SUPREME COURT OF QUEENSLAND

CITATION:	*Martin & Anor v Qld Electricity Transmission Corporation* [2003] QSC 309
PARTIES:	**JOHN MARTIN and RAY ANDERSON AS REPRESENTATIVES COMPLAINANTS ON BEHALF OF EMPLOYEES OF THE RESPONDENT AS AT 1 JANUARY 2000 AND WHO REMAINED EMPLOYEES OF THE RESPONDENT ON 1 JULY 2000, AND WHO AT THAT DATE WERE AGED 41 OR OVER AND WHO WERE OFFERED THE OPTION OF TRANSFERRING FROM THE DEFINED BENEFITS SECTION OF THE ELECTRICITY SUPPLY INDUSTRY SUPERANNUATION FUND (QLD) (ESI) TO THE DEFINED CONTRIBUTIONS SECTION** (appellants) **v** **QLD ELECTRICITY TRANSMISSION CORPORATION LTD t/as POWERLINK QUEENSLAND** ACN 078 849 233 (respondent)
FILE NO/S:	SC No 11755 of 2002
DIVISION:	Trial Division
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	28 February 2003
JUDGES:	White J
ORDERS:	**1. Dismiss the appeal** **2. The appellants pay the respondent's costs of and incidental to the appeal to be assessed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – where appellants appealed against orders of Anti-Discrimination Tribunal – where appeal brought under s 217(1) *Anti-Discrimination Act* 1991 (Qld) – where appellants brought proceeding as representative complaint – whether tribunal misconceived the nature of a representative proceeding so as to constitute an

error of law

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – whether tribunal erred in law by reversing the onus of proof

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – DENIAL OF NATURAL JUSTICE – where tribunal used expressions such as "this is a matter which is distinctly commercial in flavour" and "potentially large amounts of money are at stake" – whether these statements demonstrated bias

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – where tribunal required a degree of precision in pleadings – whether appellants denied procedural fairness

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – FAILURE TO GIVE REASONS FOR DECISION – GENERALLY – whether Tribunal failed to give adequate reasons for decision

Anti-Discrimination Act 1991 (Qld), s 15, s 55, s 195, s 217(1)

Brown v Moore (1996) EOC 92-835, followed
Calder v Boyne Smelters Limited [1991] 1 Qd R 325, considered
Carnie & Anor v Esanda Finance Corporation Ltd [1994-1995] 182 CLR 398, referred to
Hehir & Anor v Smith [2002] QSC 92, considered
Re JRL; ex parte CJL (1986) 161 CLR 342, considered

COUNSEL: M Spry for the appellants
P Applegarth SC for the respondent

SOLICITORS: Mullins and Mullins for the appellants
Deacons for the respondent

[1] **WHITE J:** On 26 November 2002 the Anti-Discrimination Tribunal ("the Tribunal") ordered the appellants, who are the complainants below, to file and serve amended points of claim and ordered costs against them. They appeal those orders. It is convenient to refer to the appellants as the complainants in these reasons.

[2] Appeals may be made to this court by a party to a proceeding before the Tribunal against a decision of the Tribunal on a question of law only, s 217(1) of *Anti-Discrimination Act* 1991 ("the Act"). The Tribunal may make rules for the effective and efficient performance of its functions. Rule 14 of the *Anti-Discrimination Tribunal Rule* 1993 enables the Tribunal to make orders and give directions about the conduct of a proceeding that it considers appropriate including defining the issues "by statements of particulars, points of defence or otherwise", r 14(2)(a). The decision appealed from is a discretionary one and in order to set it aside it must be demonstrated that the Tribunal acted on a wrong principle of law which has infected the exercise of the discretion, *Brown v Moore* (1996) EOC 92-835 at 79,184 and *Calder v Boyne Smelters Limited* [1991] 1 Qd R 325 at 347-8 per Cooper J.

[3] The complainants and those they represent at all material times were employees of the respondent, Powerlink, and members of the Electricity Supply Industry Superannuation Fund (Qld) (the "ESI Fund") an approved industry superannuation scheme for the purposes of the *Electricity Act* 1994. The ESI Fund is established by a Trust Deed. Although referred to in the points of defence it is not in the Appeal Book but its relevant terms can be gleaned sufficiently from the Powerlink booklet *Your Guide to the New Defined Contribution Superannuation Offer* which is in the Appeal Book. The trustee is Electricity Supply Industry Superannuation (Qld) Limited. The Trust Deed governs the entitlements of the members of the ESI Fund. There are, relevantly, two sections to the ESI Fund – Defined Benefits and Defined Contributions – the former offering members who resign or retire a specific sum based on a multiple of the member's final average salary and years of membership of the ESI Fund less a discount factor for member under age 55 or the member's account multiplied by a factor; the latter is dependent on the amount contributed by the member plus the compulsory contribution of the employer less tax plus the interest earned which is reflective of the investment market.

[4] The respondent, for reasons that need not be set out, wanted its employees who were members of the ESI Fund to be in the Defined Contribution Section of the ESI Fund rather than the Defined Benefit Section. All new employees were admitted to that section and the respondent gave the current members an opportunity to transfer from the Defined Benefits Section to the Defined Contributions Section. That offer was open until 16 June 2000. The transfer date was designated 1 July 2000.

[5] In order to encourage members to transfer the respondent included an incentive in the offer. The complainants contend that the terms of the offer to transfer impermissibly discriminated against them and those they represent based on their age in contravention of s 7(f) of the Act. Whether that discrimination has been adequately identified in the points of claim is an aspect of the issue between the parties.

Chronology

[6] Two separate complaints by Mr Martin and Mr Anderson were accepted by the Anti-Discrimination Commission on 5 October 2000 and referred to the Tribunal on 6 April 2001. On 20 July 2001 the respondent consented to the proceeding being dealt with as a representative complaint pursuant to s 195 of the Act and the Tribunal ordered on 10 October 2001 that the complainants were representative of

> "employees of the respondent as at 1 January 2000 and who remained employees of the respondent on 1 July 2000 and who at that date were ages 41 or over and who were offered the option of transferring from the Defined Benefits Section of the Electricity Supply Industry Superannuation Fund (Qld) (ESI) to the Defined Contributions Section."

[7] Points of claim and defence were filed on 2 and 30 November 2001 respectively. Amended points of claim were filed on 21 January 2002 and amended points of defence on 14 February 2002. An unsuccessful conciliation conference was held on 14 June 2002. On 12 November 2002 the respondent applied to the Tribunal to strike out amendments to the points of claim and it is from the orders made on 26 November in response to that application that this appeal is brought.

Defined Benefit and Defined Contribution

[8] Part 2 of the ESI Fund Trust Deed governs the entitlements of a Defined Benefit member. Such a member's benefit upon termination is determined by a formula based on the member's final salary or the member's account balance multiplied by a factor. The Defined Benefit at a particular date is the greater of

(i) 19.5% x years of membership x the member's final average salary reduced by a discount factor (a reduction of 2% for each year the member is below the age of 55 ceasing at age 40); and
(ii) the member's account balance (being the member's 5 per cent contributions plus interest at the declared rate plus any additional contributions) x 2.5.

[9] For Defined Benefit members aged between 55 and 65 the resignation benefit comprises, in respect of alternative (ii), the member's account balance immediately before the member attained 55 or, in some cases, members known as 11B members, 60, x 2.5.

[10] Part 3 of the Trust Deed governs the entitlements of a Defined Contribution member of the ESI Fund. Each member has an account in which the respondent's 10 per cent of salary and the member's 5 per cent contributions are located (plus any other voluntary contributions). The amount available to such a member on resignation or retirement will depend on the earnings on the investment. In other words, the member bears the investment risk.

The Transfer Offer

[11] Direct Benefit members were offered an incentive to transfer by a "notional" improvement payment, that is, the amount did not come into the member's hands but was added to the member's account balance. The amount to be transferred into the Defined Contribution account for any member was to the greater of

(i) 19.5% x years of membership x final average salary x discount factor where the discount factor was reduced from 2 per cent to 1 per cent for each year the member was below the age of 55 ceasing at 40 years and up to a maximum of 15 per cent; and
(ii) the member's account balance x 3.

Once a member reaches the age of 55 years there is no discount factor and accordingly there would be no improvement under (i), that is, no incentive to change was offered other than the perceived benefit in transferring to an investment fund. This was consistent with the retirement/resignation benefit of a member aged 55 (60 for 11 B members) and over.

[12] The effect of the improvement offer for members over 55 based on the discount factor was nil. For those under 55 years it was on a sliding scale offering the greatest incentive to members aged under 40. For the alternative calculation there was a 0.5 increase but the account balance was to be as at 55 (or 60). There was, no doubt, an actuarial basis for the formula chosen. That much is apparent from the respondent's amended points of claim.

The Complaint of Discrimination

[13] The complaint of discrimination is set out in paragraphs 4-9 of the amended points of claim, alleging contravention of various provisions of the Act

- by denying or limiting the complainants' access to a benefit that relates to superannuation, s 55(b);

- by treating the complainants unfavourably connected with superannuation, s 55(c); alternatively

- in a work-related area by being
    - (i) subjected to a discriminatory variation in the terms of work, s 15(1)(a);
    - (ii) denied or limited access to opportunity for a benefit, being an improvement payment to transfer, s 15(1)(b);
    - (iii) treated unfavourably in connection with work, s 15(1)(f).

[14] The discrimination is alleged to be directly related to the complainants' age, ss 7(f), 10. Alternatively the discrimination is alleged to be indirect in as much as the improvement payment was linked to the resignation benefit formula in the Trust Deed which was linked to the complainants' age, s 11.

The Scheme of the Amended Points of Claim and Amended Points of Defence

[15] Paragraphs 1-3 relate to the parties. Paragraphs 4-9 set out the relevant provisions of the Act. Paragraphs 10-33 set out the facts alleged to give rise to the contravention of the Act divided further into the relevant provisions of the Trust Deed (paras 10-21) and the respondent's offer (paras 22-33). Paragraph 29 alleges

> "The improvement payment offered by the respondent involving a reduction of the Discount Factor, referred to above, is based on the individual employee's age."

Paragraph 34 sets out the question of law or fact common to each member of the representative class

> " The question of law or fact common to all members of the class is: whether the respondent contravened the Act by offering an inducement to its employees in the form of an improved payment, based on the employee's age, to transfer from the Defined Benefits Section of ESI to the Defined Contributions Section."

[16] In paras 35 and 36 the complainants plead that the discrimination has caused them stress and anxiety, hurt and humiliation, and financial loss and that "as a result of the discrimination the complainants have suffered financial loss as the quantum of the financial inducement varied according to the complainants' age." Particulars of the financial loss based on figures pertaining to Mr Martin and Mr Anderson are set out. Mr Martin was born in 1938 and Mr Anderson in 1943. At the relevant date Mr Martin was 62 (he was an 11 B member) and Mr Anderson 57. The calculations in the pleading are on the members' actual account balances as at 1 July 2000 not at age 55 (or 60). Of the other class members it is pleaded in para 36 (n) that "further particulars cannot be provided until discovery". It was estimated that there were some 200 other class members. Discovery had occurred at the time of the hearing on 26 November.

[17] Paragraph 37 sets out the orders sought

> "(a) an order under s209 (1) (b) of the Act requiring the respondent to pay the complainants such amount as the Tribunal considers appropriate as compensation for loss or damage caused by the contravention of the Act;
>
> (b) an order that the respondent apologise to the complainant;
>
> (c) an order under s 213 of the Act that the respondent pay such costs as the Tribunal considers reasonable;
>
> (d) such other orders as the Tribunal considers appropriate."

[18] The amended points of defence admit, for all practical purposes, paras 1-21 of the amended points of claim. In paras 6-17 the respondent has responded to paras 10-33 of the amended points of claim setting out why it favoured the Defined Contribution Section over the Defined Benefit Section, the advantages and disadvantages to employees and a summary of advice received from actuarial consultants about what incentives would be necessary to induce members to transfer noting that older/longer serving members would require a substantial financial incentive and that there was a significant proportion of total benefit in the 40-55 age group. The effect of the advice was that the Defined Benefit would be phased out over a period of about 10 years and in calculating the incentives the respondent was governed by the need to maintain a balance between an appropriate incentive and prudent reserve levels.

[19] In their points of reply the complainants contend that whether the offer made by the respondent was based on reasonable actuarial or statistical data or other factors as provided for by way of exemptions in ss 61, 62 and 63 of the Act, which make it not unlawful to discriminate on the basis of age in imposing a superannuation fund condition, is irrelevant because the respondent does not allege that the offer is a superannuation fund condition within the meaning of the Act.

[20] The respondent denies that the offer was based on the individual employee's age as contended for in para 29 of the amended points of claim, but "on a formula based on the employee's current resignation benefit", para 15(c), and sets out the offer formula, para 15 A. The offer was based on a starting accumulation value calculated in accordance with the Trust Deed. In para 17(c) the respondent contends

> "If (which is not admitted) the effect of the formula was that the maximum improvement as a percentage of that employee's Resignation Benefit was offered to employees aged 40 or younger, then this was the result of the Resignation Benefit of employees aged 40 or younger being, on average, less in dollar value than employees aged over 40."

[21] The respondent's response to the complaints of loss and damage are set out in paras 25-29 of the amended points of defence. These complaints were the subject of orders by the Tribunal and it is convenient to set them out in full.

> "25. As to paragraph 36 of the Points of Claim, the Respondent denies that the Complainants have suffered financial loss, as alleged, and says that the Complainants have not particularised the nature or extent of their alleged financial loss, or how it is alleged to have been caused as a result of the alleged discrimination, save for the complainants Ray Anderson and John Martin.
>
> 26. Further as to paragraph 36 of the Points of Claim, the Complainants have not pleaded the basis upon which the transfer would have been offered or effected had the alleged discrimination not occurred, or whether the Complainants would have elected to transfer had the transfer been effected on the basis.
>
> 27. Further as to paragraph 36 of the Points of Claim, the allegations of loss and damage particularised in respect of Ray Anderson and John Martin are not causally related to the discrimination complained of but relate to the adoption of a starting accumulation figure calculated by reference to a member's current registration benefit.
>
> 28. Further, the claimed loss and damage is based upon an assumption that members aged 55 and over, but not members aged under 55, should have been offered a starting accumulation figure which was not based on their current resignation benefits.
>
> 29. If (which is denied) there was discrimination on the grounds alleged in the Points of Claim, then in the absence of such discrimination any transfer figure would have been based on a member's current resignation benefit.
>
> Ray Anderson

> In the case of Ray Anderson this was the greater of:
> (a) a figure based upon years of membership applied to a Final Average Salary of $43,431, resulting in a figure of $168,771.25; or
> (b) a multiple of the balance of his Member Account as at the age of 55, namely his account balance as at 14 February 1998 which was approximately $51,094.
>
> Irrespective of whether the multiple was 2.5 or 3 the resulting figure would have been less than $168,771.25.
>
> John Martin
>
> In the case of John Martin this was the greater of:
> (c) a figure based upon years of membership applied a Final Average Salary of $64,815.31, resulting in a figure of $217,669; or
> (d) a multiple of the balance of his Member Account as at the age of 60, namely his account balance as at 27 April 1998 which was approximately $63,997.
>
> Irrespective of whether the multiple was 2.5 or 3 the resulting figure would have been less that $217,699.
>
> In the circumstances, neither Ray Anderson nor John Martin suffered any financial loss as a result of the alleged discrimination."

The Application

[22] The respondent sought particulars of

- the facts, matters and circumstances relied on to support the alleged discrimination of the members of the representative class who were not aged 55 and over as at 1 July 2000;
- the financial loss suffered as a result of the alleged discrimination;
- the basis upon which the starting accumulation figure would have been calculated and offered to the complainants and other members of the class had there been no discrimination;

Alternatively, the respondent sought

- a better description of the "other members of the class" and whether they were confined to persons who were aged 55 and over at 1 July 2000;
- The further particulars referred to in paras 29B(e) and 36(n) of the amended points of claim;
- the non-discriminatory transfer offer which should have been made.

[23] Particulars were sought of the stress, anxiety, hurt, humiliation and financial loss referred to in paragraph 35 but it was said at the hearing that no medical evidence would be advanced and no orders were made.

The Tribunal's Orders

[24] The Tribunal made orders that the complainants file and serve amended points of claim within 28 days which

> "1. (a) plead and particularise the facts, matters and circumstances relied upon in support of alleged discrimination insofar as the complainants were members of the class particularised at paragraph 2 of the amended points of claim;
>
> (b) plead and particularise the facts, matters and circumstances to allege that as a result of the discrimination the complainants suffered financial loss;
>
> (c) provide a better description of the "other members of the class" used in the particulars to paragraphs 29 B and 36 of the amended points of claim,
>
> (d) provide the further particulars referred to in paragraphs 29 B (e) and 36 (n) of the amended points of claim."

The Tribunal ordered the complainants to pay the respondent's costs.

The Grounds of Appeal

[25] The grounds of appeal are numerous and all are relied upon. In summary they are that the tribunal erred in law in a number of ways

(i) by ordering the complainants to particularise the alleged discrimination against as the complainants members of the class when particulars have been given;

(ii) by directing the complainants to plead how as a result of the discrimination the complainants suffered financial loss;

(iii) in requiring the complainants to plead the terms of a non-discriminatory offer that the respondent should and could have made, the terms of that offer and what complainants or other members in the class would have done had such an offer been made;

(iv) alternatively, that the Tribunal reversed the onus of proof in requiring the complainants to plead the terms of a non-discriminatory offer;

(v) in the further alternative in requiring the complainants to plead a formula showing the way the complainants say the financial loss would be calculated when paragraph 36(a) pleads a formula applicable to all members of the representative class including both Mr Anderson and Mr Martin;

(vi) in the further alternative in holding that para 33 was the only paragraph dealing with employees age between 41 and 54;

(vii) by ordering the complainants to provide a further and better description of "other class members" in paragraph 29 B and 36 when those members are as defined in paragraph 2 other than Mr Martin and Mr Anderson;

(viii) by ordering the complainants to provide a better description of the "other class members" in paragraph 29 B and 36 while stating in her reasons that the complainants had not particularised the loss suffered by class members other than Mr Anderson and Mr Martin;

(ix) in ordering that the complainants provide the further particulars referred to in paragraphs 29B(e) and 36(n) in that the tribunal had said "in her oral reasons" that the specific figures need not be provided, acknowledging in her written reasons that the respondent did not seek specific figures for each employee who is a member of the class;

(x) ordering the complainants to pay the respondent's costs.

[26] The complainants contend that the Tribunal erred in law

- by not providing full and adequate reasons, in not distinguishing any of the authorities to which she was referred and took the complainants' counsel's submission out of context;
- in characterising a complaint under the Act "in her oral reasons" as "like a failure to warn case";
- by characterising the proceedings as "distinctly commercial in flavour";
- by failing to take into account, appropriately, s 209(4) of the Act and by stating "in her oral reasons" that she would not be taking evidence from individual members of the class defined in paragraph 2;
- by focusing on what differentiated the cases of individual members of the represented class rather than what those members have in common;
- in taking into account irrelevant considerations, namely that the matter had a distinctly commercial flavour and that potentially large sums of money were in issue and requiring the matter to be conducted with more formality than may sometimes be the case in the Tribunal;
- by denying procedural fairness to the complainants on the ground of apparent bias by reason of pre-judgment, because she characterised the matter as distinctly commercial in flavour and that actuarial evidence would be necessary to prove the complainants' case and undue delay (in excess of 12 months) in making known to the complainants her concerns about the

pleadings and by reversing the onus of proof requiring them to prove what non-discriminatory offer could have been made.

Was there an Error of Law?

[27] Before turning to the question whether the complaints of error by the Tribunal are well-founded and if so, whether they constitute errors of law one or two things need to be mentioned. There is a reference to the Tribunal's "oral reasons" as distinct from her written reasons. Although no transcript is provided and I assume that there was none, Ms Kane, the complainants' solicitor took notes in the course of the hearing before the Tribunal and deposes to some of what was said by the Tribunal about which complaint is made. These were observations made in the course of submissions and while they might be drawn upon to substantiate an allegation of bias or perceived bias, the reasons to support the orders made are contained in the document in the Appeal Book at pp 011-020 and described by the Tribunal as the "Reasons for Decision". Observations, comments and questions made in the course of argument are part of the hearing process, usually to elucidate, but rarely constitute the reasons for decision and do not in this matter.

[28] Neither is it clear to me that the Tribunal on 26 November ordered the complainants to articulate a formula which would have been non-discriminatory. The respondent sought such an order. The order to particularise the allegation that as a result of the discrimination the complainants suffered financial loss does not constitute such a direction although it is true that its effect might do so. Orders made on an earlier directions hearing resulted in the formula in para 36(a) of the amended points of claim but that has not been the subject of appeal.

[29] Another matter to mention is this - Mr Spry submitted expressly in reply and inherently in his submissions generally that there was no necessity for the complainants to demonstrate financial loss to establish a breach or breaches of the Act and that the complainants seek declaratory relief, not merely compensation. That is not the case as para 37, being the orders sought, demonstrates.

(a) Misunderstanding of Nature of Representative Complaint

[30] Section 195 of the Act sets out the criteria which must be satisfied before the Tribunal can deal with a complaint as a representative complaint

"(1) The tribunal may deal with a complaint as a representative complaint if the tribunal is satisfied that –

(a) the complainant is a member of a class of people, the members of which have been affected, or are reasonable likely to be affected by, the respondent's conduct; and
(b) the complainant has been affected by the respondent's conduct; and
(c) the class is so numerous that joinder of all of its members is impracticable; and
(d) there are questions of law or fact common to all members of the class; and
(e) the material allegations in the complaint are the same as, or similar or related to, the material allegations in relation to the other members of the class; and

(f) the respondent has acted on grounds apparently applying to the class as a whole.

(2) If the tribunal is satisfied that –

(a) the complaint is made in good faith as a representative complaint; and

(b) the justice of the case demands that the matter be dealt with by means of a representative complaint;

the tribunal may deal with the complaint as a representative complaint even if the criteria set out in subsection (1) have not been satisfied."

[31] The basis upon which the Tribunal acceded to the application to deal with the complaints of Mr Martin and Mr Anderson as representative complaints does not appear in the material. The application was not opposed and it may well be that the Tribunal did not specifically turn her mind to each of the criteria in s 195 (1) or whether she was making the order under s 195(2). However, it must be assumed that she was satisfied that it was proper to do so in the light of those provisions. That would, at least, include a conclusion that the class was so numerous that joinder of all its members would be impracticable and that there were questions of law and/or fact common to all members of the class.

[32] It is trite to say that such a provision is beneficial in its effect. As Mason CJ, Deane and Dawson JJ observed in *Carnie & Anor v Esanda Finance Corporation Ltd* [1994-1995] 182 CLR 398 at 404

> "The sub-rule [of the Federal Court Rules relating to representative actions] is expressed in broad terms and it is to be interpreted in the light of the obvious purpose of the rule, namely, to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions."

Here the Tribunal had the benefit, in s 195, of a more detailed approach to the question whether a complaint should proceed as a representative complaint than in *Carnie* where the relevant Federal Court Rule was couched in terms requiring only "numerous persons having the same interest". The further value of the representative action as saving both time and costs in Tribunal proceedings is contained in s 209(3) which provides that an order may be made requiring the respondent to pay compensation

> "in favour of a person on whose behalf a representative complaint was made… if on the evidence before it the tribunal is able to assess the loss or damage of the person."

If the evidence is insufficient and the Tribunal decides that the respondent contravened the Act "the person may subsequently make a request for the tribunal to assess the person's loss or damage", s 209(4).

[33] The present proceedings in the Tribunal seem to me to be the kind of case where the issue of discrimination could conveniently be severed from the quantum of the compensation, but that is, of course, a matter for the parties and the Tribunal.

[34] By its amended points of claim the complainants indicated that after discovery particulars of the financial loss of other members represented by the complainants would be given. Discovery had occurred by the time of the hearing. There was no application to be dispensed from doing what the complainants in their pleading said that they would do after discovery. It was not unreasonable, accordingly, to require that to be done but that was not, in fact, what was ordered. In para 17 of her reasons the Tribunal stated

> "Counsel for the respondent did not ask that specific figures be provided for each employee who is a member of the class, but that a formula be provided in the pleading showing the way the complainants say that such loss would be calculated. In my view, it is appropriate that this should be done in order to make plain the matters in issue in the proceedings."

The Tribunal noted at paras 7,8 and 9 of her reasons that there were no facts pleaded in support of the alleged discrimination against employees aged between 41 and 54. She ordered further particulars which, although not limited to that age group must be so because there is no complaint about the particulars concerning members aged over 54.

[35] Is this, then, focusing on the differences rather than the common interest so as to manifest a misapprehension of what constitutes a representative complaint? Paragraphs 29, 29 A, 29 B and 33 of the amended points of claim seem to me quite clearly to set out the two areas of complaint about the improvement payment offered by the respondent to the members of the ESI Fund

(i) that members who are older than 55 had their account balance capped at 55 (or 60);
(ii) that there was a sliding scale based on age for those under 55 to age 40 offering the greatest incentive to those aged 40.

Ordering further particulars of these allegations seems unnecessary to inform the respondent of the complaints in this representative proceeding. However, I am unable to conclude that to do so misconceives the nature of a representative proceeding as provided for in the Act so as to constitute an error of law.

(b) Reversing the Onus of Proof

[36] As mentioned above, the Tribunal made no order requiring the complainant to plead a non-discriminatory offer. Section 204 of the Act makes plain that it is for the complainant to prove on the balance of probabilities that the respondent contravened the Act subject to the requirements of s205 and 206 – in a case involving an allegation of indirect discrimination the respondent must prove that a term complained of is reasonable; if the respondent wishes to rely on an exemption then the respondent must raise the issue and prove on the balance of probabilities that the exemption applies. To establish discrimination on the grounds of age the complainants need to show that the respondent treated the complainants as members

of the ESI Fund less favourably than another member of the fund in circumstances that are the same or not materially different because of the members' age. Reference to the offer formula alone may achieve this. It may be demonstrated by example. In para 17 of her reasons in the passage just prior to that already referred to, the Tribunal said

> "Allied with the complaint of the respondent that the amended points of claim do not plead facts relied upon in support of the alleged discrimination against employees aged between 41 and 54, is the complaint that the claimants have not particularised the loss pleaded at paras 29B(e) and 36(n)."

[37] The complainants plead in para 36 that as a result of the discrimination the complainants have suffered financial loss "as the quantum of the financial inducement varied according to the complainants' age". The particulars at (a) provide a formula in (i) which is applicable to members under the age of 54 by removing the discount factor. The formula in (ii) takes account of those members over 54. While there is no obligation to plead a non-discriminatory offer, it is a convenient way of demonstrating the discrimination. However, contrary to Mr Spry's contention, the complainants do not seek a declaration of discrimination. They seek compensation for loss cause by the discrimination. The orders made by the Tribunal are nothing more than requiring particulars of the loss to be given.

[38] This is not to confuse the nature of the proceedings under the Act with proceedings to recover damages brought in tort, contract or in other civil matters. The Tribunal is asked by the complainants to order the payment of compensation. While such a payment and its quantum is discretionary it must bear some relationship to any actual financial loss. This is not reversing the onus of proof.

(c) Denied Procedural Fairness

[39] There are a number of complaints of error associated with this aspect of the appeal. It is contended that the Tribunal has demonstrated bias in as much as she has pre-judged the issue by the use of expressions such as "this is a matter which is distinctly commercial in flavour" and, "potentially large amounts of money are at stake". Perhaps the word "commercial" was not apt. The complaint is certainly about money and what is apparently seen as an "unfair" inducement payment to younger members. That the Tribunal was persuaded by submissions on behalf of the respondent about the defects in the pleading is not, in the circumstances of this proceeding, bias. As Mason J (as his Honour then was) in *Re JRL; ex parte CJL* (1986) 161 CLR 342 said at 352

> "It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party… In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of pre-judgment and this must be 'firmly established'."

No bias has been demonstrated.

[40] It is next said that in requiring the pleadings to conform more closely to those required for civil litigation in a court is to fail to accord procedural fairness to the complainants. This proceeding in the Tribunal has moved slowly. It is more complex than are many complaints of discrimination by virtue of the nature of the complaint and the number of people it involves. I note the comments of Wilson J in *Hehir & Anor v Smith* [2002] QSC 92 decision of 10 April 2002 at para 46 of her Honour's reasons, with which I respectfully agree. Also *Smallwood v Queensland Police Service* [2002] QADT decision of 24 December 2002 of Mr W Sofronoff QC sitting as the President of the Tribunal at p 2, that the Tribunal is bound to act without regard to technicalities and legal forms and to give directions relating to procedure that will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties.

[41] It is, however, necessary that the issues between the parties be clearly delineated to ensure that there are no misconceptions and to assist the Tribunal to understand the nature and extent of the complaint and what is sought by way of compensation and why. It was not a denial of procedural fairness to require a degree of precision in this matter. That I would not have found it necessary to have made some or all of the orders which the Tribunal did is of no significance, *Azzopardi v Tasman UBE Industries P/L* (1985) 4 NSWLR 139; *Soulemezis v Dudley (Holdings) P/L* (1987) 10 NSWLR 247 at 259; and *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287. It was a matter for her discretion and she demonstrated no appellable error. These proceedings have been conducted along traditional adversarial lines by both sides and although there might be some legitimate complaint about the delay between the delivery of the amended points of claim in January 2002 and the application of November of that year, a conciliation conference was held in June and no other prejudice has been identified.

[42] There is also a complaint that the Tribunal gave inadequate reasons including failing to analyse the authorities cited. The Act does not require reasons to be given when making an order unless requested to do so. Reasons were given without request and accordingly the provisions of s 27B of the *Acts Interpretation Act* 1954 applies. It provides

> "If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also –
>
> (a) set out the findings on material questions of facts; and
>
> (b) refer to the evidence or other material on which those findings were based."

[43] There is considerable authority on the obligation to provide reasons, some of which are discussed in my reasons for decision in *Brown v Moore* at pp 79,180-2 and I do not propose to repeat them except to refer to *Soulemezis* where Mahoney JA said at 273

> "…it will ordinarily be sufficient…if by his reasons the judge appraised the parties of the broad outline and constituent facts of the reasoning on which he has acted."

This the Tribunal has done. Further this was an interlocutory matter relating to practice and did not call for any analysis of the authorities and so forth. There was no error in the nature of the reasons.

(d) Costs

[44] The Tribunal exercised her discretion under s 213 and ordered the complainants to pay the respondent's costs of the application. As the Tribunal expressed it, costs were to follow the event. This was against a background of a detailed letter written by the respondent's solicitors about the pleading and, in effect, the complainants' solicitors inviting the application. There is no error in the Tribunal exercising her discretion in this way.

[45] The orders are

1. Dismiss the appeal.

2. The appellants to pay the respondent's costs of and incidental to the appeal.

[46] If the appellants contend that any other costs order ought be made brief submissions can be exchanged.