

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**STREAM** : HUMAN RIGHTS

**ACT** : EQUAL OPPORTUNITY ACT 1984 (WA)

**CITATION** : SWITCH NOW PTY LTD T/AS JUST BE  
[2007] WASAT 134

**MEMBER** : MS J TOOHEY (SENIOR MEMBER)

**HEARD** : ON THE PAPERS

**DELIVERED** : 30 MAY 2007

**FILE NO/S** : EOA 78 of 2006

**MATTER** : APPLICATION FOR EXEMPTION UNDER S 135  
OF THE EQUAL OPPORTUNITY ACT 1984

EX PARTE

SWITCH NOW PTY LTD T/AS JUST BE  
Applicant

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*Catchwords:*

*Equal Opportunity Act 1995* – Sex discrimination – Application for exemption -  
Job search website targeting women but available for use by men and women –  
Measure designed to achieve equality – Conduct not unlawful – Exemption not  
necessary

*Legislation:*

*Equal Opportunity Act 1984* (WA), s 4(1), s 8, s 20, s 31, s 135, s 135(1),  
s 135(3), s 135(6)  
*Equal Opportunity Act 1995* (WA), s 83  
*Equal Opportunity Regulations 1986* (WA), reg 24  
*State Administrative Tribunal Act 2004* (WA), s 60(2)

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*Result:*

Application dismissed

*Category:* B

**Representation:**

*Counsel:*

Applicant : Ms L Pititto (Acting as Agent)

*Solicitors:*

Applicant : N/A

**Case(s) referred to in decision(s):**

IW v City of Perth and Ors (1997) 191 CLR 1

Proudfoot v ACT Board of Health and Ors (1992) EOC

Stevens v Fernwood Fitness Centres Pty Ltd (1996) EOC

**REASONS FOR DECISION OF THE TRIBUNAL:**

***Summary of Tribunal's decision***

1           The applicant sought an exemption from s 20 of the  
*Equal Opportunity Act 1984* (WA) which makes it unlawful to  
discriminate on the ground of sex in the provision of goods, services or  
facilities. The exemption was sought so that the applicant could operate a  
website providing an online job search facility for women.

2           The Tribunal was satisfied that the conduct of the applicant  
amounted to a measure intended to achieve equality within the meaning of  
s 31 of the Act. As such, it was made lawful by the Act and no exemption  
was required. The Tribunal therefore dismissed the application.

***Background***

3           This is an application for exemption from s 20 of the  
*Equal Opportunity Act 1984* (WA) (the Act) which makes it unlawful to  
discriminate on the ground of sex in the provision of goods, services or  
facilities.

4           Just Be is the trading name of Switch Now Pty Ltd, a company  
incorporated in Victoria which operates an online job search facility  
aimed at women. Although Just Be believes it is not in fact unlawfully  
discriminating against men by operating this service, it wants to put the  
matter beyond dispute and be able to assure prospective corporate clients  
in particular that nothing about the service, or their involvement in it,  
breaches the Act.

5           The application was lodged with the Tribunal on 17 November 2006.  
Notice of the application, as required by s 135(3) of the Act, was given in  
an advertisement in *The West Australian* newspaper on 14 December  
2006. The notice invited any person wishing to appear as a party to the  
application to notify the Tribunal of their interest in the proceedings by  
15 January 2007. No person has notified the Tribunal of an interest in the  
application.

6           By virtue of reg 24 of the *Equal Opportunity Regulations 1986*  
(WA), the Commissioner for Equal Opportunity is a party to an  
application for exemption unless she lodges an affidavit setting out the  
reasons why she does not wish to be a party. By affidavit dated  
9 February 2007, the Commissioner set out her response to the application  
and advised the Tribunal that she did not wish to remain a party to the  
application.

7           The Tribunal is satisfied that any person who might have an interest in the application has had an opportunity to apply to be joined as parties. It is also satisfied that sufficient relevant information has been provided by the applicant by way of affidavit, submissions and supporting information to enable it to make a determination on the basis of the documents before it: s 60(2) of the *State Administrative Tribunal Act 2004* (WA). The application has therefore been determined on the basis of the documents before the Tribunal.

***The applicant's submissions***

8           According to documents provided in support of the application, Just Be is a newly established online job search website for women, to be launched shortly. It is "female oriented and specifically targeted towards the female jobseeker and career woman".

9           The site was launched after extensive research through interviews with employers, focus groups, business leaders and women, all of whom agreed that a website would help address some of the challenges faced by women in the workplace and in searching for jobs. Those challenges are said to include finding jobs with flexible work arrangements such as job-sharing, and finding positions in organisations that take equal opportunity in the workplace seriously. The site recognises that men and women "network differently", compete for jobs differently, manage their careers differently and even approach searching for jobs differently. The purposes of the website are:

- (i) to help women find jobs and establish careers by:
  - providing a comprehensive job search [service] which lists jobs from employers of choice for women and organisations who are serious about diversity and establishing equal opportunity in the workplace; and
  - offering women online resources to help them strategically manage their career; and
- (ii) to give employers an avenue to advertise for female talent and promote the fact that they take equal opportunity and diversity in the workplace seriously.

Just Be will achieve these aims by:

- providing access to jobs for women who require special roles or flexible arrangements to accommodate their needs;
- providing career resources and information specifically tailored to career mothers who are either struggling to balance work and motherhood, or those who are simply looking to find ways to successfully manage their career through pregnancy and motherhood;
- having an interactive online forum where women can share information and advice with each other; and
- creating a supportive online community of women supporting women and employers and recruiters supporting women in the workplace.

10 The content of the website will comprise:

- a comprehensive job search;
- relevant career oriented articles;
- career advice and tips;
- an interactive careers forum;
- access to major women's networks in Australia;
- access to professional development opportunities;
- access to latest industry and [human resources] developments;
- networking prospects;
- webinars [online seminars]; and
- online blog.

11 The service is to be supported by a team of writers, industry experts and female executives who will regularly contribute articles on issues affecting women in the workplace and who will assist in the development and direction of the website content.

12 Just Be submits that it is not in fact discriminating against men because they are not precluded from registering on the website or applying for jobs on it; nor are they precluded from participating in the online forums and discussions. Moreover, it is submitted, there are

over 30 other online job search engines across Australia, as well as recruiting agencies, where men can look for jobs and get career advice and information, and they would not be disadvantaged by the introduction of this service.

***Supporting submissions***

- 13 In support of the application, Just Be has provided letters from Security for Women, one of four national women's secretariats funded by the Commonwealth Office for Women; Network Central, a large networking group for Australian business women; The Australian Federation of Business and Professional Women; the Council of Small Business Organisation of Australia, and the Victorian Women's Trust. All support the claim that the needs of men and women are different when it comes to looking for jobs and managing their careers; that women are not as assertive or confident in their skills and experience and career-planning as men and are disadvantaged when entering the job market, especially after some time out of the workplace.

***The views of the Commissioner for Equal Opportunity***

- 14 In her affidavit the Commissioner for Equal Opportunity states her view that the Just Be website does not discriminate unlawfully against men; further, that it is arguable that it provides a service that amounts to a measure intended to provide equality within the meaning of s 31 of the Act. In these circumstances, in the Commissioner's view, no exemption is necessary.

***Applications made in other jurisdictions***

- 15 Just Be has provided the Tribunal with information about similar applications it has made in other jurisdictions. Exemptions have been granted in Victoria and Tasmania. In Queensland, the Northern Territory, the ACT and South Australia, exemptions have not been required because either the website did not contravene the Act or because it fell within a special measures provision equivalent to s 31 of the Western Australian Act.

***Discrimination in the provision of goods, services and facilities***

- 16 Section 20 of the Act provides that it is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another on the ground of sex by refusing to provide those goods or services or make those facilities available, in the terms or conditions on which the goods, services

or facilities are made available, or in the manner in which they are made available.

17 "Services" is not defined in the Act other than by way of a list of matters which the term includes: s 4(1) of the Act. However, subject to the proviso that a court or tribunal should not give the term an unreasonable or unnatural construction, if the term is capable of applying to an activity, a court or tribunal should hold that that activity is a service for the purposes of the Act: *IW v City of Perth and Ors* (1997) 191 CLR 1 at 12.

18 "Facility" is not defined in the Act. Its ordinary meaning is "an opportunity, or the equipment or resources for doing something; an establishment set up to fulfil a particular function or provide a particular service": *The Australian Oxford Dictionary* (2nd ed), Oxford University Press, Melbourne, 2004.

#### *Discrimination on the ground of sex*

19 Section 8 of the Act defines discrimination on the ground of sex as follows:

"(1) For the purposes of this Act, a person (in this subsection referred to as the '**discriminator**') discriminates against another person (in this subsection referred to as the '**aggrieved person**') on the ground of the sex of the aggrieved person if, on the ground of —

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

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

(2) For the purposes of this Act, a person (in this subsection referred to as '**the discriminator**') discriminates against another person (in this subsection referred to as the

'aggrieved person') on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition —

- (a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;
- (b) which is not reasonable having regard to the circumstances of the case; and
- (c) with which the aggrieved person does not or is not able to comply.

*Exemption from the Act*

20 Section 135 of the Act provides that the Tribunal may grant an exemption from the operation of a specified provision in the Act. An exemption may be granted subject to such terms and conditions as the Tribunal orders; it may be varied on the application of the person to whom it is granted, or at the instance of the Tribunal; it may be expressed to apply only to such circumstances, or in relation to such activities, as are specified in the order; and it may be granted for a period not exceeding five years: s 135(1), s 135(3) and s 135(6).

21 The exemption must be necessary. Unless the conduct sought to be exempted would constitute discrimination within the meaning of the Act, there is no unlawful conduct for which an exemption need be sought: *Stevens v Fernwood Fitness Centres Pty Ltd* (1996) EOC 92-782.

*Measures intended to achieve equality*

22 Section 31 provides that nothing in the relevant Divisions of the Act renders it unlawful to do an act a purpose of which is:

- (a) to ensure that persons of a particular sex or marital status or persons who are pregnant have equal opportunities with other persons in circumstances in relation to which provision is made by this Act; or
- (b) to afford persons of a particular sex or marital status or persons who are pregnant access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare.

*Findings and reasons*

23 The Tribunal is satisfied, and finds, that the website operated by Just Be is a service or facility within the meaning of the Act.

24 The first matter to be determined is whether, in the absence of an exemption, the conduct of Just Be in operating its website, would constitute unlawful discrimination on the grounds of sex.

25 The mere fact that men can register with, and use, the Just Be website does not mean that it does not, in fact, operate to discriminate unlawfully against them. The website is intended for the benefit of women and the likely reality is that employers who register jobs on it are, in fact, looking to employ women; it is a fair assumption that, if jobs are genuinely open to men as well as women, the Just Be website would serve little purpose. In these circumstances, male applicants for particular jobs may well suffer less favourable treatment.

26 Similarly, the mere fact that there is a large number of other job search websites available to men is no response if the conduct of Just Be of itself constitutes unlawful discrimination.

27 However, for the reasons set out below, the Tribunal is satisfied that the conduct of Just Be in this case is made lawful by s 31 of the Act.

28 The Tribunal accepts that women face disadvantages in seeking employment by reason of their circumstances associated with bearing and raising children and the family responsibilities that commonly fall to them. Many women spend long periods out of full-time work, or out of the workforce altogether as a result of which their level of skills, experience and confidence may be affected, making them less competitive than men for positions. Moreover, they commonly have the primary care of children or elderly parents, making flexible arrangements such as part-time work and job-sharing particularly important to them.

29 The Tribunal accepts that it is a purpose of the Just Be website to ensure that women have equal employment opportunities with men and to afford them access to opportunities to meet their special needs.

30 It might be said that, although Just Be aims to promote equality of employment opportunities for women, it serves other interests including its own. Just Be is a commercial operation and its corporate clients almost certainly have their own interests and commercial reasons for wanting to use the site, besides any interest in equal employment

opportunities for women. However, s 31 of the Act does not require that the promotion of equal opportunities be the sole, or even the primary, purpose of the measure in question. It is sufficient that it be a purpose: *Proudfoot v ACT Board of Health and Ors* (1992) EOC at 92-417 Wilson J at 78 983.

***Conclusion***

31 The Tribunal is satisfied that the conduct of Just Be, being the provision of an online job search facility for women, is made lawful by s 31 of the Act.

32 There being no unlawful conduct for which an exemption is necessary, the application is dismissed.

***Orders***

The application is dismissed.

I certify that this and the preceding [32] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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**MS J TOOHEY, SENIOR MEMBER**