



JUDGEMENT

**EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA**

No. 10 of 1992

**MARILYN ELLIOTT
Complainant**

- against -

**PEARLON HOLDINGS PTY LTD
t/as CONGLOMERATE HOTEL
First Respondent**

- and -

**ANTON BICHLER
Second Respondent**

BEFORE: Mr N. Hasluck - President
Ms P. Harris - Member
Mr K. Wyatt - Deputy Member

Counsel for the Complainant - Ms H. Andrews
Counsel for the Respondent - Mr G. O'Hara

HEARD: 28 and 29 January 1993

REASONS FOR DECISION

(Delivered: 23 APRIL 1993)

The Complainant, Marilyn Elliott, claims that the Respondents discriminated against her on the ground of race. . The complaint arises out of an incident concerning the sale of wine to the Complainant by the Respondents at Nullagine.

The Conglomerate Hotel

The Respondent, Anton Bichler, has been the licensee of the Conglomerate Hotel at Nullagine for 9 years. The First Respondent is a company incorporated in Western Australia and at all material times traded as the Conglomerate Hotel, Nullagine. At all material times Anton Bichler was director and secretary of the Respondent and the licensee of the premises, and was the manager of the Respondent and the person in charge of the premises at the time the events complained of were said to occur.

Nullagine is situated on the road from Newman to Port Hedland and therefore part of its custom comes from travellers on that road. The sketch plan produced at the hearing indicated that the subject premises consist of a general store from which goods may be purchased and adjoining licensed premises including a dining room, kitchen, lounge bar and front bar. Mr Bichler said in evidence that liquor was often purchased by passing travellers. He sold casks of wine. He said also that wine was sold for consumption on the premises at the price of \$4.00 per 200ml glass.

As at mid August 1991 the staff of the First Respondent included not only Mr Bichler himself as licensee and manager but a barmaid named Jane Smales. According to Mr Bichler she would usually commence work at about midday.

The Bush Meeting

In mid August 1991 arrangements were made for various government officials and departmental officers to meet with members of the aboriginal community at Nullagine at a location some distance from the township. The officials had been invited to the meeting with a view to listening to concerns expressed by members of the aboriginal community about various social issues and to provide advice in regard to those issues.

The Commissioner of Equal Opportunity, June Williams, gave evidence at the hearing before the Tribunal that on the first day of the bush meeting, being Thursday 15 August 1991, she was one of several speakers who addressed the aboriginal community. She described the nature of her position and the general nature of the Equal Opportunity legislation. She advised those present that complaints of racial discrimination under the legislation had to be initiated by a written complaint by the person affected by discriminatory conduct. She had previously been aware of some discontent in the aboriginal community about the way in which liquor was served at the Conglomerate Hotel in Nullagine and she therefore felt obliged to point out that if any member of the aboriginal community had a complaint in that regard then the complaint would have to be put in writing.

The Commissioner, like a number of others attending the meeting, had arranged to stay overnight at the Conglomerate Hotel. In the evening she had dinner at the hotel and later went to the lounge bar. From her seat in the lounge bar she could see into the front bar and observed that it was very basic in appearance, consisting of walls of corrugated iron and without any floor coverings. A number of aboriginal people were drinking in that

part of the licensed premises. Other aboriginal people attached to government departments were staying at the hotel and they had access to the lounge bar.

The next morning, prior to the start of the second day of the bush meeting, June Williams looked for Mr Bichler with a view to introducing herself. She met him in the hallway near the entrance to the lounge and introduced herself as the Commissioner for Equal Opportunity. She said in evidence that she felt obliged to raise with him the allegations of discriminatory conduct that had been put to her. She gave evidence as follows:

" And so then I said, "Look, I'm receiving reports from the aboriginal community that you charge different prices for casks of wine for them. You in fact charge them \$20.00 and you charge non-aboriginal people \$13.00".

And what was his response to that? - Mr Bichler said to me "Yes that's right".

And did he give any explanation? - Well, yes. I mean, there was a bit of a pause because I was a bit taken aback. I said to him did he realise that was against the law, that the Equal Opportunity Act prohibited that sort of discriminatory behaviour. And he then went on to say that they - whom I presume he meant the aboriginal people - had broken into his hotel and general store and done a lot of damage a while ago and he was having trouble getting insurance, and that he was just getting his ... getting some of his money back".

The Commissioner decided that she could not take the matter any further for the time being. She and the other visitors to the township spent the rest of the day at the bush meeting.

The Complainant

Prior to the hearing before the Tribunal, Points of Claim had been filed on behalf of the Complainant. The Points of Claim state that she is a person of aboriginal descent, a fact which is readily discernible by her appearance. That plea was admitted by the Respondents in their Points of Defence and is accepted by the Tribunal.

In August 1991 the Complainant was living at Leonora. She came across to Nullagine to visit friends and relatives. She had attended the bush meeting on Thursday 15 August 1991 and as a result of what was said at the meeting was generally aware that there was some dissatisfaction amongst the local people about the prices being charged at the Conglomerate Hotel. She listened to the Commissioner of Equal Opportunity's address and she became aware that it might be possible to make a complaint about such matters.

On the morning of Friday 16 August 1991 the Complainant went to the hotel with two friends with a view to purchasing 3 casks of wine. According to the Complainant she went to the service hatch where the hallway between the dining room and the lounge leads into the barbecue area. A man served her with 3 casks of Moselle wine for the price of \$20.00 per cask. At the hearing before the Tribunal she identified the man who served her as being Mr Bichler. Her evidence was difficult to follow at times but it appears that she was not asked any questions about where she intended to drink the wine. She and her friends then returned to the bush meeting.

The Complainant said in evidence that she felt "wild" about the price that had been charged, because it was above the normal price, and she then approached the Commissioner of Equal Opportunity to voice her grievance. It was explained to her that she would have to make a written complaint if she wanted to take the matter any further and with that thought in mind she then approached Erin Wilson who was attending the bush meeting in her capacity as a Regional Employment Officer from the Port Hedland office.

The Complaint

Erin Wilson gave evidence at the hearing. She recalled that upon being approached by the Complainant they discussed the nature of the Complainant's grievance and then decided that the complaint should be reduced to writing. Accordingly, Erin Wilson, having established what she understood to be the facts of the matter, wrote out a document in these terms:

" I, Marilyn Elliott, went into the Conglomerate Hotel on Friday 16 August

1991 at about 8.15 a.m. and bought 3 casks of Moselle for \$60.00.

Non-aboriginal people can buy the same cask of wine for \$13.00. I believe I have been discriminated against on the grounds of my race and wish to complain under the Equal Opportunity Act."

Erin Wilson arranged for this document to be signed by Marilyn Elliott in the presence of a man named Graham who was one of the other visitors to Nullagine and also a J.P. The Tribunal is satisfied that the document was signed by the Complainant voluntarily and fairly represented the nature of the grievance she wished to commit to writing. The written complaint was then presented to the Commissioner for Equal Opportunity and became the basis of a subsequent inquiry undertaken by the Commissioner for Equal Opportunity in the manner allowed for by the provisions of the Act.

Erin Wilson

Later in the day, after the bush meeting was over, Erin Wilson set out on the journey back to Port Hedland and in the course of that journey the following events occurred as described in her evidence:

" And did you stop in Nullagine? - Yes, we did.

What was the purpose of you stopping? - Well the .. one of the other person .. people in the car, Lyn Willie, who was a family councillor, wanted to get a cask of wine anyway. And I wanted to find out how much in fact we'd be charged for it if we bought it in Nullagine rather than Hedland. I was curious that .. there had been a lot of talk over the price. Marilyn had just put in a complaint, and I was wondering if in fact we would be charged a different price. So I said to Lyn, "Let's buy it in Nullagine instead .. instead of Hedland, and see what we get charged." So Lyn came in with me and we went into the lounge part of the hotel and stood at the bar to purchase the cask, the bar of the lounge.

And who served you? - It was a female. I don't know her name.

And did you ask for any particular sort of wine? - I asked if they sold casks of wine and she said "Yes" and I said "What's the cheapest?" and she said, "We've only got one brand. Its all the same price". So I said, "Oh well, I guess I'll have a cask of Moselle and that then" and so she got the Moselle out of the fridge which was adjacent to the bar area.

And how much were you charged? - I was charged \$13.00."

Subsequent Events

After lodgement of the complaint, officers of the Equal Opportunity Commission wrote to Mr Anton Bichler putting the substance of the complaint to him and seeking an explanation. By letter dated 2 December 1991 the Commissioner sought a response to the allegation but no response was received.

Owing to Mr Bichler's failure to respond, in March 1992 the Commissioner herself sought to obtain a response by telephoning him. The file note describing the exchange is in these terms:

" 9/3/92 spoke to Mr Bichler.

He remembered meeting me.

He remembers being warned about charging different prices aboriginal/non-aboriginal.

He is aware of letters.

He is not going to reply. Said I'd better take him to court.

Said okay I had no choice - it would be referred J.W."

The Commissioner confirmed that her file note is an accurate reflection of the exchange.

It is significant that during the telephone conversation Mr Bichler did not attempt to deny

the grave allegation of racial discrimination contained in the letters that had been sent to him or to advance the explanation he later relied on as justifying the difference in price he charged for casks.

The Pleadings

The Points of Claim filed on behalf of the Complainant pleaded that the First Respondent, through its employee or agent Mr Bichler, treated the Complainant less favourably than it treated or would treat a person who was not of aboriginal descent by providing goods and services on different and less favourable terms and conditions. The particulars in support of the plea refer to the fact that the Complainant purchased 3 casks of wine for the price of \$20.00 per cask on Friday 16 August 1991, whilst Erin Wilson, who was not of aboriginal descent, went to the hotel on the same day and purchased a cask of Moselle for \$13.00. She was informed by Mr Bichler that all wine casks were of the same brand and price. Particulars allege further that the First Respondent through its agent Mr Bichler had a policy of selling casks of wine to persons of aboriginal descent at \$20.00 per cask, and to persons not of aboriginal descent at \$13.00 per cask. It was pleaded that as a result of the unlawful discrimination complained of the Complainant had suffered loss and damage and a claim was made for damages.

In the Points of Defence many of the central allegations were admitted. It was pleaded that the Respondents sold casks of wine for \$14.00 per cask if the cask was to be taken away and at \$20.00 per cask if consumption was to be on the premises. It was pleaded further that the Complainant was sold the cask of wine by a bar person who believed the

cask was for consumption on the premises of the Conglomerate Hotel. At the hearing, the defence principally advanced in the course of argument was that the Respondent was entitled to charge different prices because those consuming the wine casks at the hotel were making use of the facilities. The price differential was not due to discriminatory conduct referable to race but was simply due to the factor just mentioned which applied with equal force to both people of aboriginal descent and people of non-aboriginal descent.

Statutory Provisions

By Section 36 of the Equal Opportunity Act 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 a different race.

Section 46 provides that it is unlawful for a person who provides goods or services, or make facilities available, to discriminate against another person on the ground of the other person's race by refusing to provide the other person with those goods or services or to make those facilities available to the other person. Discrimination may also occur in the terms or conditions on which the first mentioned person provides the other person with those goods or services. By Section 5 discriminatory conduct need not be the dominant or substantial reason for doing the act complained of.

The Complainant bears the onus of establishing that he or she has been the victim of unlawful discrimination. The case must be proved 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 probably innocent explanations are available in the evidence. See Fenwick v Beveridge Building Products Pty Ltd (1986) EOC 92-147; Erbs v Overseas Corporation Pty Ltd (1986) EOC 92-181. 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.

The cases also indicate that a comparison can 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. See Bear v Norwood Private Nursing Home (1984) EOC 92-019; Chesson v Buxton (1990) EOC 92-295; Oakley v Rochefort Holdings Pty Ltd (1991) EOC 92-352.

Further, it is not necessary to establish deliberate discriminatory conduct for an act of discrimination to take place. The statutory provisions include conduct arising from thoughtlessness and neglect. 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 or intent to discriminate. See Williams v Council of the Shire of Exmouth (1990) EOC 92-296; Slater v Brookton Farmers Co-operative Company Limited (1990) EOC 92-321.

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

Findings

The Tribunal finds that the person who served the Complainant was Mr Bichler. He did not ask her any questions about where she intended to consume the wine. The Complainant bought wine in circumstances where there was no immediate reason for the licensee to conclude that she intended to consume the wine on the premises. No glass was provided to her and the purchase took place at an hour of the day where it seems unlikely that the person providing the wine could or would have assumed that it was to be consumed in the immediate vicinity. Accordingly, it is questionable, even on the case advanced by the Respondents, as to whether the sale of wine to an aboriginal person at a price greater than the price Erin Wilson was charged could be justified by reference to a likelihood that the wine would be consumed on the premises, this being the justification for the price differential relied on by the Respondents.

Further, the Tribunal also takes account of the exchange which took place between the Commissioner of Equal Opportunity and Mr Bichler at the subject premises on the morning of Friday 16 August 1991. An allegation of discriminatory conduct was made during the course of that exchange and, far from denying that his practices were discriminatory, the licensee tacitly accepted that the justification for the price differential was due to conduct imputed to the local aboriginal community. He was given a further opportunity to deny the allegation of racial discrimination, and to advance an alternative explanation for the price differential, when the Commissioner spoke to him on 9 March 1992. He made no denial. He provided no explanation.

Accordingly, the Tribunal finds that the complaint of racial discrimination the subject of

the written complaint made by Marilyn Elliott on 16 August 1991 has been made out. The Tribunal is satisfied on the balance of probabilities that in charging the Complainant \$20.00 per cask the Respondent treated her less favourably on the ground of her race than he would treat a white customer such as Erin Wilson who was able to buy wine at \$13.00 per cask. Both the Complainant and Erin Wilson were customers who did not intend to consume the wine on the premises and in both cases the licensee had no reason to assume that they would consume the wine on the premises. Nonetheless, he charged the Complainant a higher price. This leads to an inference that she was charged a higher price because of her race.

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) ^{the Tribunal} may also order the Respondent to perform any reasonable act or course of conduct to ^{re} address any loss or damage suffered by the Complainant.

In Hall v Sheiban Pty Ltd (1989) EOC 92-250 the court suggests 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 complained of. In Alexander v Home Office (1988) 1 WLR 968 the Court suggested that awards should not be minimal because this would tend to trivialise or diminish the respect for public policy implicit in the legislation.

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The Complainant said that she felt "wild" about what had happened. Erin Wilson's evidence indicated that as a result of the incident at the Conglomerate Hotel the Complainant was occasioned a degree of humiliation and distress. That the Respondents were apparently carrying into effect a policy of discrimination must have added to her sense of injury. In the circumstances of this case the Tribunal considers that the Complainant should be awarded the sum of \$2000.00 by way of damages. The Tribunal also requires that the Respondents publish an apology to the Complainant in a newspaper circulating in the Nullagine district.