JUDGEMENT

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No. 14 of 1991

DAVID RILEY
Complainant

- against -

KLK INVESTMENTS PTY LTD
Respondent

BEFORE: Mr N.P. Hasluck Q.C. (President)
Ms P. Harris (Member)
Ms L. Newby (Deputy Member)

Counsel for the Complainant - Ms P. Hogan
Counsel for the Respondent - Mr W. Everett

HEARD: 29th October, 1992.

REASONS FOR DECISION

(Delivered: 22nd December, 1992.)

The Complainant, David Riley, claims that the Respondent discriminated against him on the ground of race contrary to provisions of the Equal Opportunity Act 1984 ("the Act") . The complaint arises out of an incident which took place at the Duke of York Hotel in Narrogin.

In Points of Claim filed on behalf of the Complainant it is pleaded that he is a person of Aboriginal descent and this allegation is admitted by the Points of Defence filed on behalf of the Respondent. The Complainant gave evidence at the hearing. The Tribunal accepts that his Aboriginality would have been readily apparent to the employees of the Respondent mentioned to below.

The Complainant pleaded that the Respondent was at all material times the Licensee of the premises known as the Duke of York Hotel and that Beryl Fullston was employed as Manager of the Hotel. This plea is admitted also.

The Complainant pleads that on the evening of the 7th July 1989, the Complainant was drinking with his spouse and two friends who are all of Aboriginal descent. The Respondent admits this allegation.

The Complainant gave evidence at the hearing in support of the plea. He said he had lived in Narrogin for about twenty-five years, having been at school in the town. He had worked in the shearing business. On the night in question at about 9.00 p.m. he went to the hotel with his wife, his sister-in-law and brother-in-law and two of his nieces. The group of Aboriginal people went into the lounge where there was a bit of dancing going

on and sat at a table. They bought a jug of beer and had some drinks. Shortly before the pub was due to close, the Complainant got up and went to the bar to buy two bottles of beer which he intended to take home.

He said in evidence that as he was standing at the bar ordering the bottles of beer he was approached by a man named Steven Goater who claimed to have been in a fight with the Complainant a few years back. Goater, having referred to that previous connection, then assaulted the Complainant by pushing him backwards. On the Complainant's case the Barmaid went out to get the Manager. When Beryl Fullston appeared in response to the call for assistance, she immediately told the Complainant to leave the premises and ordered the other members of his group to leave with him. In the Complainant's words: "*when she chucked me out, she chucked the rest of them out too.*" His recollection was that at the time of being ordered to leave, Steven Goater was still at the bar and apparently had not been ordered to leave, even though he had been involved in the incident which led to the Barmaid calling upon the Manager to take charge of the situation. The Complainant's perception was that he had been evicted on the ground of his race.

On the following day the Complainant went back to the hotel to discuss the incident with the Manager, Beryl Fullston, but she wasn't prepared to listen to him. According to him: "*she didn't take no explaining.*" She just said "*oh no you're barred...and you're not allowed back.*"

The Tribunal notes that this evidence is reflected in the Points of Claim. The

Complainant pleaded that as a result of the incident involving Steven Goater, Beryl Fullston ordered the Complainant and his group to leave the hotel. On the 8th July 1989, Beryl Fullston advised the Complainant he was banned from the hotel and would not be served again. This plea is admitted by the Respondent in its Points of Defence. It is also pleaded on behalf of the Complainant that Steven Goater was a person of non-Aboriginal descent but he was not required to leave the premises, nor was he banned from the hotel. The Respondent dealt with this pleading by admitting that Steven Goater was a person of non-Aboriginal descent. The Respondent pleaded that after "*the fight*" he departed without being requested to leave the premises. He returned the following day and was told that he was banned from the hotel. The Respondent admitted that it was or could be vicariously liable for the actions of Beryl Fullston but denied that it had discriminated against the Complainant on the ground of his race by refusing him further access to the hotel.

Steven Goater was called as a witness on behalf of the Respondent. He referred to an incident which had occurred about four years prior to the night in question. At that time he had been living at 48 Fox Street, Narrogin and had become involved in an altercation with the Complainant which led to a fight. He said in evidence that on the night of the 7th July 1989 he was standing at the bar when the Complainant came up and started mouthing off and that during that exchange, Steven Goater put up his hand to keep the Complainant back a bit whereupon the Complainant stumbled over. Goater's evidence was that he then left the pub and went home. The next afternoon he went back to the pub and was told that he had been banned. It appears to be common ground that Goater was not told to leave the premises on the night of the 7th July 1989 because he had been

involved in the altercation.

During the course of cross-examination it became apparent that it was a contested issue as to whether the altercation at the bar took place in the manner described by Steven Goater and as to whether he was in fact banned from the hotel on the following day as he contended.

The Manager of the hotel on the night in question, Beryl Fullston, was not called as a witness. The Complainant put in evidence a letter written by Beryl Fullston some months later (date stamped the 20th April 1990) in answer to the Complainant's allegation. In that letter she said that the Complainant was known as a trouble maker. He was banned from the Duke of York Hotel for being a troublesome person. In the letter she says that he instigated the incident in question by being foul-mouthed and totally irresponsible. He approached Steven Goater looking for a fight. The letter makes no reference to Goater being banned from the hotel also, although, when faced with an allegation of discriminatory conduct, that would seem to be a point worth making, if it were so.

It was clear from the other evidence that Beryl Fullston was not present when the altercation at the bar took place and, in making the statements just mentioned in her letter to the Equal Opportunity Commission, she must have been relying upon information provided to her either by the Barmaid or by Steven Goater. No explanation was given as to why Beryl Fullston was not called to give evidence on behalf of the Respondent although obviously her evidence would have been material as to the circumstances giving rise to the decision to evict the Complainant and his associates from the hotel on the night

of the 7th July 1989 and as to what happened concerning the imposition of bans on the following day.

The Tribunal now turns to the relevant statutory provisions. By Section 36 discrimination occurs if, on the ground of the race of the aggrieved person, the discriminator 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 different race. Section 46 of the Act provides that it is unlawful for a person who, whether for payment or not, provides goods or services to discriminate against another person on the ground of race by refusing to provide the goods or services. By Section 161, an institution or employer such as the Respondent in the present case can be vicariously liable for the conduct of its employee or agents. By Section 5, discriminatory conduct need not be the dominant or substantial reason for doing the act complained of.

A review of the decided cases reveals that the Complainant bears the onus of establishing that he or she has been the victim of unlawful discrimination. The case must be proven on the balance of probabilities but, in the absence of direct evidence, the Complainant may use in support inferences drawn from the primary facts, although discrimination cannot be inferred when more probable and innocent explanations are available on the evidence. See Fenwick v Beveridge Building Products Pty Ltd (1986) EOC 92-147; Erbs v Overseas Corporation Pty Ltd (1986) EOC 92-181; Department of Health v Arumugam (1988) VR319; Allegretta v Prime Holdings Pty Ltd (1991) EOC 92-364. It also appears that the Complainant's perception that the action complained of was on the ground of race may be used in evidence. See Scott v Venturato Investments Pty Ltd

(1991) EOC 92-378.

In weighing up the sufficiency of evidence, one must take account of the view expressed in Chamberlain v R (1983) 153CLR521 at 536 that in determining whether inferences may be drawn, the Tribunal was constrained to act on the basis that there can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. Also note the remarks of Anderson J in Ralph M Lee (WA) Pty Ltd v Fort (1991) 4WAR176 that although the Act is social legislation intended to have a benevolent effect that is "*no warrant to construe it so as to give it an operation beyond the meaning that its words naturally bear.*"

The cases also indicate, however, that the Tribunal is entitled to take account of the view reflected in Bear v Norwood Private Nursing Home (1984) EOC 92-019. In that case 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, but merely a comparison with a notional person of a different sex will suffice. 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. That approach has been approved by this Tribunal in regard to cases of racial discrimination. See Chesson v Buxton (1990) EOC 92-295; Oakley v Rochefort Holdings Pty Ltd (1991) EOC 92-352.

Further, in a number of cases it has been held that the relevant statutory provisions are aimed at thoughtlessness and neglect and it is therefore not necessary to establish

deliberately discriminatory conduct for an act of discrimination to take place. All that must be shown to establish an act of unlawful discrimination is a causal connection between the alleged discriminatory act and the circumstances of the complaint. It is not necessary to show a purpose nor intent to discriminate. See Williams v Council of the Shire of Exmouth (1990) EOC 92-296; Jamal v Secretary, Department of Health (1988) EOC 92-234; People living with A.I.D.S. v City of Perth (1992 unreported).

In the circumstances of the present case, where the evidence led at the hearing was narrow in range and not completely satisfactory owing to the absence of the Respondent's Manager, Beryl Fullston, the Tribunal must also take account of a number of general rules and principles bearing upon the conduct of civil litigation.

In Mahon v Air New Zealand (1983) 50ALR193 the Privy Council said at page 200:

> "*Where facts are in dispute in civil litigation conducted under the common law system of procedure, the Judge has to decide where, on the balance of probabilities, he thinks that the truth lies as between the evidence which the parties to the litigation have thought it to be in their respective interests to adduce before him. He has no right to travel outside that evidence on an independent search on his own part for the truth; and if the parties evidence is so inconclusive as to leave him uncertain where the balance between the conflicting probabilities lies, he must decide the case by applying the rules as to the onus of proof in civil litigation.*"

In Cross on Evidence (3rd Aust Ed) at para 1.43, one finds discussion concerning the situation where a party without explanation fails to call as a witness a person whom he might be reasonably expected to call, if that person's evidence will be favourable to him, the principles emerging from the decided cases in that area commonly being termed as "the rule" in Jones v Dunkel (1959) 101CLR298. The learned Author indicates that the

unexplained failure by a party to give evidence, to call witnesses, or to tender documents or other evidence may, not must, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted that party's case. The rule has no application if the failure is explained, for example, by the absence of a witness coupled with a reasonable explanation for not compelling his attendance by subpoena, or by his illness or other unavailability, or by his loss of memory or refusal to waive privilege. But the explanation must be established by evidence and is not merely to be presumed from the passage of time. The significance of the inference depends on the closeness of the relationship of the absent witness for the party who did not call him. The rule only applies where a party is required to explain or contradict something and that depends on the issues in the case as thrown up in the pleadings and by the course of evidence in the case.

Against this background, the Tribunal comes to the circumstances of the present case.

The Tribunal accepted that the Complainant was a reliable witness and prefers his account of what transpired when he approached the bar at the Duke of York Hotel towards the end of the evening on the 7th July 1989 to the description of events given by the other participant in the altercation, Steven Goater. The parties to the altercation seem to accept that there had indeed been a previous incident involving them both some years earlier in Fox Street, Narrogin and this would explain why Goater may have approached the Complainant in a belligerent manner. Goater's explanation as to how it came about, that the Plaintiff stumbled and fell during the course of the altercation, was not convincing. The position seems to have been that the Plaintiff was involved in the altercation, not

through any fault of his own but as a result of Goater's belligerent approach, and it was then that the Barmaid summoned Beryl Fullston, as the Manager of the premises, to take charge of the situation.

The evidence given by the Plaintiff, which the Tribunal accepts, was that Beryl Fullston, without making any real inquiry as to what had happened, preceded to evict the Plaintiff and those associated with him, but without taking any similar action in regard to the other person involved in the dispute. It is material to note that in the letter she wrote to the Equal Opportunity Commission subsequently (date stamped the 20th April 1990 [Exhibit 4]), she spoke of the Plaintiff instigating the incident but there is no evidence to suggest that she could have arrived at a conclusion on the basis of her own observation as to what took place. The Tribunal could reasonably have expected that Beryl Fullston would have been called by the Respondent if she was likely to give evidence favourable to the Respondent to contradict the assertion that she was responsible for discriminatory conduct, but she was not called and no sufficient explanation for her absence was proved. It is true that on the Plaintiff's case she is not said to have used language which explicitly referred to the race of those ordered from the bar and did not say expressly that she 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 her decision to evict. The Tribunal finds it difficult to accept that the hotel Manager would ordinarily have evicted people associated with a drinker who was involved in an altercation. This leads the Tribunal to conclude as a matter of inference from the available facts proved by other evidence, that the Complainant was perceived as one of a group of Aboriginal people. Thus, the Complainant was treated less favourably

than a white drinker would have been treated in such circumstances because he was perceived as belonging to an Aboriginal group which might cause trouble. A comparison between the Complainant's situation and the case of a notional white drinker involved in an incident of the kind described above suggests that the Complainant was treated less favourably than such a drinker would have been treated. This view of the matter is reinforced by the fact that Goater was not evicted from the premises even though the Manager had no means from her own observation of determining which of the two persons involved in the altercation was at fault. The Tribunal finds support for this conclusion in the terms of the letter written by Beryl Fullston (Exhibit 4) and in the fact that she was not called as a witness by the Respondent.

The same reasoning applies to the events of the following day. It is clear from the pleadings that when the Complainant returned to the hotel the following day, Beryl Fullston, as the hotel Manager, told him that he was banned. It follows from earlier discussion that she had inadequate information from her own direct knowledge of what had occurred to justify such a ban but proceeded with the ban nonetheless. The Tribunal accepts the evidence given by the Plaintiff that the conversation between them was brief and peremptory and that she made no real attempt to find out where the fault lay.

The Respondent's case was that on the following day Goater was also told that he was banned and, as both parties were treated equally in that regard, it cannot be said that any liability for discriminatory conduct attaches to the Respondent. The Tribunal is not persuaded to that point of view. This line of argument does not go to the discriminatory conduct which had occurred on the previous evening. Thus, even if the Respondent's

evidence was accepted without reservation in regard to this aspect of the matter, on the finding the Tribunal has made concerning the events of the 7th July 1989 the Complainant's case would nonetheless have been proved to the satisfaction of the Tribunal since, on the balance of probabilities, the Complainant was treated less favourably on the evening in question than a notional white drinker in the same or not materially different circumstances would have been treated, and, more specifically, was treated less favourably than Steven Goater was treated, being the white drinker actually involved in the altercation.

A similar conclusion should be arrived at concerning the circumstances of the following day. Even if the Tribunal accepts that Goater was banned on the following day it appears that the Complainant received the same penalty as the person in default, without any or any sufficient inquiry being made as to the issue of responsibility, and was thus discriminated against and treated unfairly. It is material to note that the manager's letter (Exhibit 4) did not refer to Goater being banned.

The Tribunal is therefore satisfied on the balance of probabilities that the complaint of discrimination against the Complainant on the ground of his race should be upheld.

This brings the Tribunal to the question of relief. The Complainant claims compensation. Section 127(b)(i) of the Act provides that after holding an inquiry, 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 Respondent's conduct. Under Section 127(b)(iii) it may also order the Respondent to perform any

reasonable act or course of conduct to address any loss or damage suffered by the Complainant.

In Hall v Sheiban Pty Ltd (1989) EOC 92-250 the Court suggested that the measure of damages in such cases are analogous to claims in tort. 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 award should not be minimal because this would tend to trivialise or diminish the respect for public policy implicit in the legislation.

In the present case, the Complainant gave evidence as to the humiliation he suffered as a result of being evicted from the hotel in the company of his friends and relatives. He was unable to bring friends to the hotel for a social drink as a consequence of the ban placed upon him. Furthermore, it is material to note that, unlike a number of cases concerning racial discrimination on hotel premises, the incident in the present case was not simply an isolated transaction arising out of events which took place on a single evening. On the day following the initial incident, the Complainant was told quite firmly that he was subject to a ban. The discriminatory conduct of which he complains was repeated and underlined. This second encounter naturally added to his distress. Accordingly, in the circumstances of the present case, the Tribunal finds that the Complainant should be awarded the sum of $1,000.00 by way of compensation. The Tribunal also orders that the Respondent be required to publish an apology to the Complainant in a local newspaper circulating in the district, stating that the Respondent as the Proprietor and party in

control of the licensed premises accepts that the Complainant, David Trevor Riley, was unlawfully asked to leave premises known as the Duke of York Hotel on the evening of the 7th July 1989 and apologises to him for any embarrassment and distress caused as a result of the incident.