

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Z.U.B.S. v. Australia

Communication No 6/1995

26 August 1999

CERD/C/55/D/6/1995

VIEWS

Submitted by: Z.U.B.S.

Alleged victim: The author

State party concerned: Australia

Date of communication: 17 January 1995 (initial submission)

The Committee on the Elimination of Racial Discrimination established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 26 August 1999,

Having concluded its consideration of communication No. 6/1995, submitted to the Committee under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it by the author and the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

Opinion

1. The author of the communication is Mr. Z.U.B.S., an Australian citizen of Pakistani origin born in 1955, currently residing in Eastwood, New South Wales, Australia. He claims to be a victim of

violations by Australia of several provisions of the International Convention on the Elimination of All Forms of Racial Discrimination.

The facts as submitted by the author

2.1 In February 1993 the author, who had by then been residing for approximately two years in Australia, was hired as an engineering officer by the New South Wales Fire Brigade (NSWFB), which is part of the Public Service. Before being hired, he had applied for two higher-level positions which he claims were commensurate with his qualifications, experience and skills. He was, however, interviewed and hired for a lower-level position for which he had not applied and for which he contends that he was not provided with a job description. He says he was adversely treated in appointment because he lacked (so-called) local knowledge, a requirement that was not mentioned in the position description or the list of desirable criteria and had no relevance to the job performance. He claims that local experience was a requirement created by the selection committee after receiving his personal details, which reflected his past professional experience of 13 years in Pakistan and Saudi Arabia.

2.2 According to the author, his position was identical to that of two other engineering officers. One of them was Australian born Anglo-origin and the other was a Buddhist Malaysian-Chinese. The three were hired almost at the same time. He claims that the difference in treatment between himself (an experienced professional engineer) and the other two officers (sub-technicians) was racially motivated. Such differentiation allegedly included that the author's qualifications exceeded those of his colleagues, that his salary was inferior to that of one of the officers and that he was placed on six months probation, unlike one of the officers. In each case, he was treated the same as the other colleague, although he argues that he was not informed of the probationary requirement.

2.3 The author contends that he was given a heavier workload compared to his colleagues, that his participation in business trips was limited, and that his access to workplace information was curtailed. He alleges harassment and unfair treatment in the performance of his duties; he notes, for example, that one day he was ridiculed for refusing to drink beer with colleagues towards the end of one day's duties, although he had pointed out that his origin and religion did not allow him to drink alcoholic beverages. He says that he was continuously reminded of his background (professional and social) from Pakistan and Saudi Arabia through racially motivated comments.

2.4 After he had filed two complains with the relevant department under the Fire Brigade's grievance policy, the management prepared a report on his "poor performance". On 30 July 1993, he lodged a complaint of racial discrimination in employment with the New South Wales Anti-Discrimination Board (ADB), indicating that the matter was "urgent". On 6 August 1993 his employment was terminated, allegedly without written notice. The author informed the ADB of this development by fax of 9 August 1993. After his dismissal the three positions were upgraded and the other two officers were re-employed in two of the three vacant positions without competition.

2.5 The author alleges that the handling of his claim by the ADB was biased and discriminatory, and that the bias was racially motivated. He bases this assessment on the delay in the handling of his case which, in his opinion, led to his being dismissed. He contends that in a telephone conversation with a senior conciliation officer of the ADB on 12 August 1993, the ADB had taken part of his former

employer, as ADB agreed with the employer's suggestion that he should appeal to the Government and Related Employees Appeal Tribunal (GREAT). GREAT examines cases of wrongful dismissal, whereas ADB processes cases of racial discrimination. The author was therefore reluctant to file his grievances with GREAT, and took ADB's suggestion to mean that ADB did not believe that it was faced with a case of racial discrimination.

2.6 The author consulted with the NSW Legal Aid Commission (LAC) with a view to obtaining legal aid for proceedings before GREAT. However, in accordance with the Legal Aid Commission Act, legal aid is not provided in respect of matters before the GREAT. On 30 August 1993, the author addressed a letter to the ADB, confirming his decision not to proceed with an appeal before GREAT and asking ADB to give priority to his complaint.

2.7 The author also contacted the New South Wales Council for civil Liberties (NSWCCL) which informed him, on 1 July 1994, that his complaint had been forwarded to the Council's Complaints Sub-Committee for further consideration. After that, the NSWCCL never contacted him again.

2.8 On 19 December 1994, ADB informed the author that its investigation had been completed, and that the complaint had been found without merit. No reasons for this evaluation were provided. At the same time he was informed of his right to appeal the decision within 21 days to the Equal Opportunity Tribunal (EOT). However, the procedure before the EOT is long and expensive, and the author could not pay the costs for representation since he remained unemployed after his dismissal. He claims that the LAC again refused to provide him with legal assistance on the basis of biased criteria. He further complains about the manner in which the EOT and the NSW Ombudsman handled his case subsequently.

2.9 Finally, the author claims that the conduct and practices of the State party's organs, including the EOT, had a discriminatory effect on his professional career and that he has not been able to find a suitable employment since his dismissal in 1993.

The complaint

3. It is submitted by the author that the facts stated above amount to violations of the following provisions of the Convention:

- Articles 3, 5 (c), 5 (e) (i) and 6 by the NSWFB, in that he was discriminated on racial grounds in the terms of his appointment, in his employment conditions and in the termination of his employment. He also alleged race-based harassment and offensive behaviour on the part of colleagues.

- Articles 5 (a) and 6 by the ADB, the EOT, the Ombudsman and the LAC. He contends that the ADB did not handle his urgent complaint impartially, that it victimized and disadvantaged him and that by delaying the case for 22 months it protected the personnel of the NSWFB. He also complains about the way in which EOT evaluated the facts and the evidence presented during the hearings held from 11 to 15 September 1995 as well as the conduct of the Ombudsman who, without contacting him, accepted the ADB's version of the dispute. He was particularly disappointed in view of the fact that the NSW Ombudsman in office served as Race Discrimination Commissioner in the Federal

Human Rights and Equal

- Opportunities Commission for several years and was fully aware of racism in Australia, including the ADB's general attitude in handling complaints of race discrimination.

- Article 2, in connection with the above-mentioned provisions.

State party's observations on admissibility and author's comments thereon

4.1 In a submission dated March 1996, the State party noted that when the author initially submitted his case to the Committee, it was clearly inadmissible for non-exhaustion of domestic remedies, as the author had then instituted proceedings before the EOT. On 30 October 1995, however, the EOT handed down a judgement in the author's favour by which it awarded him \$A 40,000 of damages and ordered his former employer to address a written apology (within 14 days) to him. While the EOT dismissed the author's claims of racial discrimination, it did find that the author's dismissal as a result of his complaint amounted to victimization. Victimization of an individual who has initiated a complaint of racial discriminations is unlawful under section 50 of the New South Wales Anti-Discrimination Act of 1977.

4.2 The State party considered that with the judgement of the EOT, the author's case should be considered closed. It added that the author could have appealed the judgement on a point of law, but that no notification of appeal had been received.

4.3 In June 1997, the State party transmitted further admissibility observations to the Committee. It argued that the claim under article 2 of the Convention should be considered inadmissible as incompatible with the provisions of the Convention, pursuant to rule 91 (c) of the rules of procedure. It pointed out that the Committee had no jurisdiction to review the laws of Australia in abstracto, and that, in addition, no specific allegations had been made by the author in relation to article 2. If the Committee were to consider itself competent to review the allegation, then it should be rejected as inadmissible *ratione materiae*. It argued that the author's rights under article 2 were accessory in nature, and that if no violation under articles 3, 5 or 6 of the Convention was established in relation to the conduct of the NSWFB, the ADB, the EOT, the Ombudsman's Office or the LAC, then no violation of article 2 could be established either. Subsidiarily, the State party contended that if the Committee were to hold that article 2 was not accessory in nature, it remained the case that the author did not provide *prima facie* evidence that the above bodies engage in acts or practices of racial discrimination against him.

4.4 The State party also rejected the author's claims of a violation of article 3 of the Convention in that he "was segregated ... from English speaking background personnel during a trip to Melbourne and in an external training course". That was deemed inadmissible as incompatible *ratione materiae* with the Convention. For the State party, the author had failed to raise an issue in relation to article 3. Subsidiarily, it was argued that the claim under article 3 had been insufficiently substantiated for the purposes of admissibility: there was no system of racial segregation or apartheid in Australia.

4.5 The State party submitted that the claim of a violation of article 5 (c) and (e) (i) of the Convention by the NSWFB, the EOT, the ADB, the Ombudsman and the LAC was inadmissible

ratione materiae. In relation to the allegations against the conduct of the case by the EOT and the LAC it further argued that the author had failed to exhaust available and effective domestic remedies.

4.6 As to the author's claim that the NSWFB violated his rights under subparagraph 5 (c), to inter alia have equal access to public service and subparagraph 5 (e) (i), to work, to free choice of employment, to just and favourable conditions of work and just remuneration, the State party argued that:

These allegations were reviewed by Australian tribunals in good faith and in accordance with established procedures. It would be incompatible with the role of the Committee to act as a further court of appeal in these circumstances.

Subsidiarily, the State party submitted that alleged racial discrimination in employment had been insufficiently substantiated, for purposes of admissibility, as the author had not provided prima facie evidence which might give rise to a finding of racial discrimination.

4.7 As to the claim that the author's right to equal treatment before the ADB, the EOT, the Ombudsman and the LAC were violated, the State party argued that:

These allegations (with the exception of the one against the LAC) were incompatible with the provisions of the Convention, on the ground that the Committee was not mandated to review the determination of facts and law of domestic tribunals, in particular in cases in which the complainant failed to exhaust available and effective domestic remedies.

The claims related to the unfair and unequal treatment of the author by EOT and LAC were inadmissible, as the author failed to exhaust available domestic remedies. They could have been reviewed, respectively, by the New South Wales Supreme Court and the Legal Aid Review Committee. Neither avenue was pursued by the author.

4.8 With respect to the author's contention that the NSWFB, the ADB, the EOT, the Ombudsman and the LAC violated his rights under article 6 of the Convention, the State party submitted that:

This allegation was inadmissible *ratione materiae*, as the alleged violations of the author's rights by the NSWFB and the ADB were properly reviewed by the domestic courts, "in a reasonable manner and in accordance with the law". The State party emphasizes that it was incompatible with the role of the Committee under the Convention to act as a further court of appeal in these circumstances. Australia had a domestic system which provided effective protection and remedies against any acts of racial discrimination. The mere fact that the author's allegations were dismissed did not mean that they were ineffective.

Subsidiarily, the State party argued that the rights under article 6 of the Convention were similar to those enshrined in article 2 of the International Covenant on Civil and Political Rights. These are general rights which are accessory in nature and linked to the specific rights enshrined in the Convention. As no independent violation of articles 2, 3 and 5 of the Convention had been made out by the author, no violation of article 6 could be established.

Still subsidiarily, the State party submitted that the allegations under article 6 had been insufficiently substantiated, for purposes of admissibility, as the author did not submit any prima facie evidence that he did not have the opportunity to seek effective protection and remedies against alleged acts of racial discrimination in his employment, in a manner similar to every individual in New South Wales.

5. In comments the author reiterated his allegations, claiming inter alia that:

"six Anglo-Celtic officials" of the NSWFB "maliciously employed" him, treated him unfairly during his employment and victimized him when he complained about their attitude;

he had exhausted all available domestic remedies under Australian anti-discrimination legislation, "although the remedies were unfair, extensively exhaustive and prolonged";

he did not file an appeal against the decision of the LAC because the LAC's advice to appeal for a review of its decision "was not in good faith and was misleading";

as for the proceedings before the EOT, the case was conducted "in a biased environment". A NSWFB barrister "tampered with subpoena documents" and removed files from the record. Moreover, EOT "planted" a document in his personnel file "in order to dismiss the case of racial discrimination against the members of the dominant race".

The Committee's admissibility decision

6.1 At its fifty-first session, in August 1997, the Committee examined the admissibility of the communication. The Committee noted that the author had alleged violations of articles 2 and 6 of the Convention by all the instances seized of his grievances, and of article 3 by the New South Wales Fire Brigade. The Committee did not agree with the State party's assessment that the author had failed to substantiate these allegations for purposes of admissibility and considered that only the examination on the merits would enable it to consider the substance of the author's claim.

6.2 The Committee noted that the author's claims under article 5 (c) and (e) (i) against his former employers, the New South Wales Fire Brigade, which were reviewed by the Equal Opportunities Tribunal, dismissed the author's claims as far as they were related to racial discrimination. The Committee did not agree with the State party's argument that to admit the author's claim would amount to a review, on appeal, of all the facts and the evidence in his case. At the admissibility stage, the Committee was satisfied that the author's claims were compatible with the rights protected by the Convention, under rule 91 (c) of the rules of procedure.

6.3 The author had alleged a violation of article 5 (a) of the Convention by those administrative and judicial organs seized of his case. The Committee did not share the State party's argument that this claim was incompatible with the provisions of the Convention, since to declare it admissible would amount to a review of the determination of facts and law by Australian tribunals. Only an examination on the merits would allow the Committee to determine whether the author was treated by these organs in any way different from any other individual subject to their jurisdiction. The same

consideration as in paragraph 6.2 above in fine applied.

6.4 Finally, the State party had claimed that the author could have appealed the judgement of the EOT of 30 October 1995 to the Supreme Court of New South Wales, and could have availed himself of the opportunity to have the decisions of the LAC to deny him legal aid by the Legal Aid Review Committee. The Committee considers that even if this possibility still remained open to the author, it would be necessary to take into account the length of the appeal process; as the consideration of the author's grievances took in excess of two years before the ADB and the EOT, the circumstances of the present case justified the conclusion that the application of domestic remedies would be unreasonably prolonged, within the meaning of article 14, paragraph 7 (a), of the Convention.

6.5 Accordingly, on 19 August 1997 the Committee declared the communication admissible.

State party's observations on the merits

A. Observations concerning author's claims under article 2 of the Convention

7.1 In a submission dated 3 August 1998 the State party argues, with respect to the author's claims under article 2 of the Convention, that article 2 deals with the general observations of State parties to condemn racial discrimination and to pursue policies of eliminating all forms of racial discrimination and promoting interracial understanding. Any rights which may arise under article 2 of the Convention are also general rights which are accessory in nature and linked to the specific rights enshrined in the Convention. Accordingly, a violation of article 2 may only be found once a violation of another right has been established. Since no other violation of the Convention has been established, as submitted below, the author's allegations with respect to article 2 are without merit. Furthermore, the allegation that the State party has violated the rights of the author under article 2 of the Convention is incompatible with the role of the Committee on the ground that the Committee has no jurisdiction to review the laws of Australia in the abstract.

7.2 If the Committee is of the view that the rights under article 2 of the Convention are not accessory in nature, then the State party submits, in the alternative, that the allegations lack merit. The laws and policies of the Australian Government are designed to eliminate direct and indirect racial discrimination and to actively promote racial equality. Anti-discrimination legislation, policies and programmes exist at both the federal and the State and Territory level to ensure that all individuals are treated on the basis of racial equality and to ensure an effective means of redress if racial discrimination occurs. The laws, practices and policies in relation to the NSWFB, the ADB, the EOT, the Ombudsman and the LAC fully conform with Australia's obligations under the Convention. The author has provided no evidence that the NSWFB, the ADB, the EOT, the Ombudsman and the LAC engaged in acts or practices of racial discrimination against him.

B. Observations concerning alleged violations of the Convention by the New South Wales Fire Brigade

7.3 The author's allegations that his rights under the Convention were violated by the NSWFB concern three different issues: his appointment, conditions during his employment and the termination of his employment.

7.4 The author alleges that he was discriminated against by not being appointed to the position of Facilities Management Officer or Service Manager, for which he had applied, because his overseas qualifications and experience were not taken into consideration. The State party describes the process leading to the fulfilment of those posts and states that the author's academic qualifications were not at any stage disregarded nor devalued; however, he lacked the experience required, in particular local experience. He was granted an interview for the position of Service Manager, during which he did not demonstrate that he had sufficient relevant experience or sufficient knowledge and understanding of the duties and requirements of the position.

7.5 The unsuccessful applications were destroyed in December 1993, in accordance with the NSWFB policy to retain applications for 12 months only. The author first raised a complaint over the selection process when he made his complaints to the EOT in 1995. Prior to this, his complaints had been restricted to work-related issues.

7.6 The author did not apply initially for the three vacant positions of Engineering Officer. However, the selection committee contained some common membership with the selection committee for the service manager communications position. Recognizing that the author met all the requirements for one of the three positions, he was invited to submit a late application. He submitted an application on 21 December 1992 and on 28 January 1993 he was recommended for appointment on probation.

7.7 Regarding the claim that one of the other two engineering officers was getting more salary than the author the State party indicates that the reason was that the said officer had already been in the Public Service for some time.

7.8 As to probation, the usual practice is to appoint persons on probation when first joining the public service. The author had not been advised that his appointment was on probation due to a "systemic error"; the restructure of the NSWFB and subsequent recruitment action had created heavy demands on the personnel area. A number of letters of appointment were sent out around the same time as that of the author's which neglected to mention appointment on probation.

7.9 The EOT judgement, a copy of which was provided by the State party, indicates, in particular: "There is no doubt that Mr. S. was treated differently to his colleagues in relation to his appointment to the position of Engineering Officer, both with respect to his salary and other terms of his employment. The issue is whether this amounts to discrimination on the ground of race. We are of the view, after a careful consideration of all the evidence, that the reason that Mr. S. was treated differently was that Mr. S. did not have sufficient local experience. In our view this does not amount to discrimination on the ground of race. The failure of the Respondent to inform Mr. S. that he was only appointed for a probationary period was unfortunate. Without doubt Mr. S. had ground for complaint in relation to his appointment. His contract was breached at the outset. That is not a matter for us to redress. He was probably exploited. But he was not discriminated against unlawfully. Whilst he has been treated adversely, it was not on the ground concerning his race or a characteristic of his race or a characteristic imputed to his race."

7.10 The EOT found that, while the author's supervisor had a "robust approach" to the work to be done by those within his section, he did not treat the author differently to anyone else in the section, nor was the author treated differently from his colleagues to any marked degree with reference to

the tasks assigned to him.

7.11 The author had access to workplace information in the same manner as other officers. All files were available to him and he was provided with all information relevant to the projects for which he was responsible. In relation to business trips he was treated in the same manner as the other engineering officers. The author was not segregated from his colleagues on a trip to Melbourne. He did not participate in that trip because his presence was not required. As for his exclusion from the external training course on Fleet Mobile Communication in June 1993, it was due to financial constraints and his lack of seniority. As to training opportunities, the allegation appears to relate to a course for MS Projects/Windows that the other engineering officers attended while the author did not. However, the author attended an Excel computer training course. Further, the EOT found that the NSWFB was justified in excluding the author from both the business trip to Melbourne and the Fleet Mobile Communication course, due to his lack of seniority and the need to avoid unnecessary expenditure of public funds.

7.12 When the author complained that his workload was too high, this was reviewed but not considered to be the case by his supervisors. He was granted an extension to complete a project on at least one occasion in response to his request. The EOT found it correct that at one stage the author had five projects assigned to him while his colleagues had two each. However, an analysis of the tasks assigned to the latter showed that they were of substantially greater complexity and scope than those assigned to the author. Moreover, the EOT did not accept the author's case that he was required to attend to duties of contract administration that were of higher accountability than those of his colleagues. Material tendered by the NSWFB indicated that at various times throughout their employment all three were required to attend to duties of contract administration and consideration of vendor submissions.

7.13 Several comments alleged to have been made by the author's colleagues were carefully evaluated by the EOT, which concluded that they were isolated remarks made on purely social occasions and did not reflect any vilification or a basis for finding of racial discrimination.

7.14 Regarding the termination of the author's employment the State party submits that it was primarily due to the fact that he refused to do certain work, was unable to maintain good work relationships and created disruptive tension in the workplace by accusations against staff members. Furthermore, all three engineering officer positions were re-described and re-advertised in December 1993. The process commenced in May 1993, i.e. before the author made his complaints of 13 and 19 July 1993. His two colleagues were appointed to two of the re-described positions. The author did not apply.

7.15 The author alleges that he lodged two complaints of discrimination which were not investigated by the NSWFB according to their grievance policy. Although it is clear that the complaints were not investigated strictly according to the NSWFB grievance policy, this does not, of itself, indicate that the author was victimized. However, it appears to have contributed to the finding by the EOT that the author had been victimized. It was the author's continued insistence that he would not carry out certain duties unless he was paid engineers' rates which was the primary factor which led to the Director General's decision to annul his probationary appointment. Another factor was that, although his annulment depleted the resources of the communications unit at a time of great activity and

change, the Director General was aware that the author's continued presence was creating disharmony and adversely affecting the work performance of all involved. All officers in the Unit had become increasingly concerned that their every action and conversation was being scrutinized by him and recorded in a manner not consistent with workplace harmony.

7.16 The EOT considered that the author's complaints of racial discrimination significantly hardened his superior's views of him and were "a substantial and operative factor" upon the NSWFB adopting the view that he should be dismissed rather than seeking to resolve the issue by resorting to a grievance procedure. It also considered that although the NSWFB had stated, in a letter to the President of the ADB, that the author was dismissed because he refused to do certain work, the NSWFB had "subjected" the author "to a detriment, namely to termination of his employment without notice" because of his disciplinary allegations: this, in the tribunal's opinion, was contrary to Section 50 of the Anti-Discrimination Act 1977.

7.17 The State party concludes that the author has not provided any evidence that could justify his claims that the NSWFB violated articles 5 (c) and 5 (e) (i) in his appointment, during the course of his employment and the termination of his employment. As noted above and consistent with the evidence before the EOT, the selection committee concerned with the author's appointment to the NSWFB placed an emphasis on relevant local experience. This was on the basis that the engineering conditions and practices in Australia in relation to which the author was employed are significantly different to those conditions and practices in which the author had previously operated. For this reason the author's starting salary was \$A 2,578.00 less than that of his colleagues. The EOT also found that there was no racial discrimination in relation to any aspect of the author's employment.

7.18 In the NSWFB and throughout every jurisdiction in Australia there are no restrictions to access to public service on the basis of race, colour, descent or national or ethnic origin. The New South Wales Government - like all jurisdictions throughout Australia - has a policy of Equal Employment Opportunity which actively encourages the recruitment of, inter alia, people from other than English-speaking backgrounds into the public service.

7.19 The State party submits that the communication does not raise an issue under article 3 of the Convention in relation to any aspect of his employment with the NSWFB, since there is no system of racial segregation or apartheid in Australia. It also submits, in relation to the author's allegations that the NSWFB failed to investigate his complaints according to the official grievance policy, that the author has not provided any evidence that the investigation of his grievance by his superiors at the NSWFB was an ineffective way to provide him with protection and remedies.

7.20 The State party reiterates that it is not the function of the Committee to review the findings of the EOT. That submission is based on jurisprudence of the Human Rights Committee in deciding cases under the Optional Protocol to the International Covenant on Civil and Political Rights. It is also analogous to the well established "fourth instance (quatrième instance)" doctrine of the European Court of Human Rights, that an application that merely claims that a national court has made an error of fact or law will be declared inadmissible *ratione materiae*. The evidence provided in the transcript of the hearing before the EOT and the EOT's judgement shows that the author's allegations were carefully considered within the meaning of racial discrimination under the Anti-Discrimination Act, which in turn reflects the terms of the Convention, and were found to be

unsubstantiated.

**C. Observations concerning alleged violations of the Convention by the
Anti-Discrimination Board, the Equal Opportunity Tribunal,
the Ombudsman and the Legal Aid Commission**

7.21 Regarding the author's complaint vis-à-vis ADB the State party submits that the author has failed to provide any evidence to demonstrate a casual connection between the ADB's acts and the alleged discrimination he suffered at work. When he lodged a complaint with ADB on 30 July 1993 he was already aware that he was about to lose his job. Accordingly, it could not have been "as a result" of the ADB's behaviour that the author allegedly suffered discrimination, hostile behaviour and lost his job. As for the complaint that ADB did not apply for an interim order to preserve his rights the State party contends that the power in section 112 (1) (a) to preserve the status quo between the parties does not extend to preserving a complainant's employment.

7.22 As to the allegation that the ADB did not act promptly, it is submitted that an ADB officer spoke with NSWFB on 10 August 1993 and asked if the NSWFB would delay the decision to dismiss the author until the ADB had investigated his complaint. The ADB had no power under the Anti-Discrimination Act to compel the NSWFB to reinstate the author. After the author advised the ADB that he was not proceeding with an appeal to GREAT because he did not want reinstatement, the matter was no longer considered by the ADB to be urgent, in accordance with the ADB's usual policy. Furthermore, there is no evidence that the ADB did not act impartially in considering the author's complaints. Indeed, it is clear from correspondence from the ADB and the Ombudsman that the conciliation officer complied with the ADB's usual procedures.

7.23 The author twice complained about the conduct of the ADB in investigating his complaint to the New South Wales Ombudsman. Each of the author's complaints was declined. The Ombudsman informed the author that he was declining to investigate the author's urgent complaint about the alleged delay of the ADB because he considered that the ADB had adhered to its usual procedure for dealing with urgent complaints. The State party submits that the author's claim against the ADB is manifestly ill-founded and lacking in merit.

7.24 As for the author's allegations concerning the EOT's handling of the hearing, the State party submits that it would appear from the transcript that, as is often the case with proceedings involving unrepresented persons and all the more so where the particular tribunal's raison d'être is the elimination of discrimination, the EOT went to great lengths to be fair to the author. The author obtained a fair and relatively long hearing (the proceedings took five days). In particular, the transcript indicates that the EOT:

was very polite at all times to the author and assisted him with questions;

granted the author leave to be assisted by a friend;

invited him "not to hurry, there was plenty of time";

protected him when giving evidence and allowed a witness to be recalled at the author's

request;

allowed the author to cross-examine one of the NSWFB's witnesses for almost a whole day;

on many occasions tried to assist the author to explain why events and actions were or were not based on race.

7.25 The author has failed to provide any evidence that the proceedings were unfair, or motivated or tainted in any way by racial discrimination, or that the EOT judgement was unjust. Accordingly, the proceedings before the EOT were neither in violation of article 5 (a) nor ineffective within the meaning of article 6.

7.26 Regarding the author's claim with respect to the Ombudsman, the State party explains that the author made two complaints in writing to the Ombudsman about the handling of his case by the ADB. The Ombudsman's Office declined to investigate because the author had alternative means of redress before the EOT. As explained to the author, because of the high number of complaints and the limited resources available to the Ombudsman to investigate them, priority is given to those matters which identify systemic and procedural deficiencies in public administration, where complainants have no alternative and satisfactory means of redress. The author's allegation that a government department "can get away with it" if there is an alternative means of redress available to the victim is illogical. If there is an alternative means available then the government department "cannot get away with it".

7.27 Furthermore, there is absolutely no evidence to support the allegation that the Ombudsman "colluded" with ADB officials. The preliminary inquiries undertaken by the Ombudsman disclosed that the conduct of the relevant ADB officer complied with the usual ADB procedure. In the absence of prima facie evidence of misconduct on the part of the ADB, the Ombudsman had no alternative but to decline to investigate the author's complaint. No amount of consultation with the author would have altered this fact.

7.28 In a letter dated 26 April 1995 the author wrote to the Ombudsman seeking a review of the decision. In that letter he had the opportunity to raise his specific objections to the decision to decline his complaint. He did not do so and merely reiterated his earlier complaint and outlined developments in the hearing of this matter by the EOT.

7.29 There has been no evidence submitted by the author that the decision of the Ombudsman was motivated or tainted by racial discrimination in violation of article 5 (a), or that this remedy was ineffective within the meaning of article 6.

7.30 As for the author's claims regarding the decision of the LAC to refuse his application for legal aid, the State party argues that the decision was made in accordance with the Legal Aid Commission Act and the Legal Aid Policy Manual, in a manner which treated the author no differently to any other person making an application for legal aid. The author was advised by the LAC that legal aid was not available for any person in respect of matters before the GREAT. The refusal of legal aid did not preclude the author from accessing and effectively conducting proceedings before GREAT. This body is designed to be used by unrepresented persons. Finally, it was the author's choice to

pursue his complaint through the ADB and withdraw his proceedings before the GREAT, since he was not interested in reinstatement. Accordingly, the author has failed to provide any evidence that he was treated unfairly by the LAC in relation to his application for aid for legal representation before GREAT, or that lack of legal aid was the determinative factor in his decision to pursue a remedy through the ADB.

7.31 If the matter is one for which legal aid is available and the means test is satisfied, but there is some doubt concerning the merit, then, in accordance with the Legal Aid Commission Act, the LAC may cover the cost of obtaining an opinion from junior counsel on whether the applicant has reasonable prospects for success. On 28 March 1995, the LAC authorized the author to seek an opinion from junior counsel as to whether the proceedings before the EOT had reasonable prospects for success and the likely quantum of damages that might be awarded to the author. The solicitor's expenses were paid by the LAC. However, it was finally found that the author's application did not satisfy the LAC's merit test. The author has failed to demonstrate how the LAC's decision to refuse him legal aid on the basis that his claim lacked merit was unfair or amounted to unequal treatment.

7.32 The author was advised in writing in respect of the refusal of his application for legal aid to appear before the GREAT and of his application for legal aid to appear before the EOT that he could lodge an application to have each of these decisions reviewed by a Legal Aid Review Committee within 28 days. The author states that it was impossible for him "to comply with the EOT hearing dates and complete the LAC's appeal process. The LAC explicitly informed the author of section 57 of the Legal Aid Commission Act which provides for the adjournment of proceedings by a court of tribunal pending the determination of an appeal by the Legal Aid Review Committee. The author did not lodge an appeal to the Legal Aid Review Committee in respect of either decision to refuse his applications for legal aid. The fact that the LAC advised the author of his right of appeal is further evidence that he was treated fairly.

7.33 The author's claim against the LAC is manifestly ill-founded and lacking in merit. The author has failed to provide any evidence that the LAC decisions to refuse the author legal aid for representation before GREAT or EOT were unfair or motivated or tainted in any way by racial discrimination, and therefore in violation of article 5 (a), or that this remedy was ineffective within the meaning of article 6.

Author's comments

A. Allegations concerning violations of the Convention by the New South Wales Fire Brigade

8.1 With respect to the fact that the author was not appointed to two positions for which he had applied he disagrees with the State party's argument that understanding of the local market was an essential criterion advertised or mentioned in the description for the position of Service Manager and states that during his employment he was given several tasks of local contract market and purchase. His application showed his skills and experience to carry out all the accountabilities mentioned in the job description for the two positions. Furthermore, he was more suitable than the person appointed as Service Manager, as he had a postgraduate training course in maintenance management and six years of experience in the management of emergency services communication.

During his employment the author was assigned with one task of the Service Manager's position. i.e. the purchase of Test Analyser. He was less favourably treated on the ground of his racial background in that he was not even granted interview for both positions. Furthermore, it is not correct that he only complained over the selection process when he filed a complaint with the EOT in 1995. He did raise the matter with his submission of 15 December 1993 to the ADB.

8.2 The author does not fully agree with the State party's statement regarding the steps that led to his appointment as an engineering officer. As for his remuneration, he says it is not true that one of his two colleagues received the same salary as him. The EOT found that the colleague also received allowances by reason of being placed on a special "on-call" roster which gave him additional salary and permanent access to a car.

8.3 As for the probation issue the author argues that under section 28 (2) of the Public Sector Management Act, a person may be appointed to a position in the Public Service without being required to serve a probation period. Given his qualifications, skills and experience he could have been exempted from probation. The reason for not being exempted was based on racial considerations.

8.4 Concerning the workload he says that he had to work during the Easter holidays in order to complete a project that, given its complexity, took longer than what his supervisors suggested. He also says that his supervisor treated the migrant staff as second class citizens and that his regret and denial of discriminatory intent is untrue.

8.5 The author insists that he was segregated from the white officers on a trip to Melbourne in connection with a project he was working on and, for which, he had previously been sent to Sydney. As for training, the Fleet Mobile Communications course dealt with the latest technologies in mobile radio communication. He was the most deserving employee of the NSWFB for his course, as he was made responsible for the radio communications projects. The cost of the course was not very high.

8.6 As for the State party's statement that the author did not apply when the position was re-advertised he states that, by then, he had already been dismissed. Applying would have meant that he had to compete, as an external candidate, with hundreds of other applicants. Furthermore it would have been useless. As the EOT found, the NSWFB was unwilling to employ him.

8.7 As for the State party's claim that the author had refused to carry out work assigned to him the author refers to the EOT judgement in which the tribunal was of the view that the incidents referred to by his superiors did not amount to clear refusal by the author. He also states that he did not refuse the lawful order or requested engineer's pay; the State party's allegations that he refused duties for money are baseless. With regard to the workplace harmony and productivity, there was no complaint against the author from any staff member, neither did EOT find that there was any evidence that he created disruptive tension in the workplace.

B. Allegations concerning violations of the Convention by the Anti-Discrimination Board, the Equal Opportunity Tribunal, the Ombudsman and the Legal Aid Commission

8.8 The author states that when he requested the ADB to deal with his case on an urgent basis, as he feared he would be dismissed, the ADB limited itself to inform the NSWFB that a complaint had been lodged. ADB did not act promptly and deliberately delayed action until the dismissal took place. The author also argues that the ADB was unwilling to investigate his claims regarding "discrimination in appointment", in an attempt to minimize his prospects of success in the EOT and in seeking legal aid; indeed, the ADB's baseless findings that the author's complaint was lacking in substance undermined his prospects of success with other organs.

8.9 The author complains about the manner in which the EOT handled his case. He says, for instance, that it did not order the ADB to provide an officer to assist the inquiry, despite the fact that it could have done so under the provisions of the Anti-Discrimination Act; during the conduct of the inquiry the EOT gave advantage to the NSWFB; it further disadvantaged the author by conducting the hearing in public, reporting to the media and publishing the judgement; enormous amounts of duplicated documentation was given to him to read during the hearing, however, he was not given extra time to read it, except for a few minutes adjournment; the transcripts of the five-day hearing show that he did not have sufficient time to cross-examine the six NSWFB witnesses; two of the witnesses brought by the NSWFB were migrants whose testimony in the witness box did not fully coincide with their affidavits; the EOT allows the NSWFB to be represented by the Crown Solicitor against the unrepresented author without witnesses.

8.10 In its judgement the EOT justified the treatment of the author by the authorities as "unfair", "unfortunate", "exploitation", "adverse", etc., but failed to acknowledge the discriminatory impact and outcome on the author due to his different race to others in similar circumstances. The EOT failed to recognize the continuous pattern of unequal treatment between the author and the other two officers in the same circumstances and considered that the race based harassment in the workplace during duty hours were simple jokes on social occasions.

8.11 The author claims that his personnel file with the NSWFB was taken over by the EOT and he was not allowed to inspect it. The EOT judgement indicates that his personnel file contained a letter dated 4 May 1993 according to which he should be considered for further promotion at the end of his first year of employment. The author expressed doubts as to the authenticity of that letter and considers that it was "planted" by the EOT to justify its judgement that the NSWFB did not discriminate against him on racial grounds.

8.12 The author states that the Ombudsman abused her discretionary powers by declining to investigate his complaints and deliberately misinterpreting section 13 of the Ombudsman Act, despite the fact that the author had identified systemic and procedural deficiencies in the ADB. She did not answer as to why she did not investigate the wrongdoings of the ADB officials. The Ombudsman was deliberately not understanding that in one instance the ADB "got away" by colluding with the NSWFB and declaring that the author's claim of victimization lacked substance. The victimization claim was later substantiated and NSWFB paid the damages, not the ADB. After receiving two complaints against a public administration, it is unfair that the Ombudsman was relying on the information or advice supplied by the same public administration and reporting it back to the author. The author sent a letter to the Ombudsman, dated 26 April 1995, in which he explained in detail the types of improper conduct by the ADB official. Furthermore, the Ombudsman failed to advise the author as to the kind of additional information she needed to reopen the case.

8.13 The author states that the report of the LAC's sponsored counsel and the LAC's decision to refuse legal aid were unfair, as the author was successful in establishing his case of victimization in the EOT. It is incorrect to say that the author had to choose ADB instead of GREAT because he was not interested in reinstatement. If he was not interested in reinstatement, why did he seek reinstatement through EOT? The real reason for his withdrawal from the GREAT appeal was the denial of legal assistance.

8.14 Finally, the author disagrees with the State party's observations regarding non-violation of article 2 of the Convention. He refers to the Committee's opinion on communication No. 4/1991, in which it is stated that "the Committee cannot accept any claim that the enactment of law making racial discrimination a criminal act in itself represents full compliance with the obligations of States parties under the Convention".(1)

Examination on the merits

9.1 The Committee has considered the author's case in the light of all the submissions and documentary evidence produced by the parties, as required under article 14, paragraph 7 (a), of the Convention and rule 95 of its rules of procedure. It bases its findings on the following considerations.

9.2 The Committee notes that the author's claims were examined in accordance with the law and procedures set up by the State party to deal with cases of racial discrimination. It notes, in particular, that the complaint was examined by the New South Wales Anti-Discrimination Board (ADB) first and by the Equal Opportunity Tribunal (EOT) on appeal. The EOT examined the author's claims regarding racial discrimination and victimization concerning his appointment, employment and dismissal. On the basis of the information at its disposal, in particular the text of the EOT's judgement, the Committee is of the opinion that the EOT examined the case in a thorough and equitable manner.

9.3 The Committee considers that, as a general rule, it is for the domestic courts of State parties to the Convention to review and evaluate the facts and evidence in a particular case. After reviewing the case before it, the Committee concludes that there is no obvious defect in the judgement of the EOT.

10. In the circumstances the Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination, is of the opinion that the facts as submitted do not disclose a violation of the Convention by the State party.

11. Pursuant to article 14, paragraph 7 (b), of the Convention, the Committee suggests that the State party simplify the procedures to deal with complaints of racial discrimination, in particular those in which more than one recourse measure is available, and avoid any delay in the consideration of such complaints.

Notes

1/ CERD/C/42/D/4/1991, para. 6.4.