JUDGEMENT

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No. 11 of 1990

ROSS JOHN OAKLEY
Complainant

- against -

ROCHEFORT HOLDINGS PTY LTD
First Respondent

and

MICHAEL O'SHAUGHNESSY
Second Respondent

BEFORE: Mr N P Hasluck QC (President)
Ms P Harris (Member)
Mr T Baban (Deputy Member)

Counsel for the Complainant — Ms H Andrews
Counsel for the Respondent — Mr K Pratt

HEARD: 10 & 11 DEC 1990

REASON FOR JUDGEMENT

(Delivered: 26 FEB 1991)

JUDGEMENT

The Complainant, Ross John Oakley claims that the Respondents discriminated against him on the ground of race. The complaint arises out of an incident which took place in the main bar area of the Federal Hotel Kalgoorlie on the 4th September 1989 at which time Oakley was in the company of Andrew Fejo who advances a similar but procedurally separate complaint. Pursuant to directions given by the Tribunal the two complaints were heard together and therefore, in order to avoid confusion, the two Complainants will be described in these reasons by their respective names. These reasons relate to both complaints although final orders in respect of Fejo's complaint will be dealt with on a date to be fixed.

On the 4th September 1989 about 500 people, mostly of Aboriginal descent, marched along Hannan Street, the main street of Kalgoorlie, until they reached the Trilby Cooper Hostel opposite the Federal Hotel. The march had been organised to celebrate Aboriginal day. When the march ended at about 2.45 p.m. most of the marchers went into the hostel to listen to speeches concerning the event being celebrated.

Oakley was one of those who had helped to organise and had joined in the march. He is about 39 years of age and is of Aboriginal descent which is clearly discernible from his facial features and skin colour. He had been brought up in Geraldton and had held various jobs including a period as a Grade Checker on the Mount Newman railway line. He had come to the goldfields about four years prior to the day in question and was working as an Electrical Linesman with the State Energy Commission.

According to Oakley the Hannan Street march was peaceful and orderly.

The purpose of Aboriginal Day and the march was "for Aboriginal people to remember their past; remember who they are and where they've come from". After the speeches were over, he and his friend Andrew Fejo left the hostel and walked across the street to the Federal Hotel which stands at the top of Hannan Street. The hotel is reasonably close to the mining area known as the Golden Mile and it appeared to be common ground at the hearing that the front bar, or the main bar area, of the Federal Hotel at that time was frequented by a wide variety of customers. The Second Respondent, Michael O'Shaughnessy, said in evidence that it was a hotel for working men. Oakley had been to the main bar area a number of times before as a member of a local darts team. Fejo, who comes from Darwin, is also of Aboriginal descent, this fact being clearly discernible from his facial features and skin colour. Both men were neatly dressed. At the time they entered the bar it seems that there was still a cluster of people in the vicinity of the hostel across the way, being marchers who had lingered in the area, but, according to Oakley, these people were well-behaved.

Documents submitted to the Tribunal establish that at all material times the Lessee of the Federal Hotel was the First Respondent, Rochefort Holdings Pty Ltd. The Second Respondent, Michael O'Shaughnessy, was a Director of the company and on the day in question was serving behind the bar with the authority of the company. Having regard to his status and close association with the affairs of the company his actions may be said to represent the will of the company. It became apparent from his own evidence that he had many years of experience as a Publican and was familiar with the standards of dress, conduct and language which customarily prevail in the public bar area of a hotel such as the Federal Hotel. The Tribunal pauses to note that the Federal Hotel is now under new

management and therefore any observations contained in these reasons do not necessarily reflect upon the way in which the hotel is presently run.

The Federal Hotel stands on the corner of Hannan Street and Outridge Terrace. The room comprising the front bar has a centrally situated curved counter behind which is a central island containing bottles and glasses. A door and hatch behind the counter provides access to the residential facilities of the hotel. The front bar has two entrances. Oakley and Fejo entered by the Hannan Street entrance. O'Shaughnessy was serving behind the bar at the time. He said in evidence that he was not aware that a march was to be held that day but shortly before Oakley and Fejo arrived he had noticed a number of Aboriginal people outside the hotel and a police car and thought that there must have been an incident. He had also seen some Aboriginal people in Outridge Terrace misconducting themselves. He agreed under cross examination that Oakley and Fejo, having entered from Hannan Street, would not have noticed this latter group.

O'Shaughnessy agreed under cross examination that he "knew" Oakley, the inference being that he identified him as a customer of the hotel or person who had visited the front bar on previous occasions. It is common ground that Oakley and Fejo ordered and were served with a glass of beer each. There were about half a dozen customers in the bar including Roy Carry who at that time was a resident at the hotel. Apart from Oakley and Fejo there were no Aboriginal people present. The newcomers took up a position about mid way down the bar with Carry being not far away. They sat quietly enjoying their drinks.

Oakley and Fejo had been in the bar for about five minutes or so when

Oakley's brother-in-law Dion Meredith entered. He too was dressed neatly and joined the others so that the three men were sitting up at the bar in a line. Meredith ordered a squash.

There is a dispute as to the exact sequence of events which then followed. According to Oakley, a short time after Meredith arrived a young Aboriginal man called Brenton Taylor entered the bar. Oakley described him as "a young bloke with a full moustache who looked older than eighteen years." Taylor asked for a beer but this request was refused by O'Shaughnessy who said that he was too young and had to get some "ID", the modern vernacular for identification papers. Oakley didn't hear the reply but whatever it was it seemed to annoy O'Shaughnessy. Taylor left. Oakley said that an Aboriginal man named Robinson then entered the front bar accompanied by Lisle Walker. Robinson was wearing boots, jeans and a red flannel shirt with the sleeves cut off. Robinson ordered two cans of beer but this request was refused by O'Shaughnessy. Robinson was told "to get some decent clobber on." Robinson began to argue the point and the case for the Complainant was that at some stage during this exchange Meredith intervened and queried O'Shaughnessy's right to refuse service. According to Oakley, O'Shaughnessy then said "you can all fuck off" making it clear that the comment applied to all Aboriginal people present including Oakley and Fejo who were merely onlookers. O'Shaughnessy went on to say "you're a mob of bludgers bludging on my taxes."

Oakley said in evidence that at about this time he asked for another beer to test the willingness of O'Shaughnessy to serve him but he could not be certain that O'Shaughnessy heard the request. O'Shaughnessy had retired to the central island behind the counter with arms folded and was waiting for

Robinson and the others to leave. Oakley said to those near him "let's go". Whereupon the Aboriginal people left the bar.

Oakley said that he left quietly because he was not prepared to get involved in a quarrel with the Barman that could turn into a fight, but he was "fuming and boiling up inside." As Oakley put it in evidence,

> "It really humiliated me. I still can't look at this bloke over here ... He knows I go there to play darts once every so often - because I'm in the darts competition - and when I go there he takes my money then and, he doesn't say hello or anything but on this particular day he took my money and then he kicks me out of my hotel just because I'm an Aboriginal."

Immediately following his eviction, in the street outside the Federal Hotel, Oakley happened to meet Murray Stubbs from the Aboriginal Legal Service. Stubbs gave evidence and corroborated Oakley's state of upset. It was Stubbs who suggested that Oakley lodge a complaint with the Equal Opportunity Commission.

Oakley's version of what happened differed from O'Shaughnessy's account in some respects. According to O'Shaughnessy the exchange with Robinson preceded the exchange with Taylor. O'Shaughnessy said that Robinson's hair was matted and his shirt front unclean. O'Shaughnessy refused the request for service by saying "get some decent mocker on and spruce yourself up a bit and I will serve you." Taylor then joined "the group" and was told to come back when he could prove he was old enough. O'Shaughnessy said that Taylor then called O'Shaughnessy "a white racist cunt". O'Shaughnessy became agitated and told him to "fuck off". Meredith intervened to say that O'Shaughnessy was obliged to serve the customer. O'Shaughnessy told Meredith to fuck off too. According to O'Shaughnessy Meredith then up-ended his glass of squash whereupon O'Shaughnessy told the entire group to

"fuck off". O'Shaughnessy conceded in cross examination that his requirement applied to all the Aboriginal people present including Oakley and Fejo even though they had not caused any trouble or intervened in the argument.

O'Shaughnessy denied that he had any policy of refusing service to Aboriginal customers. He recognised an obligation under the Liquor Act to serve all customers. His only policy, being more a long standing practice than a policy, was that when trouble started all members of the group concerned should be evicted as a means of forestalling further trouble. In this case, he told all the Aboriginal people in the bar to "fuck off" because they all appeared to be part of a group that was causing trouble and starting to get out of control - one member of the group had refused to leave, one had called him a white racist cunt and a third was telling him how to run his pub. When asked who his remark was directed to when he said "you can all fuck off" he replied "Well, I was basically talking to Meredith but I did infer, I suppose, that that whole group that were together - that they should all fuck off". Referring expressly to Fejo and Oakley he said later in his evidence. "They were part of a group that were causing trouble and there was a situation arising there that I couldn't handle so they all go. It's as simple as that".

The evidence given by O'Shaughnessy was partly corroborated by Roy Carry who was sitting at the bar. Carry agreed that Oakley and Fejo arrived first. His recollection was that Robinson arrived looking untidy and was refused service. This was followed by the altercation with Taylor and Meredith as described by O'Shaughnessy whereupon O'Shaughnessy said: "you can all get out".

Andrew Wright who was passing through the reception area overheard O'Shaughnessy telling a customer to get some decent mocker on. Wright came to the hatch leading to the bar and then heard a new customer call O'Shaughnessy a white racist cunt. He saw an Aboriginal man upend a glass of squash and heard O'Shaughnessy telling them that they could all fuck off.

Before addressing the differences which emerge from the conflicting testimony it will be useful to identify the undisputed facts. It appears to be common ground that Oakley and Fejo entered the bar together. As to the Aboriginal customers who arrived subsequently, putting aside for the moment the order of arrival, Oakley had a slight connection with Meredith but Oakley and Fejo had no connection with Robinson and Taylor other than that they were all people of Aboriginal descent. O'Shaughnessy considered or came to consider that the Aboriginal people in the bar were "a group". The instruction to "fuck off" applied to all Aboriginal present people including Oakley and Fejo. Prior to that instruction being given Oakley and Fejo had caused no trouble and had not participated in any of the verbal exchanges that had upset the Publican. Although Oakley may at a later stage have arguably allied himself with those involved in the exchanges, namely, Robinson, Taylor and Meredith, by asking for another beer, so that on one view of the matter the Aboriginal people present could be regarded as a "group" momentarily unified by a common cause or interest, this action did not occur until after the instruction to "fuck off" had occurred. The only grounds O'Shaughnessy had for treating Oakley and Fejo as troublemakers was that they formed part of a group consisting of Oakley, Fejo, Meredith, Robinson and Taylor.

Against this background the Tribunal now turns to the issues raised by the pleadings filed on behalf of the parties.

Section 36 (1) of the Equal Opportunity Act 1984 ("the Act") provides that:

> "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 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 circumstance, 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."

Section 45 provides that:

> "It is unlawful for a person (in this Section referred to as the "discriminator") to discriminate against another person (in this Section referred to as the "aggrieved person") on the ground of race:
>
> (a) by refusing to allow the aggrieved person access to or the use of any place or vehicle that the public or a section of the public is entitled or allowed to enter or use, for payment or not;
>
> (b) in the terms on which the discriminator is prepared to allow the aggrieved person access to or the use of any such place or vehicle;
>
> (c) by refusing to allow the aggrieved person the use of any facilities in any such place or vehicle that the public or a section of the public is entitled or allowed to use, for payment or not;
>
> (d) in the terms on which the discriminator is prepared to allow the aggrieved person the use of any such facilities; or
>
> (e) by requiring the aggrieved person to leave or cease to use any such place or vehicle or any such facilities."

Section 46 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 person on the ground of the other persons race:
>
> (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;
>
> (b) in the terms or conditions on which the first mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
>
> (c) in the manner in which the first mentioned person provides the other person with those goods or services or makes those facilities available to the other person."

By Section 4 the term "race" includes colour, descent, ethnic or national origin or nationality. By Section 5 the doing of an act by reason of a particular matter includes a reference to the doing of an act by reason of two 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 contains references to the principle of vicarious liability. Thus, Section 161 provides:

> "(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 of 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."

Section 162 provides that:

> "(1) where for the purpose 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."

Section 160 provides that a person who causes, instructs, induces, aids, or permits another person to do an act that is unlawful under this Act shall for the purposes of this Act be taken also to have done the act.

In looking at previously decided cases, the Tribunal notes that in Bear v Norwood Private Nursing Home (1984) EOC 92-019 at para 75477 it was said in regard to a complaint of discrimination on the ground of sex that in order for there to be discrimination against a person it is not necessary that a person of the other sex be a reality, it is enough that there be merely a comparison with a notional person of a different sex. In other words, the statutory provisions allow for a comparison to be drawn between the situation of the Complainant and the situation of a notional person in the same or a not materially different set of circumstances.

The Tribunal now returns to the facts of the present case, and, in doing so, notes that in his Points of Claim Oakley relies on Sections 45 and 46 of the Act and alleges that having regard to Section 161 the First Respondent, Rochefort Holdings Pty Ltd, by its agent the Second Respondent, Michael O'Shaughnessy, discriminated against the Complainant on the grounds of race in that he treated the Complainant less favourably than he would have treated a person not of Aboriginal descent in circumstances that are the same or not materially different contrary to Sections 45 and Sections 46 of the Act. The allegation is that O'Shaughnessy on behalf of the company made derogatory remarks to Oakley and Fejo, refused to serve Oakley a further drink and ordered Oakley and Fejo from the premises without

reasonable cause. It is alleged that in the circumstances under notice persons not of Aboriginal descent would not have been treated in the manner just described in respect of any of the three matters specified.

In paragraph 8 of their defence the Respondents plead that the Complainant was not treated less favourably than he would have been treated had he been a person not of Aboriginal descent in circumstances that were the same or not materially different from those circumstances which existed at the hotel on the 4th September 1989. The Complainant was treated in the same manner as any other person would have been treated in the circumstances which existed at the hotel on the 4th September 1989. In other words, although there are differences between the parties on matters of detail and as to what words were said during the course of the verbal exchanges, it appears to be accepted by the Points of Defence, and by the way in which the case was presented on behalf of the Respondents at the hearing, that the outcome of the altercation resulted in Oakley and Fejo being ordered to leave the premises. The thrust of the defence is, however, that this was not due to their race but due to the manner in which they had conducted themselves. It is contended that two white drinkers would have been treated in the same way if it appeared to the barman that they formed part of a group of troublemakers.

Before turning to the three specific matters which are said to constitute the unlawful discrimination it will be useful to look at the situation in a general way. The Tribunal notices immediately that O'Shaughnessy did not use language which explicitly referred to the race of those ordered from the bar and did not say expressly that he was ordering them from the bar on the grounds of their race. However, that is not the end of the matter. It

is necessary to examine the evidence with a view to determining what factors influenced his actions. A critical question here is the basis on which O'Shaughnessy decided that Fejo and Oakley formed part of the group that was causing him trouble. Even if his evidence about the sequence of events were to be accepted in its entirety, the Tribunal would find it difficult to accept that a Publican of O'Shaughnessy's experience would have ordered out of his bar two white drinkers who had happened to be close onlookers of the altercation between him and Meredith, Robinson and Taylor. At the point at which he told them all to "fuck off", the only basis on which he could have linked Oakley and Fejo to those involved in the altercation was because they, like the customers involved in the altercation, were Aboriginal people. This leads the Tribunal to conclude that one of the factors influencing O'Shaughnessy to act in the manner he did was their racial characteristics. The major if not the sole factor which connected them as a group in O'Shaughnessy's mind was that they were Aboriginal people. In essence, then, Oakley and Fejo were treated unfavourably not because of anything they did but because they were perceived as belonging to an Aboriginal group causing trouble and with potentiality to cause disruption.

The Tribunal now turns to specific issues. The Tribunal finds that O'Shaughnessy did make derogatory remarks concerning Oakley and Fejo by referring to them and those he thought to be their companions as bludgers. The Tribunal is satisfied that these remarks were made with the implication that Aboriginality was associated with 'bludging'. As such, they reflected popular prejudicial attitudes towards Aboriginal people, and carried an implied racial insult. As to the second specific matter, on the evidence, the Tribunal is not able to make a finding that O'Shaughnessy refused

Oakley's request for a further drink because it is not clear from the evidence that he heard this request. The indications are that he probably would have refused to serve a further drink but in the absence of clear evidence that he heard the request a finding that there was a refusal cannot be sustained. As to the third specific matter, namely, the requirement that Oakley and Fejo leave the front bar, it follows from observations made earlier that this instruction was given pursuant to a misconceived perception that Oakley and Fejo formed part of a group of Aboriginal troublemakers. The Tribunal is satisfied that the decision to evict amounted to an act of discrimination because a notional pair of white drinkers, who were close to the altercation but essentially passive onlookers, would not have been treated in that manner. Thus, within the language of the Act Oakley and Fejo were treated less favourably than a person not of Aboriginal descent would have been treated. The comparison to be made is not between how a Publican such as O'Shaughnessy would have treated a notional group of white drinkers and a notional group of Aboriginal drinkers where there was some likelihood of trouble developing but a comparison between the case of two notional white drinkers who are merely onlookers when an altercation occurs.

On this view of the matter it becomes unnecessary to determine whether provocation was offered to O'Shaughnessy by Robinson and Taylor in arguing about the refusal of service and, in Taylor's case, going on to call O'Shaughnessy a white racist cunt. Even if those words were said by Taylor so as to create a state of justifiable annoyance on O'Shaughnessy's part, owing to the extremity of the language used, this would not have formed a basis for O'Shaughnessy to order Oakley and Fejo as passive onlookers off the premises. It is unlikely that he would have done so, even in

circumstances of extreme provocation, had they been white drinkers who were not involved in the altercation. However, in any event, should it be thought necessary to resolve that evidentiary issue, the Tribunal does not accept that the words were used by Taylor as alleged. The Tribunal is satisfied that the decision to evict occurred after a comparatively minor altercation concerning the age of one of the drinkers and standards of dress and, as the barman's derogatory suggestion that those in the group were bludgers indicates, the decision was arrived at by reference to matters other than the immediate altercation, one such matter being the race of the customers in question. By Section 5, the doing of an act by reason of a particular matter includes a reference to the doing of an act by reason of two 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.

It follows from the observations set out above that the Tribunal is satisfied that Michael O'Shaughnessy, a Director of and a barman employed by the Respondent company, discriminated against Oakley and Fejo by making derogatory remarks to them and by ordering them from the bar without reasonable cause. The company is responsible for the acts of its servant. The Tribunal is not satisfied that O'Shaughnessy refused to serve Oakley a further drink. The source of Oakley's distress was the fact that he had been kicked out of the hotel because he was an Aboriginal person.

This brings the Tribunal to the question of relief. Oakley claims compensation. Section 127 (b) (i) of the Act provides that after holding an enquiry, if the complaint is substantiated, the Tribunal may order the Respondent to pay to the Complainant damages by way of compensation for any

loss or damage suffered by reason of the Respondents conduct. By Section 127(b)(iii) it may order the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the Complainant.

A number of decisions bear upon the way in which these provisions should be interpreted. In Hall and Others v A and A Sheiban and Others (1989) EOC 92-250, a case concerning sexual harassment, the full Court of the Federal Court, indicated that the purpose of the legislation is remedial not punitive. Lockhart J suggested that although it cannot be stated in all claims for loss of damages arising from discrimination, the measure of damages in tort is the closest analogy. One should compare the position in which the Complainant might have been expected to be if the discriminatory conduct had not occurred with the situation which he or she was placed by reason of the conduct of the Respondent.

In Alexander v Home Office (1988) 1WLR968 the Court suggested that although the damages to be awarded should be restrained in quantum having regard to the difficulty of assessing the monetary value of injured feelings, the awards made should not be minimal because this would tend to trivialize or diminish the respect for public policy.

In Holmes and Others v Donhardt (1989) EOC 92-270 the facts concerned the refusal of service to people of Aboriginal descent in a hotel in Port Augusta. The damages were awarded from a single course of events as opposed to the case of Hall v Sheiban (Supra) which concerned a number of incidents in an employment situation.

Further, the Human Rights and Equal Opportunity Commission has recently handed down decisions relevant to the present case. On the 13th December 1990 Commissioner Kevin O'Connor awarded compensation of between $1,000.00 and $1,200.00 to seven Aboriginals who were refused service at two Mareba Hotels, the Royal and the Graham. He also directed that public apologies be published. As to the Royal Hotel, in handing down the relevant decisions, Commissioner O'Connor noted that he was satisfied that in February 1990 a barring policy was in place at the Royal Hotel which was racist and was directed against Aborigines and blacks in general including Torres Strait Islanders.

In the present case, the Tribunal is not satisfied that a policy of refusing service to Aboriginal customers was in force at the Federal Hotel under the supervision of Michael O'Shaughnessy on the 4th September 1989. Indeed, the initial service of drinks to Oakley and Fejo stands in the way of such a finding. It appears to the Tribunal that the derogatory remarks and the ordering of the Complainants off the premises was as a consequence of a fit of anger and annoyance rather than as a result of a conscious policy of discrimination. Nonetheless as appears from the reasoning set out above, the peremptory conduct of the Publican amounted to discrimination and this must be taken into account when estimating the hurt to feelings and embarrassment endured by the Complainants. As a result of findings made by the Tribunal, the Complainants are entitled to relief.

Relief in respect of Fejo's complaint will be dealt with on a date to be fixed.

Oakley gave evidence, which was corroborated by the witness Stubbs, of

being deeply upset and enduring humiliation and loss of sleep for several days later. He was a quietly spoken man and obviously not accustomed to having to give an account of himself in a public forum. He said in evidence that he experienced a deep sense of humiliation and this was partly related to the fact that the incident occurred after the Aboriginal day celebration, an event which was intended to improve the standing of Aboriginal people by reminding them and others of their past and of their place in the community. Against this background the Tribunal looked closely at the question of whether the Respondents should be required to make a public apology to the Complainant as was required of the parties held responsible for implementing a refusal of service policy in the cases referred to earlier concerning the two Mareba Hotels. However, being aware that the Federal Hotel is no longer controlled by the Respondents, and having found that the discrimination arose out of a momentary altercation, the Tribunal considers that in the circumstances of the present case an award of damages in the sum of $800 is the appropriate form of relief. Such an award provides compensation for the injury inflicted and operates as an apology does by clearly placing the burden of fault on the shoulders of the wrongdoer. At the moment of transgression O'Shaughnessy was both a director of the First Respondent and an individual responsible for his own actions. The Tribunal therefore directs, having regard to the principles of vicarious liability referred to earlier, that the Respondents shall be jointly and severally liable for an award of damages in favour of Oakley in the sum of $800.00.