less favourable treatment' and that less favourable treatment must be 'because' (meaning 'by reason') of the taking of maternity

leave.

121 As I said above, the relevant person the treatment of whom is to be compared with the treatment of Ms Thomson is someone who is not pregnant, 'in circumstances that are the same or are not materially different'. The effect of that phrase, requiring equivalence, throws up the following possibilities here:

(a) a similarly graded account manager with Ms Thomson's experience at Orica who did not take any leave (in this case the equivalence being limited to the relevant status of account manager);
(b) a similarly graded account manager with Ms Thomson's experience who, with Orica's consent, took twelve months leave and wanted to return (in this case equivalence being the status of the account manager and taking twelve months leave and returning); and
(c) such a person as in (b) but who had a right to return on the same basis as Ms Thomson.

122 In my view the equivalence required by the Act is not adequately reflected by (a). Nor, it seems to me, is it by (b). Unless one posits the same apparent or expressed rights and obligations by way of any relevant company policy (I leave aside whether they are contractually binding) then the notion of equivalence required by the section is absent. So, it seems to me, the person with whom to compare Ms Thomson in the evaluation of their respective treatments is as identified in (c).

123 Looking at the facts here, I am confident that Mr Majer took the opportunity afforded by Ms Thomson's absence during maternity leave to move her to what is reasonably characterised as a significantly inferior job. I am satisfied that he must have appreciated that she would reasonably perceive her new role as a significantly inferior one in the way, and for the reasons, that I have discussed. I am satisfied that he would not have done that if she had not taken maternity leave. I am confident that because of, or by reason of, Ms Thomson having taken maternity leave she was treated unfavourably by Orica, in that the opportunity was taken to move her to report to the Spectrum line manager in a position of reduced status. What the motive of Mr Majer was I cannot be sure but their 'personality clash', which I take to be a euphemism for mutual personal dislike, may provide a clue. However, it does not necessarily follow that by reason of Ms Thomson taking maternity leave, Orica treated her less favourably than it would have treated someone who took a similar period of leave with

the same right of return, but who was not pregnant.

124 Whilst I rejected Mr Chesterfield's evidence referred to at [111] above as evidence of a clear practice in relation to maternity leave, it may be evidence of the fact that if a substantial period of leave were taken by an account manager, whether maternity leave or other, in the order of twelve months, an approach would or could well be taken as described by Mr Chesterfield. However, on one view all he was saying was that if an account manager is away for twelve months they are not returned to precisely the same customers. Nevertheless, it tends toward the proposition that after twelve months leave a different job is assigned to the account manager. It is not easy to reconcile this evidence with the terms of Orica's 'Family Leave Policy'. It stated the following:

> ***Policy***
> *Document Management System*
> *Document Title: Family Leave (Maternity/Paternity/Adoption)*
>
> *This document covers/introduces the following topic/s:*
> *ELIGIBILITY FOR FAMILY LEAVE*
> *REPLACEMENT FOR EMPLOYEE ON FAMILY LEAVE*
> *MATERNITY LEAVE*
> *PATERNITY LEAVE*
> *ADOPTION LEAVE*
>
> *1. Policy*
>
> *Employees are eligible for Family Leave (maternity/paternity/adoption) after twelve months' continuous service. Subsequent family leave does not require a further 12 months' continuous service. Employees granted Family Leave have the right to their previous position, or if this is no longer exists, to a comparable position if available.*
>
> *Replacement of Employee for employee on Family Leave:*
>
> ***Before a replacement employee for an employee on family leave is engaged, that person must be informed of the temporary nature of the employment and of the rights of the employee who is being replaced.***
>
> ...
>
> ***All employees granted entitled family leave have the right to return to their previous position, or if this no longer exists, to a comparable position if available.***
> [emphasis added]

125 The policy was expressed in terms of rights and obligations. It was expressed in language reflecting an intention to regulate the relationship between the parties to the contract of employment in the respects covered by it. It was available to employees on the company computer system. I deal later with the question whether it formed part of the contract of employment. It certainly reflected how an employee such as Ms Thomson could reasonably expect to be treated by Orica upon her return.

126 Debate took place about what the word 'position' meant in the policy. The respondent said that it referred only to the job grade and the career ladder. So, whatever duties Ms Thomson might be asked to do (presumably as long as they had some reasonable connection to the duties of an account manager) she would be being returned to her 'previous position' as long as she maintained her grade on the career ladder with the relevantly appropriate pay and conditions. See generally Mr Majer's email of 20 March 2000 set out at [78] above.

127 Some assistance is given to the meaning of the word 'position' by the terms of another 'policy' of the company published and available to employees on the company's computer system. The 'Redundancy Policy' contained, amongst other things, the following:

> ***Policy***
> *Document Management System*
> *Document title: Redundancy Policy*
>
> *This document covers/introduces the following topic/s:*
> *REDUNDANCY POLICY*
> *RESPONSIBILITIES*
> *PACKAGE DETAILS*
>
> *1. Policy*
>
> *Redundancy arises where the Company has made a definite decision to reduce its staffing by* ***eliminating a position or a number of positions.***
>
> *Redundancy is a measure of last resort. It arises in circumstances other than through the normal and customary evolution of positions, and associated changes in duties and responsibilities.* ***When a position is eliminated the first consideration must be to attempt to find the incumbent a suitable alternate position.*** *Where the Company has made a definite decision to reduce its staffing and where it is unable to redeploy an employee to an alternate position the employee will be entitled to Severance payments as outlined below.*

...

3. General

Where practicable the company will seek expressions of interest and will consult with persons likely to be affected. The Company will not offer voluntary redundancies.

The final decision as to persons who will be made redundant will rest with the company.

The company priority will be to redeploy to an alternate position.

Redundancy does not apply where an employee has refused an offer of an alternate position within the Company, *or which the Company has arranged with another employer (other than an outside contractor),* ***that is consistent with the employee's Job Grade/Classification, that is within the skills, qualifications and experience of the employee*** *and which does not submit the employee to unreasonable geographic disadvantage.*

All other things being equal, the Company shall retain in each area and classification persons of capacity and experience over persons lacking capacity and experience. In the context of a broader organisational restructuring, an incumbent of a remaining position may be made redundant and replaced by an incumbent of an eliminated position.

Where this is being considered the selection process for the available positions must be fair, just and reasonable and based on an objective assessment of the strengths and weaknesses of each employee. The selection criteria and assessment of each employee must be documented. Each employee should be provided with the opportunity to present their views on the merit of them being selected.

As an alternative to redundancy the company may offer an employee a trial period in the position that the company considers is not consistent with their current position. ***If within 12 weeks from start date in the new position the employee believes the position is not appropriate, or the company believes the employee is not suitable in the new position, the company will either provide a role that is consistent with the employee's skills, qualifications and experience and with their original Job Grade/Classification, or will provide a redundancy payment.***

If the base rate for the new position is less than that which applied to the previous position, an ex-gratia payment shall be made to compensate for the base rate difference for a period of up to six months.
[emphasis added]

128 There were placed in evidence various 'Position Vacant' documents which were posted within Orica, advertising within the company for people to occupy positions. In each

there was a description of the 'position' as 'Account Manager', but the document then went on to describe in detail what the applicant would do – the State where he or she would be working, the job description, the 'key accountabilities' and the required experience and skill.

129 I was referred to some authorities on the meaning of 'position'. Some discussion of the word took place in *Qantas Airways Limited v Christie* (1998) 193 CLR 280 in the context of s 170 DF of the *Industrial Relations Act 1988* (Cth), which relevantly provided:

> *(1) An employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:*
>
> *...*
>
> *(f) age*
>
> *...*
>
> *(2) Subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating employment if the reason is based on the* ***inherent requirements of the particular position.***
> [emphasis added]

130 The phrase 'the inherent requirements of the particular position' found its origin in the International Convention Concerning Discrimination in Respect of Employment and Occupation.

131 In this statutory context McHugh J said at [72] and [73]:

> *In my opinion, however, there is a distinction between a person's job and a person's position and that distinction may sometimes prevent the Convention jurisprudence on Art 1(2) from being applicable. The term 'a particular job' in Art 1(2) of the Discrimination Convention has been construed by reference to the preparatory work and the text of the Convention to mean 'a specific and definable job, function or task' and its 'inherent requirements' those 'required by the characteristics of the particular job' [International Labour Office, General Survey: Equality in Employment and occupation (1988), par 126]. A person's job is therefore primarily concerned with the tasks that he or she is required to perform. No doubt the term 'job' is often used to signify a paid position of employment. But in the context of determining the requirements of a job, it seems more natural to regard the term as referring to particular work or tasks that the person must perform. A person's position, on the other hand, is primarily concerned with the level or rank from which he or she performs those tasks. Position concerns rank and status. What is required of a person's position however, will usually require an examination of the tasks performed from that position. That is because the capacity to perform those tasks is an inherent requirement of the particular position.*

In most cases, the distinction between the requirements of a position and the requirements of a job will be of little significance. But it is a mistake to think that there is no distinction between 'a particular position' and a 'particular job'. In some cases the distinction between the inherent requirements of a particular position and those of a particular job, although subtle, may be material. This is often likely to be the case where qualifications are concerned, particularly those qualifications that are not concerned with the physical or mental capacity to perform the tasks involved in the position. Thus to be an American born citizen is an inherent requirement of the position of President of the United States, but it is not an inherent requirement of the 'job' of President if that term refers to the work done by the President.

132 Gummow J said the following at [104] to [107]:

In a case such as the present, the position of Captain Christie was constituted by the tasks and responsibilities which made up his duties and by the rights conferred upon him under his contract of employment with Qantas. However, in the Full Court, Gray J said [Christie (1996) 68 IR 248 at 260-261; 138 ALR 19 at 32] that Captain Christie's contractual obligation to fly anywhere in the world as required by Qantas was irrelevant to the application of s 170DF(2). His Honour continued [Christie (1996) 68 IR 248 at 260; 138 ALR 19 at 32]:

> *'That subsection refers to an "inherent" requirement, namely something that is essential to the position, rather than being imposed on it. I do not think that an employer, by stipulating for contractual terms, or by creating or adhering to rostering systems, can create inherent requirements of a particular position.'*

The assumption appeared to be that the 'position' has a distinct existence which differs in quality and kind from the bundle of contractual rights and duties, the further continuation of which is brought to an end by the termination on the initiative of the employer. Marshall J [Christie (1996) 68 IR 248 at 267-269; 138 ALR 19 at 38-39] appears to have treated the phrase 'inherent requirements' as requiring attention to 'the position of a Qantas B747-400 captain' rather than the particular position of Captain Christie.

These constructions of s 170DF(2) should not be accepted. In a particular context the term 'position' may be used to identify a position of authority conferred by the exercise of governmental power for a public purpose. Under the common law, at least some of such offices were classified as incorporeal hereditaments [Blackstone, Commentaries on the Laws of England, 1st ed (1766), vol 2, pp 76-77; Cruise, A Digest of the Laws of England respecting Real Property, 2nd ed (1818), vol 2, Title XXV, §§ 1, 2, p 117; Kendle v Melsom (1998) 193 CLR 46 at 61], being permanent substantive positions which exist independently of a person's filling them from time to time [Sykes v Cleary (1992) 176 CLR 77 at 96]. In such a context, the phrase 'inherent requirements' could be apt to identify permanent attributes or qualities of an office and thus of a 'particular position'.

Paragraph 1(2) of the Discrimination (Employment and Occupation) Recommendation 1958 states that any distinction, exclusion or preference 'in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination'. The phrase 'a particular job' has been said to refer to 'a specific and definable job, function or task', such that the limitation must be required 'by the characteristics of the particular job' [International Labour Office, General Survey: Equality in Employment and Occupation (1988), par 126]. The phrase 'job, function or task' would be broad enough to encompass steps taken in the discharge of an office. However, whilst an office in the strict sense may not lay outside the scope of the phrase 'particular position' in s 170DF(2), its primary and general application must be to identify those tasks and responsibilities which make up the contractual duties of the employee, together with the contractual rights of the employee, the termination of whose employment is in question.

Those tasks and responsibilities will be required of the employee under the express or implied terms of the contract of employment. Those terms may be supplemented by requirements of statute, for example by a certified agreement which has been made binding under s 149(2) of the Act.

133 Perhaps more contextually relevant is what Glynn J said in *Illawarra County Council v Federated Municipal & Shire Employees' Union of Australia* (1985) 11 IR 18. The statutory context there was s 153N of the *Industrial Arbitration Act 1940* (NSW) which was in the following terms:

> *(1) In this section, 'former position', in relation to an employee who has taken maternity leave in respect of a pregnancy, means –*
>
> *(a) the position held by her in the employment of her employer immediately before she commenced the maternity leave; or*
>
> *(b) where by reason only of the pregnancy she had transferred or been transferred from one such position to another such position before commencing maternity leave, the position held by her in that employment immediately before she had so transferred or was transferred to another position.*
>
> *(2) An employer shall make available to an employee who returns to work for him at the conclusion of maternity leave –*
>
> *(b) the former position of the employee; or*
>
> *(c) where the former position of the employee has ceased to exist but there is another position available, or other positions available, in the employment of the employer for which the employee is capable or qualified, that position or, as the case may be, such of those positions as is as close as possible in status and salary or wages to that of her former position.*

134 Glynn J at 20 said the following:

> *In my view, what the legislature sought to attain by the insertion of Part XIVA*

was that an employee, on return from maternity leave, would take up again a discrete set of duties at the same level in the hierarchy of the employer's organisation and at the same level of salary or wages as she had been so placed and had so received before proceeding on that leave.

If the discrete set of duties previously undertaken by her had disappeared on her return she was to be offered other duties carrying as close as possible the status and salary or wages of her pre-leave position.

135 I do not think that it is correct to pose an antinomy between 'job' and 'position' and between the 'career ladder' and the precise 'patch'. The question is what did the policy mean. Plainly it was informed by antecedent and relevant legislative provisions and provisions such as s 66 of the *Industrial Relations Act 1996* (NSW) (the IR Act). Relevantly, subss 66(1), (2) and (4) of the IR Act were in the following terms:

> *(1) An employee returning to work after a period of parental leave is entitled to be employed in:*
>
> *(a) the position held by the employee immediately before proceeding on that leave, or*
>
> *(b) if the employee worked part-time or on a less regular casual basis because of the pregnancy before proceeding on maternity leave the position held immediately before commencing that part-time work or less regular casual work, or*
>
> *(c) if the employee was transferred to a safe job under section 70 before proceeding on maternity leave the position held immediately before the transfer.*
>
> *(2) If the position no longer exists but there are other positions available that the employee is qualified for and is capable of performing, the employee is entitled to be employed in a position as nearly as possible comparable in status and pay to that of the employee's former position.*
>
> ...
>
> *(4) An employer who does not make available to an employee a position to which the employee is entitled under this section is guilty of an offence. Maximum penalty: 100 penalty units.*

136 It is plain, it seems to me, that the word 'position' in the Family Leave Policy and the Redundancy Policy was being used not merely to refer to a job grade or classification or a level of skills referred to in the career ladder matrix. In the former policy it was intending to convey to someone taking maternity or family leave to which, according to the policy, he or she had a right, that he or she would be coming back to the position previously occupied by him or her, if it were still there, that is he or she would resume the tasks, duties and

responsibilities that he or she was previously undertaking and discharging. In Ms Thomson's circumstances, that may not mean dealing with the precisely identical customers, but if, as here, the avowedly temporary employee, Ms Ferro, at the end of the maternity leave of Ms Thomson, was handling substantially the same customers as she had taken over from Ms Thomson (with some additions and subtractions) and doing and undertaking substantially the same tasks, duties and responsibilities in relation to those customers, as was the case, then according to Orica's policy Ms Thomson had a right to have her position (in the sense that I have discussed) back. This is the plain intent of the Family Leave Policy. This approach conforms with the language of the Redundancy Policy and the notion of 'position' in the way vacancies were filled. It accords with s 66 of the IR Act. It accords, it seems to me, with a common sense reading of the policy and common sense approach to the social issues to which the policy and s 66 of the IR Act were directed. A difficult factual question might arise in circumstances where Ms Thomson was not allowed to take back from Ms Ferro the tasks, duties and responsibilities that the latter had taken over temporarily, but there was available and being offered a plainly equivalent body of tasks, duties and responsibilities, albeit in respect of different customers. A nice factual question would arise as to whether that was in all the circumstances the same position. However, that is not what occurred. I will not repeat myself about the facts. It suffices at this point to say that the tasks, duties and responsibilities offered were sufficiently different to make it manifest that Ms Thomson was not given her former position back and that she was being given a position of significantly lower status by reference to her proposed tasks, duties and responsibilities.

137 On the basis of the findings that I have made, Ms Thomson was effectively being demoted in status.

138 Making the comparison referred to at [122] above, Ms Thomson was denied the return to her position, or even anything comparable. I assume that Orica would not treat the posited person in [121(c)] contrary to any policy that it had laid down for his or her treatment. There was no evidence that it would do so. Thus the comparison called for does, in point of practical application, reduce to the question to whether Ms Thomson was treated unfavourably, but only because of the identification of the person whose treatment is compared to Ms Thomson's. She was thus treated less favourably than someone who was not pregnant and who was returning after twelve months leave and with rights of the kind reflected in the Family Leave Policy.

139 Before completing the discussion of the statutory claims, it is appropriate to deal with the question of constructive dismissal. As I have indicated earlier, this was a separate contractual claim in the accrued jurisdiction of the Court. It is also within one of the fields of activity or circumstances in which discrimination becomes unlawful: par 14(2)(c). Therefore, it is appropriate at this point to resolve the question as to whether Ms Thomson was constructively dismissed or whether she abandoned her employment.

the question of constructive dismissal

140 The respondent submitted that an employer has the right to direct an employee as to the conduct of his or her duties and as to the type and nature of duties to be undertaken, as the employer sees fit. It is unnecessary to explore the limits of the accuracy of this proposition. It can readily be accepted as a proposition with some validity. However, as a general proposition it cannot be universally true, and it does not affect what I take to be the law of constructive dismissal.

141 Constructive dismissal is an unlawful termination of the contract of employment in circumstances where the employee leaves, without an express act or enunciation of 'dismissal' by the employer. It will be taken to be a dismissal (hence the word 'constructive') if the employer has behaved towards the employee in a way that entitles the employee to treat the employment as at an end. How that behaviour of the employer is to be described is at the heart of the matter. One difficulty in a simple enunciation of the common law principle is the existence of legislation and case law on closely related topics. However, if one is to approach the matter in straightforward contractual terms there is ample authority for the implication of a term in a contract of employment that the employer will not, without reasonable cause, conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee: *Burazin v Blacktown City Guardian* (1996) 142 ALR 144, 151 and the English cases there cited and *Daw v Flinton Pty Ltd* (1998) 85 IR 1, 3. Breach of that implied term will entitle the employee to treat himself or herself as wrongfully dismissed. Olson J (sitting at first instance) in *Blaikie v South Australian Superannuation Board* (1995) 65 SASR 85, 102-106 and (sitting on the Full Court, though in dissent) in *Easling v Mahoney Insurance Brokers Pty Ltd* [2001] SASC 22 at [99], if I may say so, expressed the principle with clarity. The principle expressed by Olson J in *Easling* at [99] was not the subject of any criticism from the majority (Doyle CJ

and Bleby J). His Honour said:

> *…Suffice to reiterate that the notion of constructive dismissal implies the existence of conduct on the part of an employer which is plainly inimical to a continuance of a contract of employment according to its express or implied terms. The authorities establish the concept that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. An intention to repudiate need not be proved. Rather, it is a matter of objectively looking at the employer's conduct as a whole and determining whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.*

142 The matter was approached, in part, on the basis of the existence of such an implied term.

143 Also, depending upon the terms, otherwise, of the contract of employment, there may be such a serious breach of contract as to amount to a repudiation of the contract or as to give rise to the right to terminate (as to the difference see the cases discussed in *Byrnes v Jokona Pty Ltd* [2002] FCA 41 at [70] to [80]).

144 It was in issue whether the terms of the Family Leave Policy were contractual. They were plainly intended in their expression to reflect rights and duties of both Orica and its employees. They went to important matters of the employment relationship regulated by State legislation: s 66 of the IR Act.

145 The policy reflected Orica's responsibilities under these provisions. The policy was well known to the employees and was published on Orica's computer system.

146 It is unnecessary to decide the question whether the policy was contractually binding. There is much to be said for the proposition that it was (cf *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193). However, whether or not contractually binding in terms, it was plainly company policy and if the company conducted itself in breach of it in a serious way, that would be a matter assisting in the conclusion as to whether or not Orica had behaved in a manner in breach of the implied term referred to in [141] above.

147 On the facts as I have found them, there was a plain breach of the Family Leave

Policy. I do not propose to reiterate the facts, but put shortly, Ms Thomson was being given duties and responsibilities amounting to a clear demotion, in circumstances where Mr Majer must have known that to be the case. Her position was extant. The tasks, duties and responsibilities which made up her position were being undertaken by a temporary employee. With no rational explanation being given to her, Ms Thomson was being denied that to which the Family Leave Policy said she was entitled, and she was in effect being demoted. In terms of the implied term referred to in *Burazin, supra,* this conduct towards an experienced account manager, in effect moving her to Spectrum (with some additional duties) and requiring her to do telephone transactional selling, against a background of an angry and bad tempered discussion of her taking maternity leave in early 1999, was plainly conduct likely to damage to a serious degree, or destroy, the relationship of confidence and trust between employer and employee. There was no reasonable cause for this conduct. There was no rational explanation given to her. It made Ms Thomson angry and bitter. She was, on the evidence, entitled so to feel. If she acted reasonably, as I think she did, her anger and bitterness are not an entirely unreliable barometer of the breakdown of the trust and confidence in the relationship. Alternatively, as Olson J put it, she, as the employee, could not have been be expected to have put up with it.

148 Thus, in my view, there being a serious breach of the implied term referred to in *Burazin, supra,* Ms Thomson was entitled to treat herself as constructively dismissed at common law.

the statutory claims (continued)

149 On the basis of the findings that I have made, the matters referred to in pars 14(2)(a), (b), (c) and (d) of the SD Act are present, by reason of the treatment of Ms Thomson in refusing to allow her to take up the tasks, duties and responsibilities that she previously undertook and by giving her tasks, duties and responsibilities of significantly reduced status. The satisfaction of pars 14(2)(a), (b), (c) and (d) plainly flows from the findings I have made. Ms Thomson was dismissed, for (c) to be satisfied. She plainly suffered detriment, for (d) to be satisfied, by the treatment and the demotion. I think that the significant change to her tasks, duties and responsibilities amounted to a change to the terms and conditions of her employment for (a) to be satisfied, even though her grade and pay remained the same. The demotion in status plainly would have affected detrimentally her access to opportunities for

promotion, for (b) to be satisfied.

150 Also, I have concluded that Ms Thomson was treated less favourably by Orica than it would have treated a relevantly equivalent person who was not pregnant for the purposes of subs 7(1) of the SD Act. This conclusion as to comparatively unfavourable treatment for the purposes of subs 7(1) applies likewise to subs 5(1).

151 The remaining question is whether the less favourable treatment was 'because of' or 'by reason of' the matters relied on in subss 5(1) and 7(1). It was this issue that consumed virtually all the debate about the discrimination claims.

152 The applicant submitted that a conclusion that there had been pregnancy discrimination would carry with it the conclusion of sex discrimination. Reference was made to *Bear v Norwood Private Nursing Home* (1984) EOC 92-019 and *Marshall v Marshall White & Co Pty Ltd* (1990) EOC 92-304, decisions of the South Australian Sex Discrimination Board and the Victorian Equal Opportunity Board, respectively. In these decisions, the condition of being pregnant was said to be a characteristic of the female sex and a characteristic that generally appertains to persons of the female sex.

153 What was said in *Bear, supra* and *Marshall, supra,* may be taken (and there was no debate about it) to be uncontroversial. Section 7 was said to be operative here because the taking of maternity leave was said to fall within par 7(1)(b). (No debate took place about this proposition.)

154 For my part, it is not entirely clear that, in a case such as the present, a conclusion about unlawful discrimination based on par 7(1)(b) and subs 14(2) necessarily leads to the conclusion of discrimination under subss 5(1) and 14(2). Ms Ronalds did not specifically challenge the proposition referred to in [152] above. However, her submissions stressed the need to find, on the evidence, the relationship of the required character between the less favourable treatment and the matters in subss 5(1) and 7(1) that were relied on, relevantly pars 5(1)(b) and (c) and 7(1)(b). There was debate in the submissions as to the nature and content of that relationship. The required relationship is that conveyed by the phrases 'by reason of' and 'because of', respectively. If this is present, there is discrimination 'on the

ground' of sex or pregnancy or potential pregnancy for the purposes of s 14.

155 Ms Eastman sought to apply a 'but for' test. She did so because of the clarity of the evidence that had Ms Thomson not taken the maternity leave she would not have been moved away from her 'patch' in the way she was. In support of this approach see *Birmingham City Council v Equal Opportunity Commission* [1989] 1 AC 1155; *James v Eastleigh Borough Council* [1990] 2 AC 751; and *IW v City of Perth* (1997) 191 CLR 1, 64. However, this way of epitomising the case may obscure the real inquiry. It is not a question of ascertaining whether Ms Thomson was treated badly because she took maternity leave. Rather the question is whether she was treated less favourably than would have been the person identified by subss 5(1) and 7(1) and, if so, whether that less favourable treatment was by reason of or because of a relevant factor.

156 Ms Eastman did however make an important point, that, to the extent made possible by the legislation, it is important that the legislation not be approached and construed with fine and nice distinctions which will only be comprehended by experts in the field: see Lockhart J in *Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd* (1993) 46 FCR 301, 326.

157 I was taken to decisions of the highest authority in Australia and the United Kingdom about the words 'on the ground of', 'by reason of' and cognate expressions. I do not think it necessary to deal with all of these cases. It is essential to attend to the words of the statute. If (as I have found she was) Ms Thomson has been treated less favourably than a person who took one year's leave with a right to return (s 7) or a man who took one year's leave with a right to return (s 5), then, for that to be unlawful, it must be found that it occurred because of, or by reason of, one or more of the factors relied upon in subss 5(1) and 7(1).

158 Some discussion in the submissions took place about the role of motive, malice, consciousness and intention. See generally *Birmingham City Council v Equal Opportunity Commission, supra* at 1194; *James v Eastleigh Borough Council, supra; Australian Iron & Steel Pty Ltd v Banovic, supra* at 175-77; *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359-60, 382, 400-1; and *IW v City of Perth, supra* at 59 and 64.

159 Lockhart J in *Mt Isa Mines, supra* at 321 to 326 examined the operation of the SD Act and the phrase 'by reason of' in the light of all these cases, with the exception of *IW v City of Perth, supra*. His Honour said at 321-22:

> *In my opinion the phrase 'by reason of' in s 5(1) of the SD Act should be interpreted as meaning 'because of', 'due to', 'based on' or words of similar import which bring something about or cause it to occur. The phrase implies a relationship of cause and effect between the sex (or characteristic of the kind mentioned in s 5(1)(b) or (c)) of the aggrieved person and the less favourable treatment by the discriminator of that person.*

160 Lockhart J examined what he referred to as the two schools of thought in cognate English jurisprudence. His Honour summed up this divergence as follows:

> *...One is that the test requires causation in the sense that there must be a causative link between the defendant's behaviour and detriment to the complainant and does not necessarily involve any consideration of the reason which led the alleged discriminator to treat the complainant less favourably than he treats or would treat a person of a different sex or status. Put another way, one asks the question: would the complainant have received the same treatment from the alleged discriminator* but for *his or her sex (it was thus expressed by Lord Goff of Chieveley in* Eastleigh *(supra))? This test was adopted by the House of Lords in* Birmingham *(supra) confirming earlier English authorities and reaffirmed by the House in* Eastleigh Borough Council *by a majority (Lord Bridge of Harwich, Lord Ackner, and Lord Goff of Chieveley; Lord Griffith and Lord Lowry dissenting).*
>
> *The other view which appealed to the three members of the Court of Appeal of the United Kingdom in* Eastleigh Borough Council *and to the minority in the House of Lords is what is there referred to as the subjective test, namely, that what is relevant is the defendant's reason for doing an act, not (or perhaps not merely) the causative effects of the act done by the defendant. This view was expressed in the following passage from the speech of Lord Lowry in* Eastleigh Borough Council *(at 779-780):*
>
> > *'...the causative construction not only gets rid of unessential and often irrelevant mental ingredients, such as malice, prejudice, desire and motive, but also dispenses with an essential ingredient, namely, the ground on which the discriminator acts. The appellant's construction relieves the complainant of the need to prove anything except that A has done an act which results in less favourable treatment for B by reason of B's sex, which reduces to insignificance the words "on the ground of". The causative test is too wide and is grammatically unsound, because it necessarily disregards the fact that the less favourable treatment is meted out to the victim* on the ground *of the victim's sex'*

161 Lockhart J then expressed the view that this divergence of opposite views perhaps

obscured the proper inquiry dictated by the words of the statute. His Honour was of the view that motive or intention, whilst not necessary, may be relevant, if present, to the resolution of the statutory task of answering the factual question as to whether there is a relationship of cause and effect between the sex or pregnancy or characteristic in pars (a), (b) or (c) of subss 5(1) and 7(1) and the comparatively less favourable treatment. If I may respectfully say so, I agree with that proposition and with his Honour's lucidly expressed reasons at 321 to 326.

162 What then is the position here? Was the less favourable treatment received by Ms Thomson because of, or by reason of, any of the matters in pars 5(1)(b) or (c) or 7(1)(b)?

163 No satisfactory explanation was given as to why Ms Thomson was treated as she was. I have dealt with the explanations given. I am left with the evidence that Mr Majer would not have done this to Ms Thomson had she not taken the maternity leave that she did, that there was a mutual dislike, that Mr Majer was upset with Ms Thomson about the notice he received from her in January 1999 about her taking maternity leave and that Mr Majer made the statements to Ms Thomson in January 1999 set out in [51] above. No one (unsurprisingly) gave evidence that someone who had been on leave for twelve months with a right (contractual or under company policy) to return to his or her former tasks, duties and responsibilities would or might be denied that. The closest the evidence came was Mr Chesterfield's evidence referred to in [111] above with its unsatisfactory aspects that I have identified.

164 In the circumstances, whatever other personal motive Ms Majer had for dealing with Ms Thomson in a way which he must have appreciated would be reasonably seen by her and others in the company as a demotion in status, I find that one of the reasons (for the purposes of s 8 of the SD Act) Mr Majer acted as he did was the taking of maternity leave by Ms Thomson. In those circumstances, the comparatively unfavourable treatment that I have found was because of, or by reason of, at least in part, the taking of maternity leave by Ms Thomson.

165 Is this, the taking of maternity leave, a characteristic that appertains generally to women who are pregnant? I am prepared to work on the basis that taking maternity leave is a characteristic that appertains generally to women who are pregnant. As I have said, no argument to the contrary was put. A physical characteristic that appertains generally to

women who are pregnant is that the birth of the child necessitates *some* confinement and so *some* inability to work or undertake duties whether in paid employment or otherwise. In some cases the relevant period of time may be short. However, generally, there will be some inability to attend to a usual occupation and so some requirement for leave from that occupation. To that extent, leave, that is absence from a woman's usual occupation, generally occurs and so can be said to be a characteristic that appertains generally to pregnant women. It is thus able to be said that the need to take, and the taking of, some 'maternity leave' is a characteristic of pregnancy. How long that leave might be and its terms are not matters which affect this conclusion. Thus the applicant has demonstrated unlawful discrimination for the purposes of pars 7(1)(b) and 14(2)(a), (b), (c) and (d).

166 In the circumstances of the facts as I have found them to be, the following passages from the decision of the then President of the Commission (Sir Ronald Wilson) in *Gibbs v Australian Wool Corporation* (1990) EOC 92-327 at 78, 220 illuminate the matter before me:

> *In my opinion the circumstances attending the transfer of the complainant to new duties on her return from maternity leave amounted to discrimination. She was an experienced employee who had given satisfactory service to the respondent for eight years; one would expect that she would be consulted about proposed changes affecting her role in the department. She enjoyed the work upon which she had formerly been engaged; she did not want to change; she was not consulted when the changes were made under consideration and before decisions were made. At best, the manner in which the change was effected was thoughtless and high-handed lacking any awareness of or sensitivity to the postnatal condition of the complainant. The fact that the change did not involve any variation in salary or conditions of service does not in the circumstances prevent a finding of discrimination.*
>
> *Furthermore, I think it follows that the pregnancy of the complainant must have been present as a factor leading to the arbitrary change in duties. It was the pregnancy that led to the complainant's absence on leave. If she had not been away on leave, I cannot conceive that the restructuring would have proceeded without prior consultation with her, whether or not her transfer to other duties would have eventuated.*
>
> *For these reasons, I conclude that the conduct of the respondent in arbitrarily transferring the complainant to other duties on her return from maternity leave was contrary to the Act and therefore unlawful.*

167 What of pars 5(1)(b) and (c)? I have concluded that Ms Thomson's taking of maternity leave was a reason for Mr Majer acting as he did. For par 5(1)(b) to be applicable, the taking of maternity leave must be a characteristic that appertains generally to persons of

the female sex. For par 5(1)(c) to be applicable, it must be a characteristic that is generally imputed to persons of the female sex. Ms Eastman submitted that both these paragraphs were satisfied because *Bear, supra* and *Marshall, supra* stand for the proposition that pregnancy is a characteristic of the female sex and a characteristic that generally appertains to females, and because taking maternity leave is a characteristic of pregnancy.

168 The capacity or ability to become pregnant is obviously a characteristic that appertains generally to women. What attends pregnancy, that is, the characteristics of pregnancy, can thus, perhaps without doing violence to the language of s 5, and recognising the remedial nature of the statute and the width and purpose of the Convention, be seen as characteristics that appertain generally to women. If, as here, an employer treats a female employee less favourably than a male employee in equivalent circumstances by reason of (in part) the fact that the employee took maternity leave, can this be seen as connected with the employee's female sex? It is not difficult to answer that question in the affirmative. Likewise, if an employer hired men rather than women in order to avoid a perceived extra cost in providing for maternity leave, the relevance of 'potential pregnancy' in s 7 would be obvious, but such conduct could also be seen to be undertaken by reason of a characteristic that appertains to women, but not men. I do not think that the word 'generally' in subss 5(1) and 7(1) means 'with few or no exceptions'. It could be limited to be a weaker adverb denoting 'for the most part' or 'extensively'; or it may also include the notion of 'in a general sense'. (See generally Oxford English Dictionary.) I think the word encompasses both these latter two senses in this context. So read, the taking of maternity leave can be seen as a characteristic that appertains in a general sense to women, or extensively to women. Thus, I would conclude that the applicant has demonstrated unlawful discrimination for the purposes of pars 5(1)(b) and 14(2)(a), (b), (c) and (d). In par 5(1)(c) the notion of 'generally imputed' means, it seems to me, 'for the most part' or 'extensively'. That is, some characteristic that is imputed (not always, but extensively or usually) to females. To impute is to 'attribute' or 'ascribe'. The above analysis would also support a conclusion of unlawful discrimination based on par 5(1)(c).

169 However, Lockhart J in *Mt Isa Mines, supra* at 327 expressed the view that s 7 assumed that an aggrieved person was pregnant or had a characteristic that appertains generally to or is generally imputed to persons who are pregnant. (His Honour was dealing with the section before the introduction of potential pregnancy.) His Honour expressed some

views about the relationship between ss 5 and 7 at 327-28. I interpolate the phrase 'potentially pregnant' where appropriate:

> *What is the relationship between ss 5, 6 and 7 of the SD Act? Section 5 relates to sex discrimination, s 6 to discrimination on the ground of marital status and s 7 to discrimination on the ground of pregnancy. Section 7 assumes that the aggrieved person is pregnant* [or 'potentially pregnant'] *or has a characteristic that appertains generally to or is generally imputed to persons who are pregnant* [or 'potentially pregnant']. *If the facts of a particular case concern an aggrieved person who is pregnant or who has a characteristic that appertains generally to or is generally imputed to pregnant women, in my opinion s 7 operates exclusively of s 5. But s 7 would not cover the case of discrimination against a woman on the ground, for example, that it is a characteristic of women that they may become pregnant or bear children. If an employer refused to employ a woman on that ground, his conduct would not be discriminatory on the ground of pregnancy under s 7 because the woman is not in fact pregnant. But it would be discriminatory on the ground of sex under s 5 as it is a characteristic appertaining generally to women that they have the capacity to become pregnant. In that case the extended definition of sex provided by par (b) (also (c)) of subs (1) of s 5 applies.*

170 Here the facts do concern an aggrieved person who was pregnant and who had a relevant characteristic under par 7(1)(b) and in respect of whom that characteristic was one reason for the relevant comparatively unfavourable treatment. While the SD Act has been amended since *Mt Isa Mines, supra,* I think I should give weight to and follow what Lockhart J said about the exclusive operation of s 7 from s 5. Thus, although the analysis in [168] above would support a conclusion of unlawful discrimination under pars 5(1)(b) and (c) and subs 14(2), in the light of my view that there has been unlawful discrimination under par 7(1)(b) and subs 14(2), I should limit relief to that based on subss 7(1) and 14(2).

171 Various other matters were pleaded as instances of unlawful discrimination under s 14 of the SD Act. The following matters were particularised under [14] and [16] of the points of claim:

- *The Respondent failed to provide the Applicant with access to the benefit of a company motor vehicle from about 5 February 2000.*
- *The Respondent refused to increase the Applicant's pay for the period of time she had worked prior to taking maternity leave.*

172 No argument was pressed in relation to them. I do not think that these matters were adequately proved. Ms Eastman pressed Ms Thomson's case on the basis of the fundamental

treatment she received with which I have dealt. These other matters can be put to one side.

173 As I said earlier, the hearing before me was concerned only with liability. It is therefore appropriate to make orders under O 29 of the Federal Court Rules. I propose to allow the parties time to consider these reasons and the orders which I propose. Subject to hearing from the parties, the orders that I would propose to make to resolve the matter in so far as liability is concerned are as follows:

(a) An order under O 29 r 2 that the decision of the questions raised by the application and points of claim, other than the nature and extent of relief to be granted (but including the making of declaratory relief and orders as to costs), be heard and determined separately before any further trial in the proceedings.

(b) Declarations that in the circumstances that have happened:

(i) the respondent, in breach of contract, wrongfully dismissed the applicant in or about April 2000; and

(ii) the respondent engaged in unlawful discrimination under pars 14(2)(a), (b), (c) and (d) and 7(1)(b) of the SD Act and thereby s 46PO of the HREOC Act.

(c) The motion brought by the respondent by notice of motion dated and filed 23 February 2001 for summary dismissal of the proceedings be dismissed.

(d) An order that the respondent pay the applicant's costs of the proceedings to date, including the costs of the motion referred to in (c) above.

(e) Stand the matter over to a date to be fixed for hearing of the matter in so far as the applicant claims damages and relief under s 46PO of the HREOC Act.

(f) Stand the matter over to a date to be fixed for directions in relation to the matter referred to in (e) above.

174 I will accommodate the opportunity for any debate about the form of the orders by postponing the entry of orders.

I certify that the preceding one hundred and seventy-four (174) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop.

Associate:

Dated: 30 July 2002

Counsel for the Applicant:	Ms K Eastman
Solicitor for the Applicant:	Cowley Hearne
Counsel for the Respondent:	Ms C Ronalds
Solicitor for the Respondent:	Harmers Workplace Lawyers
Dates of Hearing:	21 and 22 June and 9, 10, 11, 12 and 16 October 2001
Last submissions received:	16 January 2002
Date of Orders:	30 July 2002