IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 5407 of 2004

STEPHEN FORRESTER — Appellant

v

AIMS CORPORATION AND ORS — Respondent

JUDGE:	KAYE J.
WHERE HELD:	MELBOURNE
DATE OF HEARING:	2 December 2004
DATE OF JUDGMENT:	8 December 2004
CASE MAY BE CITED AS:	Forrester v AIMS Corporation and ors
MEDIUM NEUTRAL CITATION:	[2004] VSC 506

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catchwords: Discrimination - Complaint pursuant to *Equal Opportunity Act* 1995 - "Strike out" application – Complaint not "absolutely hopeless" – Tribunal erred in pre-trial assessment of complainant's evidence - s.75(1)(a) *Victorian Civil and Administrative Tribunal Act* 1998

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr D.B. Sharp	Arnold Bloch Leibler
For the First Respondent	Ms L.C. Bird	EMA Legal
For the Second Respondent	Ms M. Rozner	Corrections Victoria
For the Third Respondent	Mr R.D. Shepherd	Wisewoulds

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HIS HONOUR:

1 On 25 June 2002 the appellant, Stephen Forrester, commenced to serve a sentence of imprisonment of 18 months which had been imposed on him by the Melbourne Magistrates' Court. He completed that sentence on 24 December 2003. During that term of imprisonment he was detained, for varying periods, at the Melbourne Custody Centre, the Metropolitan Assessment Prison, the Fulham Correctional Centre and Port Philip Prison. In January, February and June 2003 Mr Forrester made complaints to the Equal Opportunity Commission, the substance of which was that during his term of imprisonment he was subjected to environmental tobacco smoke caused by the smoking of other prisoners with whom he was confined. The appellant had been a non-smoker since he ceased smoking approximately nine years previously, and he claimed that he suffered from a hypersensitivity to exposure to tobacco smoke.

2 Four of the complaints by the appellant were, at his request, referred to the Victorian Civil and Administrative Tribunal ("the Tribunal"). One complaint was against the first respondent, AIMS Corporation Limited, which was responsible for transporting the appellant between various locations during his term of imprisonment. A second complaint was against the second respondent, the State of Victoria, which controlled and operated the Melbourne Assessment Prison. The other two complaints were against the third respondent, Group 4 Correctional Services Pty Ltd, which controlled and operated Port Phillip Prison. The four complaints were consolidated into one proceeding by order of the Tribunal made 23 September 2003.

3 On 27 November 2003 the respondents applied to the Tribunal for an order that the complaint be struck out pursuant to s.75(1)(a) of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the *VCAT Act*"). The application was made on three bases, namely:

> (a) the complaint did not disclose a disability which falls within the definition of impairment in s.4(a) of the *Equal Opportunity Act* 1995;

(b) the complaint does not disclose that the respondents have treated the complainant less favourably than a non-smoking prisoner in the same or similar circumstances (s.8 of the *Equal Opportunity Act* 1995);

(c) the complaint does not disclose that in the circumstances the respondents have unreasonably imposed a requirement, condition or practice that the complainant be exposed to environmental cigarette smoke (s.9 of the the *Equal Opportunity Act* 1995).

4 That summons came on for hearing before a senior member of the Tribunal on 19 February 2004. On 11 March 2004 the senior member delivered written reasons for decision. He ordered that the proceeding be struck out against all three respondents. Pursuant to s.148(1) of the *VCAT Act* the appellant sought leave to appeal against that decision. On 8 June 2004, Master Wheeler gave leave to the appellant to proceed with the appeal limited to the following question:

> "Did the Tribunal err in summarily striking out the application pursuant to ss.75 *Victorian Civil and Administrative Tribunal Act* 1998 without the benefit of hearing any evidence particularly medical evidence?"

The *Equal Opportunity Act* 1995

5 Section 8(1) of the *Equal Opportunity Act* defines "direct discrimination" as conduct which occurs if a person treats or proposes to treat someone with an "attribute" less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances. Section 9 defines "indirect discrimination" to constitute conduct which occurs if a person imposes or proposes to impose a requirement, condition or a practice –

(a) that someone with an "attribute" does not or cannot comply with; and

(b) that a higher proportion of people without that attribute, or with a different attribute, do or can comply with; and

(c) that is not reasonable.

6 Section 6 of the *Equal Opportunity Act* provides that an "attribute" includes (inter alia) "impairment". Section 4 defines "impairment" to mean:

"(a) total or partial loss of a bodily function;

(b) the presence in the body of organisms that may cause disease;

(c) total or partial loss of a part of the body;

(d) malfunction of a part of the body, including –

(i) a mental or psychological disease or disorder;

(ii) a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder;

(e) malformation or transfigurement of a part of the body."

7 It appears, both from the appellant's complaints, and from the manner in which the appeal was argued before me, that the appellant relied on allegations of indirect, rather than direct, discrimination against him by the three respondents. Further, Mr Sharp, who appeared on behalf of the appellant, stated that the attribute which was the occasion for that discrimination was an "impairment" of the appellant, consisting of his hypersensitivity to exposure to environmental tobacco smoke. Mr Sharp stated that the appellant relied on sub-paragraph (a) ("total or partial loss of a body function") or alternatively on sub-paragraph (d) ("malfunction of a part of the body") of the definition of impairment.

Proceedings before the Tribunal

8 On 25 August 2003 the Tribunal gave directions for the delivery of witness statements by the parties by 30 November 2003. On 27 November 2003 the respondents issued the application to strike out the complaint. On 30 November 2003 the Tribunal vacated the directions for the delivery of witness statements, and gave directions for the delivery of submissions relevant to the strike-out application.

9 In addition to the written submissions, some affidavit material was also filed by the parties in relation to the respondent's application under s.75 of the *VCAT Act*. The appellant filed two affidavits, sworn 23 January 2004 and 30 January 2004 respectively, together with a number of exhibits. The first respondent filed two affidavits of Marilyn O'Connor sworn 17 December 2003 and 6 February 2004. Oral

argument was presented to the senior member on 19 February 2004. He delivered his written reasons on 11 March 2004.

Reasons for Decision of Tribunal

10 The senior member's reasons commenced with a statement of the principles relevant to an application under s.75 of the *VCAT Act*. The senior member then referred to the complaint filed by the appellant, and the particulars. He also referred to paragraph 12 of the appellant's affidavit sworn 23 January 2004. There the appellant deposed that he suffered from a "medical condition" which was "generally described as a hypersensitivity to tobacco smoke which manifests in certain physical symptoms". The appellant described those symptoms as: nausea and dry-retching; dizziness; migraine headaches; consistent coughing of mucus; shortness of breath; tightness in the chest; severe eye irritation; anxiety; and stress.

11 The senior member proceeded to examine medical records maintained by doctors and other medical professionals in relation to the appellant during his period of incarceration between July 2002 and December 2003. He then summarised the parties' submissions, which focussed on the question whether the appellant had suffered from an "impairment" within s.4 of the *Equal Opportunity Act*. The senior member referred to the respondents' submission that, although the appellant alleged that he had a medical condition, there was no evidence that he had such a condition. The member noted that in response Mr Sharp, who appeared for the appellant in the Tribunal, stated that the complaint would be established by the appellant's own evidence as to his symptoms, and that a medical witness could also be called to give evidence that the symptoms described by the appellant were indicative of an underlying condition which would amount to an impairment under the Act. However, Mr Sharp did not suggest that it had been ascertained that that evidence was available.

12 The senior member then proceeded to state his conclusions. The salient parts of those conclusions are as follows:

> "36. It is fundamental in any claim for unlawful discrimination that

the complainant has the attribute alleged. The complainant, on his own evidence, complained to several doctors about his problems with environmental tobacco smoke but it does not appear that any of these doctors diagnosed any underlying condition, such as asthma or allergy. There is no indication that there is any medical evidence available to be called to establish that the complainant has a medical condition that would amount to a total or partial loss of a bodily function or a malfunction of a part of his body, or that any of the other parts of the definition of an 'impairment' apply to him. It is clear that his assertions of 'hypersensitivity' and 'allergy' are self-diagnoses, and he is not qualified to diagnose himself as having any underlying medical condition on the basis of the symptoms that he suffers.

37. I do not believe that it would be possible for the Tribunal to infer, simply on the complainant's description of the symptoms that he suffers when exposed to tobacco smoke, that he suffers from any underlying conditions. Without medical evidence to this effect, his case must fail.

38. Mr Sharp's submission that a doctor can be called to give evidence on the basis of the complainant's description of his symptoms is insufficient, even in an application such as this. It does not appear that any inquiries have been made that any such evidence can be given or that any doctor is prepared to give such evidence.

…

41. … even as a claim in indirect discrimination, it (the complainant's claim) cannot succeed because it does not appear that there is, or will be, any evidence to establish that he has the attribute that he claims to have."

Submissions on Appeal

13 Mr Sharp made three principal submissions on behalf of the appellant, namely:

(a) the Tribunal erred in striking out the complaint under s.75 of the *VCAT Act* on the basis that the complainant had not, at that stage, identified evidence which would prove the attribute upon which he relied;

(b) the Tribunal erred in holding that, in the absence of medical evidence establishing the impairment relied upon, the appellant would necessarily fail to establish that impairment at trial;

(c) the Tribunal erred in any event in concluding that there was not, for the purposes of a s.75 application, sufficient medical evidence to demonstrate that the appellant would, at trial, be able to establish the impairment upon which he relied.

14 On the appeal the first respondent was represented by Mrs L. Bird of Counsel, the second respondent by Ms M. Rozner of Counsel, and the third respondent by Mr R. Shepherd of Counsel. They each made separate submissions to me. However, their principal submissions were to similar effect. They submitted:

> (a) The Tribunal was correct in proceeding on the basis that the only evidence which might be called on behalf of the appellant was that which had been produced to the Tribunal on the s.75 application. In particular, the appellant had gone into evidence by filing two affidavits. Accordingly, the Tribunal did not err, as a matter of law, in determining whether, on the material put before it, the appellant would be able to establish the impairment on which he relied.
>
> (b) Further, the Tribunal was correct in concluding that, in the absence of supporting medical evidence, the appellant, on a full hearing, would be incapable of establishing that he suffered from the impairment on which he relied for the purposes of making out a case in indirect discrimination.

15 In addition, Mrs Bird, on behalf of the first respondent, relied on the two affidavits of Ms O'Connor which were before the Tribunal. Mrs Bird submitted that, in any event, the Tribunal acted correctly in striking out the appellant's complaint, since the appellant's case based on indirect discrimination was hopeless, because the appellant would be unable to establish that the first respondent acted unreasonably for the purposes of s.9(1)(c) of the *Equal Opportunity Act*.

The *Victorian Civil and Administrative Tribunal Act* 1998 s.75(1)

16 Section 75(1) of the *VCAT Act* provides:

> "(1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion –
>
> (a) is frivolous, vexatious, misconceived or lacking in substance; or
>
> (b) is otherwise an abuse of process."

Principles applicable to s.75(1)

17 I shall first consider the principles applicable to an application under s.75(1) of the

VCAT Act. In this respect, the decision of the Court of Appeal in *State Electricity Commission of Victoria v Rabel and ors*[1] is of particular significance. It is necessary to examine the judgments of the Court in that case in some detail.

18 In *Rabel*'s case the complainant alleged that his former employer had discriminated against him by dismissing him because of a personality disorder. The complaint was made under the *Equal Opportunity Act* 1984, which was the predecessor of the current *Equal Opportunity Act*. Section 44C(1) of that Act was similar to s.75(1) of the *VCAT Act*. The employer applied to the Board to dismiss the complaint on two grounds. First, it contended that the Board lacked jurisdiction to entertain the complaint. Secondly, the employer contended that the complaint was "frivolous, vexatious, misconceived or lacking in substance" within s.44C(1). The Board held that the complaint lacked jurisdiction. It further held that the complaint was "lacking in substance" and thus might be struck out under s.44C(1). The complainant successfully appealed to the Supreme Court. The primary judge held that the Board erred in holding that it lacked jurisdiction. Further, the primary judge held that the Board erred in refusing to have regard to a medical report in connection with the s.44C application. His Honour remitted the matter to the Board for further consideration of the s.44C application. The employer appealed to the Court of Appeal. That Court allowed the appeal, for the purpose of dismissing the employer's s.44C application absolutely. The Court of Appeal held that the Board had erred in allowing the application under s.44C, and that the trial judge erred in remitting that application to the Board for further consideration.

19 Phillips JA, who delivered the leading judgment, noted that the employer had sought to sustain its application under s.44C by demonstrating that the complaint was not borne out in voluminous material which had been put before the board by the complainant. In particular, it was contended that there was no nexus between the impairment and the discrimination alleged by the complainant. Phillips JA noted that the Board had excluded the medical report which established the

1 [1998] 1 VR 102.

impairment. His Honour then stated:

> "But to my mind the exclusion of that report or those reports is relatively incidental: what matters is that the Board went to the supporting material in order to see the extent to which, if at all, it supported the allegations being made in the complaint. I do not say that that course must always be error; but it was error on this occasion.
>
> It was error because there was no basis whatsoever for the apparent assumption that the complainant was in some way confined to 'the complaint documentation' (as the Board described it) to sustain his allegations of discrimination. Perhaps, if a complainant did concede, at some preliminary and interlocutory stage, that the whole of his material was already before the Board, a respondent might seek by reference thereto to have the complaint struck out under s.44C if that material plainly demonstrated that the complainant was lacking in substance. But that was far from this case. On 27 October 1994 the complainant had raised the possibility of calling further evidence and had, in effect, been denied that opportunity. I do not say that the Board was wrong in denying the opportunity. It seems to me to have been correct because the application under s.44C was not a full scale hearing; it was in the nature of an interlocutory application and fell to be determined accordingly."[2]

20 Phillips JA then considered a number of authorities, including the decision of the Human Rights and Equal Opportunity Commission in *Assal v Department of Health, Housing and Community Services* [3] which concerned statutory provisions such as s.25X of the *Racial Discrimination Act* 1975 (Cth). Those provisions – similar to s.44C of the *Equal Opportunity Act* 1984 and s.75 of the *VCAT Act* – provided for striking out or dismissal of a complaint which was "frivolous, vexatious, misconceived or lacking in substance." They had been construed to justify the summary dismissal of a complaint where the evidence, placed before the board or court (as the case may be), was plainly insufficient to establish a critical element of the complaint. Phillips JA noted that provisions such as s.25X of the *Racial Discrimination Act* conferred a power which could be exercised at any time of an inquiry including during the hearing of it. By contrast, s.44C plainly provided for such an application only to be made at an interlocutory stage, and before the commencement of a full scale hearing.

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2 at p.119.

3 (1992) EOC 92 – 409 (Sir Ronald Wilson).

21 Accordingly, Phillips JA noted that s.44C is closer to the type of application made in civil proceedings in the Supreme Court pursuant to Order 23 of the Rules of the Supreme Court. His Honour concluded:

> "… the question is whether there was any basis upon which the application under s.44C might succeed and in my view there was not. That section is intended to be used, in my opinion, only in a clear case. The Board itself considered that the test of whether a complaint was lacking in substance was this: does it raise issues of real substance fit to go to a full hearing of the Board? That may perhaps be a satisfactory test, but it is not to be determined upon the complainant's material, at all events in a case where the complainant does not concede that that contains the whole of his case. It was the submission of the SEC that the Board could decide its application under s.44C by reference to 'the complaint documentation' and in my view the Board should have rejected that submission."[4]

22 In *Rabel*, Ormiston JA agreed with the judgments of both Phillips JA and Tadgell JA. His Honour expressed views which were similar to those of Phillips JA. First, his Honour rejected the test prescribed by cases such as *Assal* for the purposes of defining the Board's summary powers under s.44C[5]. His Honour noted that that test, and its application, was more analogous to the test applicable on a no case to answer submission at the conclusion of evidence for a complainant (or plaintiff) rather than on a test for the interlocutory striking out of a proceeding. His Honour stated:

> "It may be that other boards, tribunals and commissions will find it useful to conduct some form of preliminary trial based on hearing the evidence, so that they may weed out complaints which should not be allowed to proceed further, but under s.44C (and its successor) it is clear that, making allowances for the difference between procedures before a tribunal and in the courts, a test should be applied which is appropriate to a preliminary application heard 'expeditiously' … on an interlocutory basis, i.e., before 'the commencement of the hearing of the complaint'. If that be so, the material available for a hearing of such an application, which is directed to commence within seven days (and within 14 days under the new Act), must be limited to the complaints and any particulars thereof and such evidence, filed on behalf of the respondent, intended to show why the complaint ought not to proceed, and any answer thereto by the complainant, none of

4 at p.122.
5 at p.107.

> which having regard to the timetable can be expected to canvass the whole of the case but merely deal with specific matters of defence raised by the respondent. In other words the basis for hearing the application is akin to that applicable under Rules 23.01 and 23.03 of Chapter 1 of the Supreme Court Rules. Though evidence may be called it should be confined to that which shows that the complaint is either frivolous or vexatious (similar to that now allowed under Rule 23.01: see Rule 23.04) or that which shows that the complaint is so lacking in substance that it ought to be summarily terminated, together with any necessary answering material from the complainant."[6]

23 Ormiston JA then referred to the tests which are applicable under Rule 23.01 and 23.03 of the Rules of the Supreme Court. He recited the test stated by Dixon J in *Dey v Victorian Railway Commissioners*[7]– that it must be "very clear indeed" and that the action is "absolutely hopeless" – and by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (New South Wales)*[8] – the action must be "so clearly untenable that it cannot possibly succeed." His Honour then concluded:

> "In the absence of a proper hearing at which the complainant has an opportunity to call all relevant evidence there can be no satisfactory way of determining that a complaint should be dismissed at a preliminary stage, unless it can be demonstrated, either from the materials by which the complainant has instituted the claim or by reference to facts which would undoubtedly deny the complainant relief, that the complaint is so hopeless that it should be summarily brought to an end. For this purpose I cannot accept that Parliament intended a lesser test than has been imposed by the courts, nor can I accept that the power to dismiss should be exercised upon the basis that the claim 'presents no more than a remote possibility of merit', if that expression means anything other than that the complainant has no reasonable prospect of success. At a preliminary stage there is simply no argument that some lesser form of substantiality can be relied upon to terminate a complaint. With respect, some form of 'curate's egg' test cannot be considered acceptable, if it is to be applied before a hearing gets underway. The complaint is either wholly bad, that is undoubtedly shown to be hopeless, or it must be allowed to proceed to an ordinary tribunal hearing. Whatever test may be acceptable at other stages of the administrative process or during the conduct of an ordinary tribunal hearing, a complaint cannot be dismissed under s.44C or its successor unless it is clear beyond doubt that the complaint is lacking in substance, that is, that the complainant

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6 at p.108.
7 (1949) 78 CLR 62 at 91.
8 (1964) 112 CLR 125 at 130.

has no arguable case which should be allowed to be resolved with a full hearing."[9]

24 Finally, Tadgell JA expressed his agreement with the reasons for judgment of Phillips JA. Tadgell JA noted the submission by the appellant that it had been open to the Board to infer as a matter of fact that there was no causal nexus between the alleged impairment and the alleged discrimination. His Honour rejected that submission in the following terms:

> "Both the submission and the Board's reasons reveal what I take to be misconceptions. It cannot be the office of the complaint to provide evidence of, or to 'disclose', more than the allegations of fact which the complainants will seek to prove by evidence. Having chosen to exclude evidence upon the hearing of the s.44C application, it was not open to the Board, for the purpose of adjudicating upon it, to draw inferences of fact from the 'complaint documentation' as though that were evidence.
>
> The Board did not conclude that the complaint was frivolous, vexatious or misconceived within the meaning of s.44C. It did conclude that the complaint was 'lacking in substance' because, as I understand, there was an insufficiently solid factual foundation for it. That of course is a justification for dismissing a complaint after hearing the complainant's evidence. It is not, in my opinion, a justification for ordering that a complaint be 'struck out' pursuant to s.44C – at all events without allowing evidence to be called by the complainant with the view to establishing a prima facie case."[10]

25 The following propositions, relevant to this case, emerge from the above consideration of *Rabel*'s case:

1. In order to justify the summary dismissal of a proceeding under s.44C of the *Equal Opportunity Act* 1984 the onus lay on the respondent to the complaint to show that the complaint is undoubtedly hopeless. That onus is similar to the burden imposed by courts when considering applications under Order 23.01 and 23.03 of the Rules of the Supreme Court.

2. The task of the tribunal is quite different to that which it might undertake upon the hearing of a no case submission after evidence has been heard upon the full hearing of a complaint. Of necessity the application under s.44C is of an interlocutory nature which is heard without the taking of full evidence.

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9 At p.110.

10 at p.106.

3. The power under s.44C may not be invoked where all that is shown is that, on the material currently put before the Tribunal, the complainant may fail to adduce evidence substantiating an essential element of the complaint, at least where the complainant has not conceded that the material before the Tribunal constitutes the whole of the evidentiary material which the complainant intends to adduce on the hearing of the complaint.

26 Section 44C of the *Equal Opportunity Act* 1984 was expressed in different terms to s.75 of the *VCAT Act*. In particular, s.44C(1) provided for an application to be made for the striking out of a complaint "between the lodging of the complaint and the commencement of the hearing of the complaint by the Board." Section 44C(2) provided that the Board must begin to hear the application within one week of receiving it, and must determine the application "as expeditiously as possible." By comparison, s.75(1) of the *VCAT Act* provides that "at any time" the Tribunal may make an order summarily dismissing or striking out a proceeding or part of it. Section 75(3) provides that the Tribunal's power is exercisable by the Tribunal as constituted for the proceeding, a presidential member, or a senior member who is a legal practitioner.

27 Notwithstanding those differences in the legislation, nevertheless in the present case the application to the Tribunal under s.75(1) was plainly made at an interlocutory stage of the proceedings. Clause 1 of the respondent's application sought that the complaint be struck out because "the complaint does not disclose a disability that falls within a definition of impairment under s.4(a) of the *Equal Opportunity Act* 1995." The application by the respondents was directed to the complaint itself, and not the evidence to be adduced to establish it. At the stage at which the application was heard, the Tribunal had vacated its previous directions for the delivery of witness statements. Some affidavits were filed for the hearing of the s.75 application, but at no stage did the senior member purport to conduct a full hearing of the complaint. Indeed, the question considered by the senior member was not what evidence was before the Tribunal; rather the question was what evidence would be before the Tribunal upon the full hearing of the complaint.

28 In his reasons for decision (at paragraph 6), the senior member set out the principles which he considered were applicable to the application under s.75. Those principles included: that the application was for the summary termination of the proceedings, and was not the full hearing of the proceedings; and that the application to strike out the complaint was similar to an application to the Supreme Court for summary dismissal of civil proceedings under Rule 23.01 of the Rules of the Supreme Court. That statement of principles correctly identified that the application then before the Tribunal was essentially interlocutory, akin to one brought under Rules 23.01 of the Rules of the Supreme Court. It therefore follows that the principles in *Rabel*'s case were applicable to the determination of the application brought by the respondents, and are applicable to the present appeal.

Application of principles in this case

29 It is important to appreciate that the issue before the Tribunal, and before me, was not whether the appellant could establish an "impairment" under s.4 of the *Equal Opportunity Act*, if he was able to prove that he suffered the hypersensitivity to environmental tobacco smoke of which he complained. Rather, the basis of the Tribunal's decision, and the basis of the submissions made on behalf of the respondents before me, was that, on the material placed before the Tribunal on the hearing of the s.75 application, the appellant would not be able to prove that he suffered from the hypersensitivity to environmental smoke alleged in his complaint documents. In other words, it was not suggested before the Tribunal or before me that, if the appellant proved that he suffered from that hypersensitivity, that condition would not constitute an "impairment" under s.4.

30 The nature of the issue before the Tribunal – and thus before me – is apparent from the conclusion of the senior member's reasons, where it is stated that there was "no indication that there is any medical evidence available to be called to establish that the complainant has a medical condition" which would amount to an impairment[11]. The Tribunal stated[12] that it could not infer, from the complainant's description of

11 at para 36; emphasis added.
12 at para 37; emphasis added.

the symptoms from which he suffered, that he suffered from any underlying condition, and that "without medical evidence to this effect his case must fail." Finally the Tribunal concluded[13]: "However even as a claim in indirect discrimination, it cannot succeed because it does not appear that there is, or will be, any evidence to establish that he has the attribute that he claims to have."

31 Accordingly, the Tribunal held that the complaint should be dismissed under s.75(1) because, on the evidentiary material then before it, the appellant would not be able to prove an essential element of his complaint. I consider that in reaching that conclusion the Tribunal did not correctly apply the principles identified in *Rabel*. The approach adopted by the Tribunal was tantamount to an approach which might be adopted on the hearing of a no case submission by a respondent at the conclusion of a case, at full hearing. The Tribunal examined, in detail, the evidence then put before it by the appellant, as if that was the sum total of the evidence which had been called before the Tribunal on a full hearing of the complaint. In doing so the Tribunal adopted an approach akin to that which was prescribed in *Assal*, but which was rejected by the Court of Appeal as being inappropriate to an application at an interlocutory stage of the proceeding.

32 The error in the reasoning of the Tribunal lay, not in its statement of the legal principles relevant to the application before it, but in its application of those principles. At paragraph 6 of his reasons, the senior member set out the principles which he considered were applicable. In particular, he correctly identified that the approach he should adopt is similar to that of a court in a "strike out" application under O23.01 and O23.03 of the Rules of the Supreme Court. However, the senior member then proceeded to do that which is not permissible on such an application, namely, to examine the evidence which the complainant then had to determine whether that evidence could prove his case. Thus, at paragraph 8 of his reasons, the senior member stated:

> "…I must consider the complainant's claim and assume that he will lead the

13 at para 41; emphasis added.

evidence in support of it that he says he has. I shall then consider whether, if that evidence were accepted, the complaint could be determined in his favour."

33 It was at this point that I consider the senior member fell into error. As the decision in *Rabel's* case shows, it is not for the Tribunal, at least at an interlocutory stage of proceedings, to conduct a pre-trial assessment of the complainant's evidence to determine whether the complainant can prove his case. Such an approach is incorrect and inappropriate, at least unless the complainant clearly concedes that the material he has placed before the Tribunal contains the whole of the complainant's case.

34 The respondents contended that the approach by the senior member was appropriate, because the appellant had gone into evidence by tendering two substantial affidavits to the Tribunal in opposition to the application under s.75 of the *VCAT Act*. Accordingly they submitted that the appellant having embarked on that evidence, the application was heard on the basis that that evidence constituted the material which would be before the Tribunal upon the full hearing of the complaint. If the appellant desired to put before the Tribunal any evidence he might be able to rely upon to establish his complaint, it behoved him to do so at that stage.

35 Certainly the appellant did go into extensive evidence on the hearing of a s.75 application. It is not altogether clear why he did. Some of his affidavit material responded to other matters, such as an allegation by the first respondent that he made no complaint of being confined in vehicles in which other prisoners smoked during transportation from one location to another. However, and be that as it may, I do not consider that the appellant, by filing those affidavits, thereby altered the test which was applicable to the respondents' application. At no time did the appellant concede that his affidavit material constituted all the evidence upon which he intended to rely on the full hearing of his complaint. Indeed, the transcript of the oral argument before the senior member indicates to the contrary. The senior member asked Mr Sharp what evidence would be called to establish the hypersensitivity. Mr Sharp responded that he anticipated that he would be able to

call medical evidence along the lines that the symptoms, which the appellant described as suffering from, placed him within the definition of impairment under the Act. Mr Sharp stated " … We believe, sir, that we will be able to produce medical evidence to link the symptoms to the impairment. We believe that we will be able and we submit that this is plausible and reasonable. We submit that properly we will be able to provide a history, a medical history, through a medical practitioner who will be able to give evidence as to whether or not this amounts to an allergy … ".

36 The appellant did not, at that time, have the medical evidence to which Mr Sharp referred. However, what is significant in the above passage is that Mr Sharp was not conceding, on behalf of the appellant, that the only evidence which would be called at trial was that contained in the material then before the Tribunal. Indeed, he indicated that the appellant might call further evidence. The respondents have not pointed to any concession made on behalf of the appellant that the only material which would be adduced on the full hearing to establish the impairment would be that contained in the affidavit material then placed before the Tribunal.

37 The approach of the Tribunal, in assessing for itself the evidence which might be adduced to them on the full hearing, gave rise to a second and allied error. Mr Sharp contended that, at the interlocutory stage, it was not possible to conclude, on the material then available, that the appellant at trial would not be able to establish that he suffered from the hypersensitivity of which he complained, even if he were restricted to the evidence referred to in the affidavits and the exhibits then before the Tribunal. I consider that that submission is correct. The appellant's affidavit, in at least two respects, indicated that he may be able to call medical evidence – at least on subpoena – to establish that he suffered from hypersensitivity of the type of which he alleges in his complaint.

38 First, on 6 July 2002 he saw Dr Morgan at the Melbourne Assessment Prison. Dr Morgan made a note on his medical file:

"Non-smoker – continually being housed with smokers – not in 1-out

- needs non-smoking cell in future."

On an interlocutory application under s.75 the Tribunal was obliged to view that evidence in the light most favourable to the complainant. As such, the notation by Dr Morgan may have referred to a medical diagnosis made by him, namely, that the complainant had a medical need to be placed in a non-smoking cell in the future.

39 Secondly, on 26 August 2002 the appellant saw Dr Yousef Ahmad at Fulham Correctional Centre. Three days previously he had undergone a chest x-ray which was normal. In his affidavit the appellant stated "Dr Ahmad said that the ailment I have got would not show up on an x-ray." Thus, conceivably, the appellant might subpoena Dr Ahmad. If the appellant was correct (and for the purposes of a strike out application his affidavit is assumed to be correct), Dr Ahmad might give evidence that the appellant suffered from an ailment.

40 There was debate before me whether the appellant could establish the hypersensitivity as an impairment without calling medical evidence. It is important to bear in mind that the question before the senior member was not whether the appellant would be likely to establish such an impairment. Without medical evidence, ordinarily a claim of the type made by the appellant would be quite weak. However, on the material before it, I do not consider that the Tribunal could conclude that it would be impossible for the appellant to establish the existence of his condition without calling medical evidence. It might be most unlikely that he would. Nevertheless, it is possible to envisage some, albeit unusual, cases in which it might be possible to establish a reaction to exposure to a particular set of circumstances (as an "impairment") without calling medical evidence. Whether such a method of proof would be possible, or would be accepted, would depend on the facts. Those facts would have to be elicited by evidence at a full hearing. The Tribunal could only conclude that the appellant could not establish, as a matter of proof, his impairment, after the appellant had had the opportunity to adduce his proofs at such a hearing. Only then could the Tribunal decide whether, on the facts of the case, the evidence adduced by the applicant could (and did) establish the

impairment on which he relied.

41 In this context Ms Rozner for the second respondent, and Mr Shepherd for the third respondent, each contended that the hypersensitivity, on which the appellant relied, could only be established by medical evidence. They submitted that the evidence of the appellant was opinion evidence by way of "self-diagnosis". I do not accept that submission. The evidence which has been foreshadowed to be given by the appellant was not opinion evidence. Rather, it seems that the appellant would seek to establish that when he was exposed to environmental tobacco smoke, he suffered from a combination of acute symptoms. No doubt he would seek to contrast those symptoms with the response of other persons to the same exposure. If his evidence stopped at that point, it would not contain any expression of opinion by the appellant. As I have stated, it is possible to conceive that, in some unusual cases, a tribunal of fact might accept that that evidence is sufficient to establish a relevant impairment. Of course whether a tribunal, in this case or in any case, accepted that evidence as establishing the impairment, would necessarily be a matter for determination on a full hearing of the complaint. However, for the purposes of a s.75(1) application at an interlocutory stage, such as in the present case, I do not consider that it would be correct to conclude that, if the appellant was confined to that evidence alone, without any expression of opinion, such evidence must necessarily fail to establish the impairment on which the appellant relies.

42 Ms Rozner also submitted that the appellant could not now obtain medical evidence as to the condition from which he suffered when he was incarcerated in the Melbourne Assessment Prison. As I understood it, she submitted that the only relevant admissible medical evidence would be evidence from a medical practitioner who examined the appellant while he was at the Melbourne Assessment Prison. I consider that that submission is misconceived. It is admissible for a medical practitioner to express, ex post facto, an opinion as to a condition from which a person suffered, based purely on that person's description of his or her symptoms at the time at which the condition is alleged. Such evidence is admissible at common

law and would, accordingly, be admissible before the Tribunal (I note in this respect that the Tribunal is not, in any event, bound by the Rules of Evidence, see s.98(1)(b) of the *VCAT Act*).

43 Thus, even if the appellant had been confined to the materials adduced by him on affidavit before the Tribunal, I consider that the Tribunal erred in concluding that the appellant, on a full hearing of his complaint, was shown to be incapable of establishing that he suffered from the hypersensitivity on which he relied as constituting the impairment under s.4 of the *Equal Opportunity Act*.

44 Finally, it is necessary to deal briefly with the further submission made by Mrs Bird on behalf of the first respondent. That submission was that, based on the affidavits of Ms O'Connor, the appellant would not be able to establish, on a full hearing, that the requirement, that he travel in a vehicle accompanied by smokers, was not reasonable pursuant to s.9(1)(c) of the *Equal Opportunity Act*. I reject that submission. The question whether the appellant will be able to establish that element of his claim for indirect discrimination depends essentially on the evidence which will be adduced at trial, including matters elicited on behalf of the complainant in cross-examination of witnesses called on behalf of the respondents. It would not be possible, at an interlocutory stage, to conclude that the appellant's case, on that point, is so utterly hopeless to justify the summary striking out of the complaint against the first respondent.

Conclusion

45 For the reasons which I have set out above, I conclude that the Tribunal erred in summarily striking out the consolidated complaint pursuant to s.75 of the *VCAT Act*. Subject to hearing from counsel as to the precise formulation of the relief, I propose the following orders:

1. That the appeal from the order of the Victorian Civil and Administrative Tribunal dated 11 March 2004 be allowed.

2. That the order of the Tribunal dated 11 March 2004 be set aside.

3. That the matter be remitted to the Tribunal for the hearing of the complaint made by the appellant against the respondents.

46 I shall hear counsel in relation to the formulation of those orders and in relation to costs.
