JUDGEMENT

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No. 2 of 1992

GLADYS YARRAN and IVAN YARRAN
Complainants

- against -

WESTPAC BANKING CORPORATION
Respondent

BEFORE: Mr N.P. Hasluck Q.C. (President) sitting alone

Counsel for the Complainant - Mr P. Sullivan
Counsel for the Respondent - Mr A. McCarthy

HEARD: 31 March 1992

REASONS FOR DECISION

(Delivered: 21 MAY 1992)

This is a complaint of unlawful discrimination on the ground of race in the provision of services contrary to Section 46 of Equal Opportunity Act 1984 ("the Act"). The Respondent seeks to strike out the complaint pursuant to Section 125 of the Act which provides that:

> " *(1) Where, at any stage of an inquiry, the Tribunal is satisfied that a complaint is frivolous, vexatious, misconceived or lacking in substance, or that for any other reason the complaint should not be entertained, it may dismiss the complaint.*
>
> *(2) Where the Tribunal dismisses a complaint under subsection (1), it may order the complainant to pay the costs of the inquiry."*

By their Points of Claim filed on 27 February 1992 the Complainants plead that on 18 September 1991 the Complainants made application for a small overdraft in the amount of $2,000.00 from Westpac Banking Corporation, being a financial institution which amongst other functions provides overdraft facilities to members of the public who provide security and satisfy certain criteria. These allegations are admitted save and except that the application was made by the male Respondent. Although not expressly pleaded in the Points of Claim it did not appear to be contested that the Complainants are people of Aboriginal descent and that fact is discernible from their appearance. As appears from the affidavit of Brian Johnston, the Manager of the West Perth branch of the Respondent Bank, which was sworn on 30 March 1992 in support of the application to strike out, the Complainants were interviewed by him on the relevant date and he completed a personal loan form containing personal particulars and details of the male Complainant's financial situation.

The Complainants plead that they made a full disclosure of past credit, they are both

gainfully employed, possess assets far in excess of the amount sought as an overdraft facility, bank their entire wages on a weekly basis and offered to have their loan commitment deducted from their weekly wages by means of a stop order payment which they would sign. They say that they supplied documentary evidence of income from the Second Complainant's employer and were persons of mature years who would be unlikely to default. They say further that they were received in a shabby and cool manner and the application was subsequently refused without them being afforded the courtesy of being supplied with reasons as to why their application was refused. Against this background it is alleged that racial discrimination contrary to the Act occurred and relief is sought.

By its Points of the Defence the Respondent denies that financial particulars were provided as pleaded by the Complainants and deny that the Complainants were discriminated against in the manner alleged. In his affidavit Mr Johnston says that information relevant to the application was received from the Credit Reference Association of Australia Limited and as a consequence he advised Mr Yarran of his decision to decline the application on the grounds of the adverse credit check. Exhibits to the affidavit amplified the nature of the credit check and showed that the Complainants had defaulted in respect of arrangements made with other financial institutions such as Esanda Finance Corporation and A.G.C. Limited and that they had been subject to debt collection proceedings in the Local Court. He goes on to refer to Westpac Bank policy reflected in a publication "Credit Principles: Credit and Finance Skills" which suggests that past borrowing record is one of the best indications of an applicant's suitability as a borrower. The Tribunal notes that the form in question, although suggesting that care must be exercised in respect of someone with an adverse record, does not say that an

application must be automatically be refused if there is a record of default.

He also referred to a Personal Loan Assessment form set out in the form of a checklist containing reference to such matters as previous credit record, employment, purpose of loan, stability of home life, income/outgoing ratio, bank accounts and net asset accumulation. This checklist contain eight categories in all and suggests that an applicant must pass at least six criteria. Mr Johnston states that he did not refer to that particular form when assessing the subject loan application but was aware of the Bank's lending policy reflected in the form when assessing the application. He said that race was not a consideration in assessment of the loan application. He decided to refuse the application because according to the Bank's lending policy he was obliged to refuse a loan if the applicant had an adverse credit history. The male Complainant's application form bears a notation *"Declined Mr Yarran. Advised 19/9/90 by phone past default history precludes"*.

It emerges from a consideration of these materials, that although a person with an adverse credit record might well have difficulty in obtaining a personal loan, a Branch Manager is not necessarily obliged to refuse a loan in such circumstances. The checklist clearly implies that the Branch Manager or other agent of the Bank will undertake a balancing exercise in the course of which various considerations will be weighed up, although if there is a failure or inability to comply with six criteria nominated on the checklist then the application for a loan may well be declined. Thus, in the present case, on the basis of the materials presented to the Tribunal at the hearing of the application to strike out, there was a basis for refusing the application on the grounds of an adverse credit record. It is not established conclusively, however, that Mr Johnston was obliged to refuse the

application as a matter of bank policy. There was no evidence before the Tribunal as to what the normal practice of the Bank was when confronted with an application for a comparatively small loan by a customer with a less than perfect credit record.

The causes of action created by the Act are statutory remedies and the Act must be regarded as the sole point of reference in determining whether relief is available to a Complainant and as to the procedure controlling the exercise of the remedies allowed for by the Act. However, in construing Section 125, the Tribunal takes account of the fact that the jurisdiction of the Tribunal, and the procedures of the Tribunal, are analogous to jurisdictions exercised by courts of law set up to make binding determinations a right.

Courts and tribunals within the legal system of this State are generally allowed to control any abuse of process. Quite apart from the jurisdiction conferred by rules such as the Supreme Court Rules to strike out frivolous and vexatious pleadings and actions where no reasonable course of action is revealed, a court such as the Supreme Court also has a separate inherent jurisdiction to control proceedings, and thus prevent an abuse of its process. See Cairns: Australian Civil Procedure (Second Ed) page 190. The rationale of the inherent jurisdiction is to ensure that the legal process is not abused by the institution of groundless proceedings. Such proceedings are vexatious and harassing, and from that the Court has the right to protect itself. See Metropolitan Bank v Pooley (1885) 10 AC 211 @ 220. Where application is made to strike out on the grounds that a reasonable cause of action is not disclosed by the pleading, the usual practice is for argument to

proceed as on a demurrer, namely, the facts as pleaded are assumed but it is open to the Respondent to assist that, even so, the claimant cannot obtain relief. Where the inherent jurisdiction is invoked the Court can inform itself by the reception of evidence Cairns *(supra)* p. 192.

Extensive as the inherent jurisdiction is, however, it is one that is not readily exercised, particularly if the exercise of it effectively puts an end to the action. If it becomes apparent at any stage of the proceedings that there is a substantial and difficult question of law involved in deciding the matter, the application should be dismissed and the Defendant left to proceed. See Dey v Victorian Railways Commissioners (1949) 78 CLR 62; Inglis and Another v Commonwealth Trading Bank of Australia (1972) 20 FLR 30. This view arises from the general rule that ordinarily a litigant is entitled to have his complaint determined by the usual methods of procedure, including a trial for the resolution of the ultimate issues. Burton v President of the Shire of Bairnsdale 9108) 7 CLR 76.

These decisions are not directly applicable to the circumstances of the present case, and the Tribunal accepts that the issue presently before it must be decided solely by reference to the provisions of the Act referred to earlier which do not exactly coincide with the criteria reflected in the Supreme Court or to be found in the cases concerning the inherent jurisdiction of superior court. Nonetheless the decided cases may be of assistance in understanding the rationale of a provision such as Section 125, and it is useful to note that a similar approach has been adopted by other Tribunals working in the field of equal opportunity legislation.

In Langley v Niland (1981) 2 NSWLR 104, Hunt J. said of a similar provision that of the four specific descriptions of complaints which can be declined three clearly refer to the insufficiency or to the absence of merit of the factual basis for the allegation. The adjective "misconceived" was the possible exception. In its context, however, the word should not be given a meaning beyond a complaint founded upon a wrong idea as to the facts so that a common genus or class is maintained with the three other adjectives utilised. In relation to the category "for any other reason", His Honour was of the view that that expression was subject to a strong indication that the words in question should not be read *eusdem generis* with the categories preceding it.

In Hill v University of New England (1990) EOC 92-291 the Tribunal considered the provisions of this kind represented a broadening of the categories of cases beyond those which constitute an abuse of process in the ordinary court. The Tribunal was not prepared to define with any precision the range of cases which would enliven the jurisdiction to dismiss "at any stage" of an inquiry but considered that it was "apt to deal with situations analogous to that arising in ordinary litigation where a submission that there is no case to answer may be made at the conclusion of a plaintiff's case". On that basis the Tribunal held that in a case concerning an allegation of discrimination in employment on the grounds of sex, where the evidence was insubstantial, and the circumstances relied on were incapable of establishing on the ground of sex, the complaint should be dismissed as lacking in substance. It would be an abuse of process in a general sense if not in the technical sense, for the matter to continue.

Thus, in the present case, the Tribunal considers that Section 125 should be regarded as a

means whereby the Tribunal can control and if necessary terminate summarily proceedings which do not have any reasonable prospect of success or are otherwise lacking in substance or merit. The Tribunal also notes that in the recently decided case of People Living with Aids v City of Perth & Others (1992 unreported) the Deputy President of this Tribunal considered that the power to entertain and rule on a submission of no case to answer is to be found in Section 125(1), as an application for an order dismissing the complaints on the grounds that they are "lacking in substance or for (some) other reason ought not to be entertained". Reference was also made to the decision of Anderson J. in Ralph M. Lee (WA) Pty Ltd v Fort and Another (1991) 4 WAR 176 in which His Honour accepted that a ruling upon a submission of no case was one for the President to make under Section 105(3) of the Act on the basis that it was a question of law. In that case Anderson J. upheld a submission of no case to answer on the basis that there was no evidence sufficient to support a finding of political discrimination having regard to the meaning attributed to that concept by the court.

In the present case, both Counsel at the hearing of the application accepted and were of the view that a ruling upon the application to strike out should be made by the President alone and therefore, having regard to the views expressed at the hearing, and the decided cases just mentioned, the Tribunal proceeds on the basis that the issue is to be decided by the President as a question of law pursuant to Section 105(3) of the Act. It is important to note, however, that the present application is not a submission of no case to answer advanced at the conclusion of the Complainant's case but is rather an application brought before trial on the basis of the pleadings filed on behalf of the respective parties and having regard to the affidavit and accompanying materials sworn on behalf of the

Respondent as described above. It follows from earlier observations that, in such a case, the Tribunal is concerned with the question of whether the complaint has any reasonable prospect of success and the matter is viewed at the stage when the application to strike out is brought. A ruling at this stage on the basis of the allegations contained in the pleadings and the admissions in the Points of Defence and the affidavit will not necessarily pre-empt or foreclose any ruling that may be applied for at some later stage as part of a submission of no case to answer.

The Tribunal also notes that in a complaint of racial discrimination 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) VR 319; 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) 153 CLR 521 @ 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 and Another (*supra*) 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".

It is apparent, however, that the Tribunal is entitled to take account of the view expressed 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 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 Chesson v Buxton (1990) EOC 92-295 and Oakley v Rochefort Holdings Pty Ltd (1991) EOC 92-352, in regard to cases of racial discrimination. 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 Complainant. It is not necessary to show a purpose nor intent to discriminate. See Williams and Another v Council of the Shire of Exmouth (1990) EOC 92-296, following the New South Wales Court of Appeal in Jamal v Secretary, Department of Health (1988) EOC 92-234. Also see People Living with Aids v City of Perth (*supra*)

Against this background, the Tribunal now turns to the circumstances of the present case. A suggestion was advanced in argument by Counsel for the Respondent that certain necessary particulars had not been pleaded by the Complainants as material facts and thus, in effect, the argument was advanced that a cause of action was not disclosed on the face of the pleadings.

The Tribunal considers, however, that the pleadings, even if capable of further refinement, reveal in essence the matters in issue between the parties and where any deficiency is capable of remedy by amendment, it is not appropriate that the Tribunal should strike out the application on the grounds indicated by Section 125 on that basis alone. If the facts pleaded are assumed, including principally that the loan was refused and that they were received in a shabby and cool manner, then a reasonable cause of action is disclosed. Thus, as became apparent during discussion at the hearing the key issue was whether the Tribunal, in a manner analogous to the exercise of an inherent jurisdiction, should dismiss the claim on the basis allowed for by Section 125 having regard to the nature of the claim advanced and the evidence put before the Tribunal by affidavit. The question is whether the claim cannot succeed having regard to the allegations generally discernible from the pleadings in the light of the circumstances and evidence known to the Tribunal at the time the application to strike out is made.

By Section 36 a person discriminates against another person on the ground of race 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 a 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 such as a Bank can be vicariously liable for the conduct of its employee or agent. By Section 5 discriminatory conduct need not be the dominant or substantial reason for doing the act complained of.

In the present case, there are some objective facts from which an inference could be drawn that an act of discrimination had occurred. It is not denied that the Complainants are people of Aboriginal descent. The Respondent is a financial institution and it appears that it is accustomed to making small personal advances of the kind applied for in the present case to customers and applicants for financial assistance. There is no feature of the Bank's lending policy which would automatically lead to a rejection of the present application and it seems that some element of discretion at Branch Manager level would be brought to bear upon an application of the kind in question. The adverse credit record may have been a significant factor when the decision to decline the loan was taken but Section 5 of the Act shows that discriminatory conduct need not be the dominant or substantial reason for doing the act complained of. Thus, in considering in what manner that discretion was exercised, it is difficult to make any finding at this stage that the Complainants cannot succeed in their claim that an act of discrimination occurred.

This is not a case where the claim should be summarily terminated pursuant to the criteria set out in Section 125. It is a case where the litigant is entitled to have his complaint

determined by the usual methods of procedure, including a trial for the resolution of the ultimate issues. At trial the Complainants will have an opportunity to support their plea that they were received in a shabby and cool manner by sworn testimony and to test the Respondent's stance concerning its lending practices by cross-examination. They should not be deprived of that opportunity on the basis of the comparatively scant materials presently before the Tribunal. The ruling on this interlocutory application must not be taken as pre-empting any finding that may be made by the Tribunal when the matter proceeds to a hearing. It follows that the application to strike out the claim is dismissed.