EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No. 2 of 1990

FAY OLIVE SLATER

Complainant

- against -

BROOKTON FARMERS COOPERATIVE COMPANY LTD

Respondent

BEFORE: L.W. Roberts-Smith, Q.C. (Deputy President)
P. Harris and B. Buick (Members)

HEARD: 30 and 31 July 1990

REASONS FOR JUDGEMENT

(Delivered: 19 September, 1990)

REASONS FOR JUDGEMENT
SLATER V BROOKTON FARMERS' CO-OPERATIVE

This is a complaint of discrimination on the grounds of race made under Part III of the Equal Opportunity Act. ("the Act").

Discrimination for the purposes of this ground (insofar as relevant here) is defined in Section 36(1) of the Act as follows -

> "... a person ... discriminates against another person ... on the ground of race if, on the ground of -
>
> (a) the race of the aggrieved person;
>
> (b) a characteristic that appertains generally to persons of the race of the aggrieved person; or
>
> (c) a characteristic that is generally imputed to persons of the race of the aggrieved person,
>
> the discriminator-
>
> (d) treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person of a different race or;
>
> (e) segregates the aggrieved person from persons of a different race.

The complainant alleges discrimination in selection for employment. Mrs Slater applied for a position with the Brookton Farmers Cooperative ("the Co-op") but was not employed. She complains that the reason for her non-selection was that she is an Aboriginal. The complaint is therefore founded on Section 37(1)(b):

> "S.37 (1) It is unlawful for an employer to discriminate against a person on the ground of the race of that person-
>
> (a) in the arrangements made for the purpose of determining who should be offered employment;

(b) in determining who should be offered employment; or

(c) in the terms or conditions on which employment is offered."

The complainant does not have to establish that race was the only reason for her non-selection for employment.

Section 5 of the Act provides that -

> "A reference in Part II, III or IV to the doing of an act by reason of a particular matter includes a reference to the doing of an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act."

The act of not selecting the Complainant for employment was not the act of the respondent Co-op itself but one of its employees.

The Co-op is a registered company. At all material times Mr Ted Jones was the manager of its store in Brookton. The Co-op is said to be liable vicariously under Section 161(1) of the Act which provides that -

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

(a) an act that would, if it were done by the person, be unlawful under this Act (whether or not the act done by the employee or agent is unlawful under this Act); or

(b) an act that is unlawful under this Act,

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

(2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (a) or (b) of that subsection done by an employee or agent of a

> person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph."

However in that Section the word "person" probably means a natural person. Section 5 Interpretation Act 1984 does provide that in every written law the word "person" includes (inter alia) a company or association or body of persons, corporate or unincorporate. However, Section 3(1) of that Act excludes its operation to the extent something in the particular statute is inconsistent with such operation.

The position in relation to an incorporated body here is specifically covered by Section 162(1) of the Act which reads

> "Where, for the purposes of this Act, it is necessary to establish that a body corporate has done an act on a particular ground, it is sufficient to establish that a person who acted on behalf of the body corporate in the matter so acted on that ground."

Thus, if the Complainant establishes here that Mr Jones acted on the ground of race, that would be sufficient to establish liability in the Co-op for that act under Section 162(1).

In these proceedings the Complainant bears the onus of proof. She must establish her case on the balance of probabilities.

It is perhaps necessary to observe at the outset that it is not for this Tribunal to substitute its opinion of who should have been appointed to the position. The question at the end of the day simply is whether or not the decision not to appoint Mrs

Slater was a decision which was based wholly or in part on the ground of her Aboriginality and she was thereby on that ground treated less favourably than a non-Aboriginal person would have been treated in the same or similar circumstances.

Brookton is about 140 km from Perth. It is a town of some 600 people. There are approximately 1200 people in the district. The population is approximately 60:40 with Aboriginals being in the minority. Most of the Aboriginal members of the population live in the township itself.

The complainant was born in Brookton in 1939 and is a person of Aboriginal descent.

At all material times the Co-op had the management of a food retail store in Brookton known as the Brookton Farmers' Co-operative Store ("the Co-op Store") of which Mr Jones was the manager.

Mr Jones was responsible to a Board of Members, the Chairman of whom was Mr Hobbs.

Mr Jones had been employed as manager since August 1972. Part of his responsibilities included the hiring and dismissal of staff subject only to the ultimate control of the Board.

The Co-op Store in Brookton is divided into five "departments" one of which is the bakery. That last was established in 1984 and until recently never made a profit. At best the bakery

would break even.

In approximately November 1986 Mrs Denise Duff was employed to work at the bakery. Although it was said in evidence by Mr

Hobbs and Mr Jones that for financial reasons in particular it was always the policy of the Board to employ a junior in that position where possible, Mrs Duff was employed as a senior. In evidence Mr Jones pointed out that the employment market in Brookton was usually limited and it was sometimes not possible to employ people who met the criteria specified for a particular position. There was no evidence as to other applicants for the position when Mrs Duff was appointed to it.

By November 1988 Mrs Duff had been there some two years. She was working 5 days per week (another person would work Saturday mornings). The responsibilities of her job included taking the dough out of the freezer at night, being at the bakery by 6 o'clock each morning, putting the dough in the "prover" and then putting it in the oven and baking it. Once the bread was baked the employee then had to serve customers in the bakery. There were also cinnamon rolls and buns which would have to be iced.

In late November 1988 Mrs Duff told Mr Jones that she wanted to leave, as she wanted to spend more time looking after her three-year old child. Initially she said nothing about part-time work.

Brookton being a small community, if an employee wished to leave a job it was common practise that he or she had to find a replacement. That is what occurred here. Mr Jones asked Mrs Duff to ask around amongst her friends and acquaintances to

find out if anyone was interested in applying for the position.

Mrs Duff was married to an Aboriginal man. She agreed that most of her friends and acquaintances would have come from the Aboriginal community. Mr Jones testified that he was aware of that and therefore expected that if she did find someone interested in applying that person would probably be Aboriginal. Mr Jones said in evidence:

> "I thought it probably a good opportunity. I knew there was unemployment up there and possibly someone there could get the job."

He discussed it with Mr Hobbs and other members of the Board. The outcome was that the Board (through Mr Jones) was looking for a junior and would have been happy had that junior been Aboriginal.

There was difficulty finding someone to work full time.

After initial enquiries proved fruitless Mrs Duff said she would be prepared to work part-time. It appears that by that stage she had already obtained (or was close to obtaining) part-time work at a Brookton roadhouse so it was agreed she

would look for someone to work part-time with her in the bakery position.

Mrs Duff mentioned it to the complainant, Mrs Slater. She explained to Mrs Slater the requirements of the work. The

latter was interested, and she gave it some thought. The more she thought about it the more she was attracted by it. She decided she wanted the job, and told Mrs Duff. Mrs Duff suggested she come to the store before the job was advertised and see Mr Jones.

So Mrs Slater went down to the bakery whilst Mrs Duff was working. Mrs Duff took her up to Mr Jones' office and left Mrs Slater at the door.

On any account the "interview" which then followed lasted no more than a minute or so.

There is some dispute about exactly what was discussed but it was common ground that Mrs Slater told Mr Jones she wanted to apply for the job, that she said she thought she could do it, that nothing was said about references nor past employment experience, that he told her the position would be advertised in the "Brookton News", that it would not be necessary for her to submit an application in writing and that he would notify her of the result of her application.

Mrs Slater had written references with her at the time but was neither asked for them nor given an opportunity to show them to Mr Jones.

Mrs Slater never did hear anything further about the position either from the Board or Mr Jones until after she had lodged

her complaint with the Equal Opportunity Commission ("the Commission") on 29 December 1988.

Mrs Slater testified that when she left the "interview" she thought there could be only two possible explanations for what she (obviously rightly) regarded as quite peremptory treatment - that is either Mr Jones knew all he needed to know about her and was going to give her the job; or he had no intention of giving her the job. Her immediate (and subsequently re-inforced) reaction was that if it were the latter the only reason he could possibly have for not wanting to employ her was the fact that she was Aboriginal.

Mr Scott, who appeared for the Co-op, argued that these thoughts were inconsistent and mutually exclusive. He suggested Mrs Slater's evidence on this could not be accepted as she could not possibly have entertained both reactions.

We have no difficulty with Mrs Slater's evidence in that respect and we accept it. That however goes only to her reaction. The issue here is Mr Jones' decision not to appoint

her and the reason (that is, the "ground") for that decision. What occurred at the initial "interview" is relevant only to the extent that it may throw some light on that issue.

The "Brookton News" is published fortnightly. The following advertisement for the bakery position appeared in the edition published on Friday 16 December 1988 (Exhibit A) -

"REQUIRED

1) Hot Bread Shop
A person to cook bread
3 or 5 days a week

2) Grocery Assistant
Junior or Senior

Apply Manager - Brookton Co-op"

Mr Jones gave evidence that the advertisement would have to have been presented by the afternoon of Tuesday 13 December to appear the following Friday. There was no other evidence on this and we accept it.

Mr Jones said there had been one applicant before Mrs Slater, who was a girl about 20 years old from Beverley. However she lived too far away and he had, for that reason, not considered her suitable.

After the advertisement was published a Mrs Dorman and her daughter came to see Mr Jones. The daughter wanted to apply. She was 14 or 15 years old.

Although the family lived on a farm about 30 km out of Brookton

and she did not have a driver's licence, arrangements had been made by the mother for the girl to board in the town. Mr Jones said he thought that "We're looking for a junior -we'll give her a go!" He employed Ms Dorman on a two week trial basis.

Mr Jones did not advise Mrs Slater of this. He said that was deliberate because if Ms Dorman was unsuccessful Mrs Slater might still have got the job.

During Ms Dorman's trial period Mr Jones received another application. This was from a Mrs Bennett. She was a newcomer to the district. She was aged about 34 or 35. She was not Aboriginal. She was living about 10 km out of the town and opposite one of the current Co-op employees.

Mr Jones said she came to the door of his office and the time he spent speaking to her was about the same as he had spent with Mrs Slater - about a minute.

In that brief time he "took her particulars". She told him she "could do the job" and had previously worked in a bakehouse and chemist shop.

Towards the end of Ms Dorman's trial period, Mr Jones asked Mrs Duff if she was suitable. He said Mrs Duff told him she was not. He did not discuss Mrs Slater's application with Mrs Duff, although he did tell Mrs Duff he had decided to employ Mrs Bennett on a two-weeks trial basis.

He had to choose between Mrs Slater and Mrs Bennett. He testified in evidence in chief that the only difference was that Mrs Bennett came across as a cheerful person and that, with her baking experience, "she would have a little bit of a clue". As to his assessment of Mrs Bennett's personality Mr Jones said she had been a fairly regular shopper at the Co-op since she had been in town and "was always sort of singing and very happy". He said he spoke to the staff member who lived opposite Mrs Bennett and made his decision on that and his own impression. He chose Mrs Bennett. He told the Board of his view and the Board "backed (his) judgement".

He said that if Mrs Bennett had not applied Mrs Slater would have had the job.

He still did not advise Mrs Slater. The reason then he said was that Mrs Bennett was on trial and if she were not successful Mrs Slater could still get the job. He wanted to keep his options open until he had a successful applicant.

He went on leave about that time. Whilst he was away Mrs Duff left. When he got back he felt he had no choice but to appoint Mrs Bennett - although she had proved successful anyway - because the Co-op had to have a baker.

He agreed that at this stage at the very least he should have notified Mrs Slater. His explanation for not doing so was that he was very busy and it was an oversight.

In fact Mrs Bennett proved most satisfactory. According to Mr Jones and Mr Hobbs bakery sales have doubled over the last 18 months.

We return now to Mrs Slater after the initial interview with Mr Jones.

She testified he said he would let her know the outcome of her application within a week or a fortnight at the most because the position was going to be advertised. So she waited ... and waited ... and heard nothing. She became quite worried. Mr Jones saw her quite often as she shopped at the Co-op. About one month went by. She asked Mrs Duff a couple of times if she had heard anything. Mrs Duff was non-committal. After about 3 or 4 weeks Mrs Duff told Mrs Slater she did not think it was much use waiting as she was "pretty positive" Mrs Slater was not going to get the job.

She then told Mrs Slater that Mr Jones had said to her (Mrs Duff) that he thought Mrs Slater would be an unreliable person and perhaps might work for 1 or 2 weeks at most and then leave the job and "leave the Co-op in the lurch."

Mrs Slater said she became very upset and depressed on hearing this. She had "just wanted a fair go". She said -

> "I would have liked an interview. It wouldn't have mattered if I hadn't got the job. I just wanted a fair go."

She said her main complaint was that Mr Jones said she would be unreliable. He was assuming that without any evidence - and in fact she said, her employment history, references and experience demonstrated the opposite.

When she heard this from Mrs Duff, Mrs Slater "just gave up". She suffered high blood pressure and deep depression. Her husband, a District Officer with the Department for Community Services, had to give her counselling. She became aggressive and withdrawn. She has not shopped at the Co-op since that time. She shops instead at Narrogin, which is some 70 km from Brookton and much more inconvenient. She said she has been too ashamed to shop at the Co-op since these events.

One of the significant features of this case is that prior to her complaint to the Commission Mrs Slater was never advised directly by the Co-op (nor Mr Jones) of the outcome of her application nor given any reason for her non-selection.

The information she did get came from Mrs Duff and it was what Mrs Duff told her about what Mr Jones had said which confirmed Mrs Slater's fears that she had been discriminated against because of her race.

It is therefore important to examine Mrs Duff's evidence.

She told the Tribunal that she took Mrs Slater to the door of

Mr Jones' office and left her there. Mrs Slater was not in the office for long - it would have been only a minute or two. She said she met Mrs Slater coming out and asked her how it went to which Mrs Slater replied: "I don't know. He didn't give me much time!"

Mrs Duff said that it was "a couple of weeks" after that before the advertisement appeared in the "Brookton News".

In cross-examination she said a young girl was employed for training, and Mrs Duff had to train her. She thought that after the young girl (obviously Ms Dorman) had done two weeks Mr Jones called Mrs Duff to his office specifically to tell her Mrs Slater was not suitable. That was when Mrs Bennett got the job.

Her description of those events was rather more detailed in cross-examination than it had been in evidence in chief.

In the latter she had said simply that Mr Jones called her into his office to tell her he was not going to employ Mrs Slater. She testified he said that he did not think Mrs Slater would be appropriate because she might work for a couple of weeks and then leave the Co-op in the lurch. She said he did not say anything else to her about Mrs Slater at that time. Her reaction was to think he did not want to employ Mrs Slater because she was Aboriginal.

She agreed in cross-examination that Mr Jones did not use the word "unreliable" - he said Mrs Slater would be "unsuitable".

Apart from his dealings with Mrs Slater in relation to this particular application, the only evidence in this case that Mr Jones (or the Co-op) had manifested any overt racial prejudice towards Aboriginal people again came from Mrs Duff.

There was no other direct evidence of any particular behaviour, conversation, attitude or action or any antipathy towards or discrimination against Aboriginal people.

There was a suggestion in the correspondence attached to the Commissioner's Report (tendered by consent as Exhibit 1) that Mr Jones and his wife had a reputation in Brookton as "... anti-Aboriginal people and are considered generally as very racist towards Aboriginal people ...". The correspondence referred to is in fact Mrs Slater's original letter of complaint to the Commission dated 29 December 1988 and in it she also made the observation that -

> "... I strongly feel that the only reason I didn't get the job was because of my race as there are a lot of rumours floating around, certainly racist remarks, but which I cannot use to strengthen my case as people are not prepared to back them up".

However this was not adverted to in Mrs Slater's testimony.

The end result is there is no evidence before us of any generally racist attitude or behaviour by Mr Jones nor his wife. Indeed, the Respondent called evidence to the contrary.

Against the background of these observations we return to Mrs Duff's evidence.

In examination she was asked how Mr Jones treated Aboriginal people. She told the Tribunal that "he really didn't take the time to talk to them"; that if Aboriginal people came into the shop he'd make them wait and his attitude towards them was always rude. This was different from the way he treated white people. He never made them wait and was polite to them. She said she did not think any Aboriginal person had an account with the Co-op. She said that after what Mr Jones told her about Mrs Slater not getting the job her attitude changed to the extent that she no longer wanted to job share. She said "If that was his attitude I did not want any part of it".

In cross-examination Mrs Duff said she had lived in Brookton for 9 or 10 years before being employed in the Co-op and had been with her (Aboriginal) husband about 8 years. She would have expected Mr Jones to know that her husband was Aboriginal when she was employed.

She insisted that Aboriginals who came into the shop to see Mr Jones were made to wait whilst every white person was seen immediately. She said she had seen this herself and had

received a lot of complaints about it.

She agreed Mr Jones did tell her to ask amongst her friends whether anyone was interested in applying for the job and that he did not tell her to mention it to whites only. She said that did surprise her.

She said she had worked two years at the Co-op and throughout that time had felt "pretty strongly" about the racial discrimination she saw there.

Mrs Duff related an incident which to her had indicated discrimination against Aboriginals. That concerned a staff meeting held in 1988. Some children had been caught stealing from the shop. Mr Jones called a staff meeting and told the staff to "watch all people in the shop - and Aboriginal people". She said she regarded the way he said that as demonstrating prejudice against Aboriginals.

Council for the respondent put to Mrs Duff that she had a grievance against Mr Jones and her testimony was coloured by that. He put to her that Mr Jones had accused her of stealing packets of cigarettes from the shop. She agreed that accusation had been made a couple of months before she left the job but it was untrue and that, although it made her angry at the time, she got over it in a couple of weeks and it no longer bothered her.

She said that she had always held the view that the attitude of Mr Jones and the Co-op management generally was racist - she found that in particular the meeting in 1987 or 1988 (she was uncertain in the end which year it was) but said nothing because she wanted the job then and he would have fired her.

She said she found out "what was really going on" when Mr Jones told her he was not going to employ Mrs Slater and her attitude changed after that. We took that to mean that the incident was in effect "the final straw" for her. However even at that stage she apparently said nothing and she continued to work in the bakery until after Mr Jones had gone on holiday.

In the witness box Mrs Duff conveyed an impression of being quite defensive.

Whilst she professed to have held strong feelings about what she perceived as racist attitudes and behaviour at the Co-op and to have held them for a long time, there is no suggestion that she manifested them in any way previously. She did have cause to be resentful of Mr Jones and we formed the impression that her evidence may well have been coloured by that. Her evidence as to the alleged conversation with him (which he denied) was unsatisfactory as was her account of the way in which she came to communicate that to Mrs Slater. There is absolutely no evidence from any other source to support her testimony about Mr Jones' demonstrated racist attitudes and conduct.

All in all, for these reasons, and particularly on our own assessment of Mrs Duff when testifying, we feel unable to accept her evidence on contentious issues as accurate except to the extent that it is supported by other evidence.

Our dissatisfaction with Mrs Duff's evidence means the position here is that there is no evidence at all of any general racist attitude, behaviour or conduct by Mr Jones or the Co-op other than as to the circumstances of Mrs Slater's application and the way in which that was dealt with.

The latter can conveniently be examined in three aspects, they being the initial interview, the conversation between Mr Jones and Mrs Duff with respect to the non-selection of Mrs Slater and the actual non-selection of her.

It is important to realise that although we approach it this way for the purposes of analysis, the ultimate question here remains whether or not the complainant has established on the balance of probabilities that the decision not to appoint her was one founded at least in part on the ground of her race. Further, it would be wrong to consider parts of the evidence or these events in isolation : the evidence has to be considered as a whole and our conclusions should be based on the evidence as a whole, giving to individual aspects of it such weight as we think proper.

There is no doubt that Mr Jones' initial interview with Mrs

Slater was peremptory to the point of rudeness and fell far short of even the most rudimentary standard for any reasonable employment interview. There is no doubt that neither Mr Jones nor the members of the Co-op had any proper knowledge of Mrs Slater's experience and qualifications for that employment.

It is impossible to avoid the conclusion that they did not really care.

The extent of Mr Jones' actual knowledge of Mrs Slater's background at that time was that she had "helped in a kindergarten and had been a housewife" and that she had been on a farm for 2 or 3 years before he came to Brookton. He had seen her in the shop and around the town from time to time and had formed the opinion that she did not have a particularly outgoing personality.

Mr Hobbs, to whom Mr Jones made his recommendation, was Chairman of the Board. He had been living in Brookton since 1949. He had known Mrs Slater since they were at school together. He said she had been a class behind him (her testimony was that they were in the same class) from 1950 to 1953 approximately. Mr Hobbs initially said he knew Mrs Slater well, but in cross-examination he conceded that since those school days (some 36 years ago) although he had seen her around he had actually spoken to her very few times - sometimes not even once a year. He thought it was "possible" she had been away from the district for a few years. Ultimately he conceded

that he knew her by sight but not more than that.

In fact Mrs Slater's father had been born in Brookton and lived there all his life. The family name was Collard and the Complainant described the family as one of the old pioneer families of the district. Most of her family lived there until they grew up and married. Some of them then left but Brookton is still the family home. Mrs Slater herself was born there in 1939 and lived there most of her life. The only appreciable time she has been away was for a period of five years when she and her husband lived in Bunbury because of his work. He is a District Officer with the Department for Community Services.

Mrs Slater has been married for 30 years. When she was 17 she worked as a waitress in a city restaurant for about 18 months and for about a similar period worked as a shop assistant in a sandwich bar in London Court. She worked 3 years as a homemaker in Perth helping Aboriginal families settle into homes. She worked at an Aboriginal kindergarten in Narrogin for 18 months. When her husband was transferred to Bunbury she undertook a years study in the Aboriginal Access Class at the Bunbury College of TAFE and after that completed a further 12 months at the Bunbury Institute of Advanced Education obtaining a Diploma in Arts. For about 8 years whilst her husband had been employed on a farm near Brookton, she performed domestic duties at the farmhouse.

When she went to see Mr Jones about the job Mrs Slater took

with her a number of references (which were not tendered in evidence). She told the Tribunal those included character references from the local minister, one from a Mr Barry Moulton who is Officer in Charge of the Narrogin District Office of the Department for Community Services and whom she had known for 12 or 14 years and one from Mr Alan Evans, the farmer for whom she and her husband had worked for 8 years. Part of her complaint of course is that Mr Jones neither asked for any references or details of prior employment nor gave her an opportunity to produce the ones she had with her.

(We pause to interpolate that the Complainant did tender an affidavit from Mr Moulton in which he deposed to his extensive knowledge of and contact with her over the last 12 years. He said that in all his dealings with her he had found her to be courteous, polite and well-groomed. He considers her to be a most reliable person and of good character, sincere and honest. We assume these sentiments would have been reflected in his reference in relation to her).

In his evidence Mr Jones said the interview with Mrs Bennett had been conducted in much the same way and was just as brief as the interview with Mrs Slater. He said Mrs Bennett told him she had worked in a bakehouse and pharmacy and "could do the job". He testified she had been a fairly regular shopper since she had been in town and was "always sort of singing and very happy".

There was no other evidence of the interview with Mrs Bennett

(nor of the interview with Ms Dorman and her mother) apart from that of Mr Jones and so there is no other basis for the Tribunal to compare them.

So far as the alleged conversation between Mrs Duff and Mr Jones about Mrs Slater not getting the job is concerned, we are not satisfied on the balance of probabilities that it occurred as described by Mrs Duff.

Mr Jones' evidence on this was that Mrs Duff was responsible for training Ms Dorman during the latter's trial period. That was confirmed by Mrs Duff. Mr Jones said that towards the end of that period he called Mrs Duff in and asked her if Ms Dorman was suitable. Mrs Duff said she was not. He said he then told Mrs Duff he had chosen Mrs Bennett for a trial period. He categorically asserted in evidence that he did not discuss Mrs Slater's application with Mrs Duff either then or on any other occasion. The reason for that was because he anticipated he would "get a slanted view" from her friend.

By contrast Mrs Duff maintained that Mr Jones had called her in specifically to tell her that Mrs Slater was not going to get the job because she would be likely to stay only a few weeks and then leave the Co-op in the lurch.

Given Mrs Duff's necessary training role of any applicant "trying out" for the position and having regard to the evidence as a whole, we are not able to accept Mrs Duff's account of

this conversation, although we have no doubt that she subsequently recounted it to Mrs Slater in the terms described by the latter. We formed the view that there could well have been an element of mischief-making in what Mrs Duff said to Mrs Slater about that.

So we come to the actual selection of Mrs Bennett in the context of these events and the background outlined.

Both Mr Jones and Mr Hobbs were at pains to emphasise to the Tribunal the importance they attached to trying to employ someone with a friendly and outgoing personality.

The essence of Mr Jones' evidence in the end was that he chose Mrs Bennett originally because of her "bubbly personality" and because of her prior experience in a bakery (although he had no details of what that had been). It was a question of personality and experience. Otherwise he felt Mrs Bennett and Mrs Slater were "on a par". He said it was a very hard decision to make and one he did not make lightly. He was also somewhat influenced by Mrs Bennett's confidence - which he expressed as being reflected in her statement that "I can do the job" as compared to Mrs Slater's statement that "I think I can do it".

In a rather profound understatement, he conceded in cross-examination that "maybe I did not know enough about Mrs Slater when I made the decision" but he nonetheless maintained to the

end that even knowing what he does now about both applicants, he would still decide the same way. Likewise he has adamantly maintained throughout that race played no part in the decision.

We found Mr Jones' evidence as to the reasons for the brevity of the initial interview, his failure (at various stages) to notify Mrs Slater of the outcome of her application and the actual selection of Ms Dorman and finally Mrs Bennett instead of Mrs Slater quite unconvincing.

We pause to briefly consider the law.
For a complaint of racial discrimination to be made out the Act requires proof that less favourable treatment was accorded "on the ground of" the Complainant's race. Here, therefore, Mrs Slater must show the fact of her Aboriginality had a proximate bearing on the decision not to offer her employment and had a causally operate effect on that decision (see Director General of Education v Breen (1984) EOC 192-015 per Street CJ and Clarkson v The Governor of the Metropolitan Prison and Another (1986) EOC 92-153.)

Furthermore, the act which constitutes discrimination must be shown to be advertent and done with knowledge of the relevant characteristic, that is, in this case, the Complainant's Aboriginality - see Jamal v The Secretary Department of Health and Another (1988) EOC 92-234. However, as Samuels JA said there, speaking of discrimination on the ground of physical impairment under the New South Wales legislation

> "This does not mean that the actor must be influenced by affirmative animus to use Marshal J.'s phrase in Alexander. Governor of Tennesee el al. v. Choate et al. 469 U.S. 287 (1985), or that proof of discrimination in Pt IVA requires an element of malice in the ordinary legal sense of the intention to do something unlawful. Discrimination is the label which the Act attaches to certain kinds of conduct which may be motivated by want of compassion or lack of understanding, or by ignorance or apathy, or by brutality, hostility or prejudice. The Act does not concern itself with motive nor does it make discrimination under Pt IVA depend upon proof of some deliberate intent to injure the prospects or deny the aspirations of the physically handicapped."

In our evaluation of the evidence and determination of the probable course of events generally we thought an appropriate starting point to be to try to ascertain the chronological order of events. That was not as easily done as it should have been. The Respondent in particular could reasonably have been expected to produce definite evidence of such events as the dates of commencement or termination of the employment of particular people. However, the evidence overall on these matters was unsatisfactory and confusing.

It seemed to be common ground that Mrs Duff told Mr Jones in late November 1988 that she wanted to leave her job. She said she told Mrs Slater of the situation and invited her to consider applying in December sometime, she thought, and that Mrs Slater's interview with Mr Jones occurred at the end of November or the beginning of December. That is what was asserted in the Points of Claim (paragraphs 5 and 7) filed on 1 March 1990. In the Respondent's Points of Defence dated 19 March 1990, on the other hand, it was claimed (at paragraph 7) that Mrs Slater applied on or about 23 December. That however,

cannot be correct because on Mr Jones' evidence Mrs Slater had applied before both the advertisement appeared (which it did on 16 December 1988) and Mrs Dorman applied (which is logical since she responded to the advertisement).

Witnesses had difficulty recollecting when Mrs Slater had her "interview" with Mr Jones. He thought it was only a day or so before the advertisement appeared and was "possibly" on Monday 12 December. Mrs Duff and Mr Slater both said the advertisement appeared a couple of weeks after the interview. We think it unnecessary to resolve this specifically, it is enough to find (as we do) that the interview was at least several days and possibly up to a couple of weeks before the advertisement appeared on 16 December 1988.

The Respondent's Answers to Request for Information (dated 8 June 1990 and sworn by Mr Hobbs) stated that Ms Dorman's oral application for employment was made on 20 December (A6(i)(a)). Although in its Points of Defence the Respondent said her two week trial employment did not commence until 28 December (paragraph 8(a)), in evidence Mr Jones said he thought her two week trial ended on 29 December and clarified that with the observation that it was one week before and one week after Christmas. He said her employment was terminated on 5 January 1989 (the same day he began his holidays) and that Mrs Bennett started her two week trial on 9 January 1989.

As to the conversation between Mrs Duff and Mr Jones the former

said that occurred a couple of weeks after the advertisement and a similar time after Mrs Dorman had done her two week trial. It was common ground that the Jones/Duff conversation occurred either at or towards the end of Ms Dorman's trial period (which is likely because the purpose of it was for Mr Jones to ascertain how Mrs Dorman had performed). And that it must have been after Mrs Bennett had applied because both Mr Jones and Mrs Duff say he told her then he had decided to employ Mrs Bennett on a trial basis.

Of course it was Mrs Duff's account of that conversation to Mrs Slater which was the catalyst for the latter's complaint to the Commission. That was dated 29 December 1989.

Thus, the assertion in the Respondent's answers (6(ii)(a)) that Mrs Bennett applied "approximately" on 29 December cannot be correct unless taken as a substantial approximation.

There are other aspects of the evidence as to the chronology which necessitate careful consideration. We shall not pursue them further here. Suffice to say, that on the evidence as a whole, we find the most likely chronology and course of events was as follows:-

Mrs Duff advised Mr Jones in middle or late November 1988 that she wanted to leave the job. He told her to try to find someone else. She was unsuccessful. She discussed it further with Mr Jones and indicated she was prepared to continue work

part-time if that would make things easier. She mentioned it to Mrs Slater on that basis in early December 1988.

Mrs Slater saw Mr Jones at least several days and possibly a couple of weeks before 16 December. The position was advertised in the "Brookton News" on 16 December. Mrs Dorman applied on Tuesday 20 December and must have commenced her two week trial employment almost immediately. Towards the end of that period Mr Jones spoke to Mrs Duff about it; by then, Mrs Bennett had applied. Mr Jones had thought about it sufficiently to be able to tell Mrs Duff on that occasion that he proposed to employ Mrs Bennett on a two week trial. That conversation must have occurred not later than the week commencing Monday 26 December because Mrs Slater's complaint to the Commission (which was prompted by what Mrs Duff told her of that conversation) was made on Thursday 29 December.

At that stage Mrs Dorman was still actually employed although Mr Jones had decided to terminate her employment and employ Mrs Bennett on trial. He in fact terminated Mrs Dorman's employment on 5 January 1989 and employed Mrs Bennett to commence on 9 January. Mr Jones returned from Holidays on 19 January and confirmed Mrs Bennett in the position from 23 January 1989.

Before turning to our general conclusions on the evidence we make the following observations.

Mrs Slater and her husband were very impressive witnesses. Certainly, Mrs Slater was obviously motivated by what she regarded as a justified sense of grievance. But in our view that did not affect the accuracy of her testimony. In the witness box she and her husband both gave evidence with restrained dignity, and if anything, tended to understate the events and reactions they described. We have no hesitation in accepting their evidence.

For financial reasons it was the policy of the Board to try to fill positions by employing Juniors. It was also long standing policy to employ staff from among the local families, that is, people from the local community and desirably who were known to the members of the Board.

Although Aboriginals comprise 40% of the population of Brookton no senior Aboriginal person had ever before either applied to, nor been employed by the Co-op.

Mrs Bennett was a newcomer to the district.

Mrs Slater had been born there, as had her father and the rest of the family.

By the time Mrs Slater applied Mrs Duff's initial attempts to find a replacement had been unsuccessful and Mr Jones and the Board were very worried about the position.

It was apparent from the evidence of both Mr Jones and Mr Hobbs that the former had consulted quite closely with the Board (although not necessarily at formal meetings) over the pending vacancy and the various applicants for it. Mr Jones insisted that he did consult with the Board, that he kept it fully informed at all times and he did discuss Mrs Slater and Mrs Bennett with the Board. He maintained, significantly, we thought, that the fact that Mrs Slater was Aboriginal played no part in the decision. He said it was never a consideration. On the other hand, although in evidence in chief Mr Hobbs had told the Tribunal the fact that Mrs Slater was of Aboriginal descent was not discussed at all by the Board, his subsequent testimony contradicted that. He said that it was unusual for a senior Aboriginal woman to have expressed an interest in employment at the Co-op. He conceded that no Aboriginal senior had ever applied before, that no Aboriginal had ever been offered a position over the whole period (22 years) he was a member. He agreed it was quite a significant thing for the Co-op to know there was an application from a senior Aboriginal person and it would have been a significant event for the Co-op to actually appoint an Aboriginal senior because it would have been the first time. In short, he said, the Board appreciated these considerations at the time, and he commented "I think it fair to say that we were ... we realised that that would have been a very significant step to take and we would really be stepping into unknown territory".

Against this background and on a consideration of the evidence

as a whole we conclude that the most probable explanation, in fact, for the whole course of Mr Jones' dealings with the Complainant and ultimately of her non-selection for employment, even on a trial basis, was that from the outset he (and indeed the Board) did not wish to employ an Aboriginal senior unless there was literally no other choice. In short, we are satisfied on the balance of probabilities, that a very strong (if not the principal) ground for the decision not to select her was the fact that she was Aboriginal, and that had a notional white person with an otherwise similar background and in otherwise similar circumstances applied she would have been given the opportunity of at least a two week trial period of employment.

Mrs Slater was rejected without any enquiry as to her ability to perform her work; without any enquiry about her past employment history, personal references or the like; despite the fact that Mr Jones had absolutely no qualms about her integrity and honesty (and indeed professed himself quite satisfied in that regard); without the courtesy of a proper interview and without any advice on the progress or outcome of her application.

The Respondent called a body of evidence to support the proposition that Mr Jones had never displayed any racist attitudes and had never behaved in a racist manner and that he treated all people equally regardless of race.

In addition to Mr Hobbs, witnesses who gave evidence to this effect were Mrs Rae White, a teacher at the Brookton District High School, and Mr Kim Mills a local farmer.

Mrs White is responsible for the placement of Year 10 students for work experience. The Brookton Co-op is on the list of employers who had volunteered to take such students. The list is made available to the students who then express a preference. Since 1983 three children have been placed at the Co-op, two of them were Aboriginal. Mr Jones has never expressed any preference for non-Aboriginal children. Mrs White has received no complaint about his treatment or the Co-op's treatment of the children whilst there. She has been living in Brookton for 27 years. She would be very surprised at any suggestion that Mr Jones' discriminates against people on racial grounds because she has always found him to be "a very fair man".

In cross-examination Mrs White said her only personal interaction with Mr Jones had been through the work experience program and as manager of the store where she does her shopping. He is an acquaintance rather than a friend.

It is apparent the three work experience students were with the Co-op only for a very short time and were not employees in any sense of the word.

According to the Respondent's Answers (paragraph 4) Michelle

Collard was there for five days in June/July 1981; Priscilla Bennell for five days in June/July 1983 and Tammy Bennell for four days from 21-24 July 1986. That two of these students were Aboriginal, in our view, says nothing at all about the employment practices of the Co-op.

Mr Mills has lived all his life in Brookton apart from his school years. He is a member of the Board of Directors of the Co-op. He is also a Justice of the Peace, Captain of the Tennis Club, First Aid Officer for the Football Club and the local Father Christmas. As a farmer he has only one permanent employee, but employs casual labour as required. About half the casual labourers would be Aboriginal. He also comes into contact with Aboriginal members of the community through the football team, about half the members of which are of Aboriginal descent. One of his responsibilities as a JP is to sit on the Children's Court and the Court of Petty Sessions. In evidence in chief he said that in his capacity as JP he would regularly come across members of the Aboriginal community and parents of Aboriginal children with whom he may deal.

In his opinion, his relationship with the Aboriginal community is good and he would expect that those members of that community closer to him would confide in him if there was something bothering them. He has never heard any suggestion that Mr Jones discriminates against Aboriginals.

In similar vein Mr Hobbs said he had never heard of any

complaint of racial discrimination against Mr Jones and he would certainly have expected to if the latter had been treating Aboriginal's as alleged by Mrs Duff. He explained that there is no racial discrimination in the Co-op's business policies. For example the prohibition against extending to credit applies to everyone regardless of race. Likewise the rules in relation to the opening of an account at the Co-op or the same for all. Any person who complies with the criteria can open an account. The criteria are that the applicant must be a business person or have a business or substantial assets. It is not open to wage earners. The applicant must also purchase 100 shares in the Co-op and meet a credit check run by the Board. Mr Scott specifically put to Mr Hobbs in examination: "the manner in which the Board assesses potential account holders-is any of the criteria related to race?" to which Mr Hobbs replied "no - definitely not". We think this answer in the context reflects precisely the same lack of appreciation of the affect of indirect discrimination as in our view permeated the whole course of Mr Jones and the Board's dealings with Mrs Slater's employment application.

In cross examination Mr Hobbs initially said there would probably be eight or nine Aboriginal people whom he would describe as close friends. Of those his closest friends he would see sometimes quite often during the football season and such like. It could possibly range from every day to as infrequently as once in six months. When pressed he acknowledged that in terms of close friends with whom he would

go out socially there would be no Aboriginals. But if it was to "stop and have a chat to them" he would say about 10% of his friends were Aboriginal.

We mention this evidence because once again it seemed to us to reflect a perception on the part of the white community (of which the Respondent's witnesses were no doubt representative) of equality, integration and harmony which, while it may be honestly held, may or may not be quite misconceived in fact.

Racial discrimination covers a spectrum of actions ranging from individual overt acts of oppression against members of minority groups to institutional and covert actions which involve the structural relations between racial groups. Individual racism is normally considered to involve intended actions while institutional racism is built into the social, economic, political, and cultural relations between minority and majority groups. By the term "institutional discrimination" we refer to the often unintentional consequences of policies and practices which negatively affect the members of a minority group.

In our view, and for reasons which are explained below, this case does involve racial discrimination falling towards the 'institutional' end of the spectrum. Apart from Mrs Duff's evidence, we have no reason to believe that Mr Jones was known for his racist attitudes. Indeed, as noted above, the Respondent's witnesses believed that his behaviour was exemplary. Against this, however, were the considerations to

which we have already referred, including the fact that the Brookton Co-op had never employed an Aboriginal senior. Furthermore, when Mrs Slater did apply, her treatment was so peremptory that one gains the impression that she almost did not exist in the eyes of Mr Jones. Obviously something is wrong, something that may best be explained in relation to the institutional (structural) relations between the Aboriginal and non Aboriginal people in Brookton, as a microcosm of wider Australian relationships.

The negative outcome for Mrs Slater has, we think, two broader antecedents both of which are anchored in institutional racism: first, the social/cultural relations between Aboriginal and non aboriginal people in Brookton, and secondly the employment practices that were commonly undertaken in the Brookton Co-op.

Social/cultural relations.

Race relations in Australia and elsewhere are generally characterised by the preference of racial/ethnic groups for their own kind. This leads to a social and cultural separation or distance between the two groups, exemplified by such things as differences in location, separate friendship and marriage patterns, and distinctly discrete networks. Despite the Respondents' evidence that Aboriginals and non Aboriginals met during community events such as sport or choir activities, it was evident that the two groups lived separate social lives. Mrs Duff, for example, was known to live among the Aboriginal community (and as Mr Jones said "tended to associate with those

sort (sic) of people - with the Aboriginal Community"). Mr Hobbs admitted that there was not much 'house to house' visiting between Aboriginal and non-Aboriginal groups, and agreed that there was a social 'divide' in Brookton.

In such circumstances, it is common for the different groups to make 'them/us, 'in/out' judgements and distinctions. While this may be a normal human process, a major problem arises when one group is in a position of power over another. This appears to be the case in Brookton. We know, for example, that the school teacher, the JP, all members of the Co-ops' board of directors, and its manager, were non-Aboriginal. Under such circumstances, the dominant group has the power to retain (and even impose) its view of reality irrespective of that of the minority group. Thus, for example, despite the obviously unequal representation of Aboriginal people in positions of influence and authority, the non-Aboriginal witnesses told the Tribunal that relations within the town were generally good. More specifically, and crucially in this context, the members of the minority group, their situation and wishes, can become almost invisible to the members of the majority group. Mr Jones' treatment of Mrs Slater can best be described as that of a 'non-person' - he did not explain things to her, get back to her, nor, of course, employ her. While this may not have been intended as a racial insult, we have no doubt that he would not have treated a member of his own cultural circle in this way.

Employment practices.

We were told that during its history the Brookton Co-op had never employed an Aboriginal senior even though the ratio of the Aboriginal to non Aboriginal population was in the region of 40-60. This could be explained by the argument that the Aboriginal population was so 'different' from the non-Aboriginal population - in terms of, say, skill or temperament - that they simply were not suitable or did not want the jobs. While it is very likely that the relatively early school leaving patterns that characterise the wider Aboriginal population also prevailed in Brookton, there was no evidence that the sales jobs at the Co-op required tertiary qualifications; indeed, the evidence was that the particular position was unskilled and required no particular qualifications. We were also told that it was the store at which the Aboriginal population regularly did their shopping - it was therefore a familiar environment and one which, on the face of it, should have provided an attractive place to work. (That view is, we think, borne out by Mrs Slater's evidence of the reaction of the Aboriginal community to her own application). Failing evidence of direct, overt discrimination, the reason for the failure to employ an Aboriginal senior over time is therefore likely to lie with the hiring practices of the Co-op.

On this, we were told that the practices were typically informal, often through the recommendation of the person who was leaving the job, that advertising was the exception rather

than the rule, and that Mr Jones would sometimes follow an applicant up through some general inquiries in the community. Under these circumstances, and given the social/cultural separation of racial groups discussed above, the 'job network' is likely to be restricted to the non-Aboriginal community. Intentional or not, it remains a closed shop, and minority group members are debarred access from its workings.

It was, we believe, under these circumstances that Mrs Slater, through her friendship with Mrs Duff, made, as it were, an unprecedented breakthrough in applying for a job. (Her feelings after the 'interview' are testimony to the ambiguity of the situation - on the one hand she could see that she was perfectly competent to do the job, and on the other she sensed the underlying reluctance of Mr Jones and thought that she might not be successful because of her Aboriginality). As Mr Slater said in his evidence, Aborigines learn to become very sensitive to all forms of racism.

Mr Jones' treatment of Mrs Slater can best be described as a variation on a theme.

In the main, he continued the informal practices that had almost certainly contributed to the exclusion of Aboriginal people in the past. Assuming (quite incorrectly) he knew all about her, he gave Mrs Slater perhaps a minute of his time. Under such circumstances, the tendency towards 'homo social reproduction' - recruitment in one's own image, on the basis of

some shared social, cultural or ethnic characteristic, is greatly amplified. (It is precisely because of this tendency that Equal Opportunity principles insist on written job specifications, well structured interview panels, written applications etc.) As a result, a minute was enough to establish Mrs Bennett's credentials and suitability (Mr Jones said that he gained the impression that she was of a fitting personality for the job), but not enough to gain sufficient confidence in Mrs Slater.

At the same time, however, events suggest that there was also a sustained reluctance to employ Mrs Slater. At a period when the Co-op was busy (pre Christmas) the possibility of job sharing between Mrs Slater and Mrs Duff (a good employee by Mr Jones' account) was not apparently even considered - a decision which if it had been made would have saved delay and at least some training worries. Instead, the job was advertised, apparently an unusual procedure when an application had been made, without specifying that (as was maintained in defence) it was a junior that the management really wanted. And finally, when the junior who was appointed did not work out, the job was offered to a non-Aboriginal senior on the basis of the customary informal procedures. During all of this time, no explanations were given to Mrs Slater. If, as he maintained, Mr Jones intended to employ her had things not worked out with Mrs Bennett, then one would expect him to keep Mrs Slater informed. His failure to do so, suggests that he just did not see her, that she did not cross his horizons as a serious

contender for the job (which returns us to the social/cultural 'distance' referred to above).

On a consideration of the evidence as a whole and having regard particularly to the impressions created by the witnesses whilst giving their evidence, we were left with the view that (on the balance of probabilities) what occurred here was that Mr Jones (and the Co-op) wanted a junior. They would not have minded had the junior been Aboriginal but if they could not have a junior then they wanted a non-Aboriginal senior. It is evident that Mr Jones' initial reaction to Mrs Slater was that he was not interested in employing her. The first option then was to try out the junior. That he did but she was unsatisfactory. We think that had no other applicant been available at that stage he may well have employed Mrs Slater, seeing it literally as a "no choice" situation. Fortuitously however Mrs Bennett had by that time responded to the advertisement. We think that virtually as soon as she applied to him, Mr Jones took the view that he would employ her rather than Mrs Slater and that her "personality" and the fact that she had worked in a bakery before were in his eyes sufficient to justify that choice - in circumstances in which he appreciated he needed some basis on which he could justify not appointing Mrs Slater.

We are satisfied on the balance of probabilities that the non-selection of the Complainant was a decision made by Mr Jones and the Board advertently on the dominant ground (although not necessarily the only ground) of her Aboriginality and that she

was in that way treated less favourably than a non-Aboriginal applicant would have been treated in similar circumstances. We accordingly find the complaint substantiated.

The Complainant is seeking compensation and an apology.

The maximum compensation which may be awarded under the Act is $40,000. The purpose of the legislation is remedial, not punitive (Hall & Ors. v A. & A. Shieban Pty. Ltd & Ors (1989) EOC 92-250). Although awards should be restrained, they should not be minimal because that would tend to trivialise or diminish the respect for public policy (Alexander v Home Office (1988) 1 W.L.R. 968).

It is important to appreciate that any award of compensation must be for loss or damage suffered "by reason of the Respondent's conduct" (which here, of course, includes Mr Jones' conduct(- Section 127(b)(i) of the Act).

In this case, Mrs Slater's deep depression and associated feelings and distress following her conversation with Mrs Duff in the weeks commencing 26 December 1988, were suffered as a result of what Mrs Duff told her specifically, the latter's assertion that Mr Jones had told her he had decided not to employ Mrs Slater because she would be unreliable and likely to leave after a couple of weeks.

As we are not satisfied that Mr Jones said that, it follows

that we are not satisfied it was his conduct which caused that reaction in Mrs Slater.

We approach the assessment of an appropriate award on the basis that she had (correctly) perceived she had been treated badly at the interview with Mr Jones and thereafter by his failure to notify her and was distressed and upset, not so much at not being selected, but rather because she had "not been given a fair go". We accept that the Aboriginal community would have known of and taken a keen interest in her application and that her non-selection occasioned her considerable embarrassment and humiliation,

Thus, excluding from our consideration the depression and other sequelae resulting from what Mrs Duff told Mrs Slater (except the fact that she had not been selected), we think an appropriate award of compensation would be $500.

In addition, we order pursuant to Section 127(b)(iii) of the Act that within 21 days the Respondent send to the Complainant and publish in the "Brookton News" (or some other mutually acceptable community publication) a written apology in terms agreed by the parties. We give the Complainant liberty to apply to this Tribunal for an order stipulating what the terms shall be, if the parties are unable to agree on such terms.

There is no order as to costs, the normal course being for each party to bear his or her own. (Section 128(i)).