JUDGEMENT

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No. 11 of 1992

JANELLE COYNE
Complainant

- against -

WOLFGANG TRITTLER
Respondent

BEFORE: Mr N.P. Hasluck Q.C. - (President)
Ms P. Harris - (Member)
Ms B. Buick - (Member)

Counsel for the Complainant - Mr G. Innes
Counsel for the Respondent - Appeared in person

HEARD: 9th March, 1993.

REASONS FOR DECISION

(Delivered: 23 APRIL 1993)

The Complainant, Janelle Coyne, claims that the Respondent discriminated against her on the ground of race. The complaint arises out of incidents leading to the eviction of the Complainant from the Tourist Village Caravan Park at Albany.

The Respondent

The Respondent, Wolfgang Trittler, has been the Proprietor of the Caravan Park since 1985. The Caravan Park is situated on the outskirts of Albany and contains seventy caravan sites and a number of "park homes" having separate ablution facilities. There are twelve on-site vans available for hire by visitors and ten of the sites available are reserved for visitors who wish to hire a caravan for a number of months, such visitors being described as "permanents". The Caravan Park has a central ablution block and the sites are roughly divided into two areas, being an area for tourists and an area for permanents. Visitors check in at an office close to the entrance. At all material times there was a sign near the entrance stating that the land was private property and that visitors other than guests were obliged to park in the car park provided for that purpose.

In mid 1988 a local artist from the Aboriginal Art Centre asked the Respondent if he could display some works of art in the office and adjoining shop at the Caravan Park. The Respondent agreed to that request and later on the artist asked if there was any chance of accommodation being provided at the Caravan Park for an Aboriginal family in need of accommodation. As a consequence of that discussion, the Complainant came to the Caravan Park and, as appears from a written form signed by her and dated the 5th August 1988, made application for rental of a caravan or "on-site van" at a rental of $75.00 per week. At that time the Complainant's family consisted of herself, her de facto

husband, Mark Williams, her son Mark born the 5th December 1984 and her daughter Marinka born the 3rd May 1986. The Complainant provided a bond of $150.00 under the terms of the tenancy agreement. The management retained the right to inspect the van on an occasional basis and "if warranted" to terminate the occupancy. The Complainant was also given a copy of the rules relating to the park. Those rules reserve to the Proprietor a right to terminate a contract without notice for misconduct, non-payment of dues or behaviour which was offensive to other persons in the park. Visitors cars were not allowed to enter the park. One car only was allowed per site. All other cars were to be parked in the car park or at a nominated place.

The Complainant

In the Points of Claim the Complainant pleaded that she was a person of Aboriginal descent, a fact which is readily discernible by her appearance, and that plea was admitted by the Respondent. It seems to have been common ground at the hearing that her de facto, Mark Williams, was also readily identifiable as a person of Aboriginal descent.

The tenancy agreement did not prescribe the length of the tenancy but the evidence suggested the parties spoke initially of a term of three months. At the expiration of two months, however, the Complainant indicated that she wished to leave and the Respondent agreed to that course. The Respondent's recollection was that she spoke of having an opportunity to take up the offer of a Homeswest house and he therefore agreed to her departure. The Complainant said in evidence that although she had applied for Homeswest accommodation, and may have mentioned this to the Respondent, the reason for her departure was that relations with her de facto husband were not running smoothly

and she had decided to move in with her sister.

After leaving the Caravan Park it seems that the Complainant sought to obtain accommodation via Homeswest, at about this time she had a third child, Preston, born the 10th October 1988.

In mid 1989 the Complainant approached the Respondent for a reference. By letter dated the 3rd July 1989 he confirmed that the Complainant had been "an exemplary tenant, paid her rent on time and was of sober habits and good character." Not long after obtaining this reference the Complainant had a disagreement with her sister and returned to the Caravan Park in search of accommodation. She was accompanied by a friend of Aboriginal descent, Kelly Burleigh, who was living in a de facto relationship with Marlon Williams, who was the brother of the Complainant's de facto husband. Arrangements were made for the two families to occupy two on-site vans in the "permanents" section of the park, although, at the hearing, no signed documentation was available concerning these arrangements.

The Eviction

The Complainant said in evidence that her neighbours in the Caravan Park were on one side a white couple, Peter and Tanya, and on the other side another white couple, David and Theresa. Marlon Williams and Kelly Burleigh were in a caravan nearby. Soon after the Complainant settled in her car was written off in a traffic accident and the only visitors to her van were her father and grandfather. Her neighbours had visitors and it did not seem that the rule requiring visitors to park outside was strictly enforced as far as

these visitors were concerned. The only Aboriginal "permanents" in the park were the Complainant and her family and Kelly Burleigh and Marlon Williams. The latter couple did not have any children and were visited occasionally by friends.

The Tribunal pauses to note that during the Complainant's second tenancy, by letter dated the 9th November 1989, the Respondent's wife provided a reference for the Complainant and her family in these terms:

> "Miss Janelle Coyne and her family (5 persons) have occupied one of our on-site caravans, under very cramped and trying conditions since 19th July 1989. She has kept our property in a very clean and satisfactory condition, and has been a quiet and careful tenant, and paid her rent promptly. We believe her to be a person of integrity, and we trust this matter of her requiring more suitable accommodation is brought to a speedy resolution."

Somewhat inconsistently with this reference, the Respondent said in evidence that he became increasingly concerned about the situation at his Caravan Park. At the time the Complainant applied for readmission, he had asked her about the Homeswest accommodation and was told that she had been involved in trouble with her relations and had been evicted. He therefore said to both the Complainant and her friend, Kelly Burleigh, that they could have on-site vans but he didn't want any trouble and they were to make sure that their visitors didn't "get out of hand". As time went by he became worried that the number of strangers entering the park seemed to increase and that now and again he saw discarded bottles along the road and "on the way to Kelly and Janelle's van."

The Complainant said in evidence that on an occasion prior to Sunday the 19th November

1989 the Respondent came to her and said "could you tell those boongs not to drive through the park." Kelly Burleigh confirmed that these words had been used. The Respondent flatly denied that he had used language of the kind alleged although it emerged from his own evidence that he was increasingly troubled by the presence of unauthorised visitors in the park and believed that they were associated with the two Aboriginal families.

The Respondent said in evidence that on Sunday the 19th November 1989, he was just about to sit down for lunch when his wife told him that there was a group of Aboriginal people sitting behind the ablution block drinking. He went out to investigate. He was then met by David, the occupier of the on-site van next to the Complainant, and as a consequence of a conversation with him, was led to believe that someone had made a mess on the floor in the male section of the ablution block. The Respondent went to the ablution block and in the passage between the showers and the toilet facilities found some human faeces on the floor and concluded that a child was responsible. He had cleaned the toilet block a few hours earlier and was therefore of the view that the mess must have been made within the last two or three hours. He cleaned up the mess and, being annoyed by what had happened, decided to take action. He didn't see any group of Aboriginal drinkers near the ablution block of the kind described by his wife but he saw some bottles on the grass. From there he went first to the on-site van occupied by Kelly Burleigh and told her that she had to move out in seven days time. He then went to the Complainant's van and repeated the instruction.

It was common ground at the hearing that on Sunday the 19th November 1989 both the

Complainant and Kelly Burleigh were given seven days notice by the Respondent, at a time when he was in a state of annoyance, but there was a degree of controversy as to whether the Respondent gave reasons for evicting them. The Respondent contended that although he was annoyed by the mess he had found in the toilet block, and was certainly of the view that the Complainant's son was probably responsible, he did not refer to this matter in evicting the tenants. He felt that such an accusation would be useless and therefore he made no reference to the matter.

At the hearing the Respondent submitted in evidence a schedule of those resident at the park on or about the date in question, including both tourists and permanents, as a means of demonstrating that his conclusion concerning responsibility for the mess he had cleaned up was reasonable. On his analysis there were only a very small number of persons in the park between the hours of 10.00 a.m. and 2.00 p.m. on the day in question and it was most unlikely that any of the tourists were responsible. In a letter to the Commissioner for Equal Opportunity dated the 28th February 1991, written many months after the day in question, he agreed that he advised Kelly Burleigh that she was to leave within seven days but denied having told her that she was the person responsible for the mess. He said in the letter that the reason why all the Aboriginal tenants in the park were asked to leave was "because an Aboriginal person defecated on the floor of the ablutions."

Kelly Burleigh said in evidence that when the Respondent gave her notice, he referred to the mess in the ablution block and told her that she had done it. The Complainant gave evidence that on the day in question the Respondent came to her van and told her to move out because her son was responsible for the mess in the ablution block. The Complainant

was convinced that her five year old son, who was toilet trained, was not responsible, but felt that she was not in position to argue the point because the Respondent, as Landlord, was in command of the situation. It was apparent from the evidence of both the Complainant and Kelly Burleigh, and from the evidence of the Respondent himself, that the tenants were not being invited to discuss the matter with him or to provide an explanation as to what had occurred, but were simply being presented with an instruction. They had had to leave within seven days. Even on the Respondent's own account of what happened it seems that, in his view, both the Complainant and Kelly Burleigh were jointly implicated in what had happened and it does not seem that he made any particular inquiries as to who precisely was responsible for the mess he had been obliged to clean up.

The Complainant and Kelly Burleigh gave evidence about an incident on the following day. It seems that Ricky Williams, brother to Marlon Williams, came to the park and was playing basketball with Marlon Williams whereupon the Respondent evicted the boy from the park. This was said to be an unusual and unreasonable step because other tenants of the park often had visitors accompanied by children who were allowed to play in the precincts of the Caravan Park without objection. The Tribunal was invited to infer that this incident revealed a discriminatory attitude on the part of the Respondent.

The Complainant and Kelly Burleigh complained about their eviction to the Aboriginal Legal Service and, as a consequence, the Respondent was told that seven days notice was not sufficient. He was prepared to allow a further period of notice but it is significant that even though he was in effect given an opportunity to reconsider his decision to evict,

he took no further step to ascertain by discussion with the evicted tenants or other residents of the park, whether the evicted tenants or some member of their respective families was responsible for the incident in the ablution block, or whether his general state of dissatisfaction with the conduct of tenants in the park was justified. In the event, the Complainant and Kelly Burleigh left the Caravan Park within three days of receiving notice of eviction because they felt hurt and humiliated by the peremptory way in which the Respondent had dealt with them and felt that they could no longer stay at the park in view of the accusations that had been made. Kelly Burleigh felt so strongly about what had occurred that she subsequently approached a local television station and was interviewed about the matter. The Complainant declined to be interviewed although she too felt that she and her family had been treated unfairly.

Subsequent Events

The two families were left with no option but to go and live with Louise Williams, mother to Mark and Marlon Williams, in a crowded household. The Complainant, her de facto husband and their three children finished up sleeping on the lounge room floor for the next twelve months before they were able to obtain Homeswest accommodation. They had scant financial resources and spoke of encountering discrimination when they sought to obtain alternative rental accommodation. The Complainant gave evidence that their poor living conditions had a prejudicial effect upon the health of her three children.

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 different race.

Section 47 provides that it is unlawful for a person to discriminate on the ground of race in the terms or conditions on which accommodation is offered, by evicting a person from accommodation, or by subjecting the person to any other detriment in relation to accommodation. 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 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 innocent explanations are available on the evidence. See Fenwick v Beverage 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 Counsel of the Shire of Exmouth (1990) EOC 92-296; Slater v Brookton Farmers Co-operative Company Limited (1990) EOC 92-321.

Findings

Against this background, the Tribunal returns to the circumstances of the present case. The Tribunal will begin by putting aside for the moment any finding concerning the occasion on which the Respondent is alleged to have used the word "boongs" in conversation with the Complainant and Kelly Burleigh.

The Respondent spoke well of the Complainant in references provided to her dated the 3rd July 1989 and the 9th November 1989. He said she was a quiet and careful tenant and a person of good character. He confirmed these views during the course of his testimony.

It emerged from his own evidence that, although he began to harbour some doubts about the presence of the two Aboriginal families in the Caravan Park towards the end of the tenancy, he didn't raise any specific matters of objection with the Complainant about the conduct of her or any member of her household prior to Sunday the 19th November 1989. Indeed, the Respondent's own testimony suggested that even if the Respondent did have some dissatisfaction about what was happening at the Caravan Park towards the end

of 1989, this was due to his views concerning the conduct of visitors to Kelly Burleigh's household. Having regard to the evidence as a whole, however, the Tribunal is not persuaded that the way in which the two Aboriginal families conducted their affairs at the Caravan Park differed in any significant respect from the way in which the neighbouring white families entertained visitors and conducted their affairs.

The Tribunal accepts that on Sunday the 19th November 1989 as a result of information provided by David, one of the permanent residents, the Respondent discovered human faeces in the male area of the ablution block and was understandably annoyed. It is clear on the evidence that he then told Kelly Burleigh and the Complainant to leave the Caravan Park within seven days. He formed the view apparently, upon the basis of comparatively scant information, that they were responsible for what had happened and should be evicted.

If one accepts his version of the crucial exchanges - that no mention was made of the mess in the ablution block at the time of evicting them - then it appears he was not willing to try and find out who was truly responsible. He linked the event in the ablution block to the presence or alleged presence of Aboriginals in the vicinity and then evicted both Aboriginal families soon afterwards, even though the nature of the event was such that only one person, or a member of only one household, could have been responsible for it.

If one accepts the account given by the Complainant's witnesses, then a similar finding follows. The Respondent raised the matter in detail with both Kelly Burleigh and the

Complainant, in that order, referring to a mess in the male area of the ablution block, but without making any attempt to find out who was to blame or whether there were any extenuating circumstances, because he had decided in advance that the blame should be attached to both Aboriginal families. If, as he contended, he believed that the Complainant's five year old son was responsible for the mess, it seems surprising, in the absence of any comparable prior incidents, that he was not prepared to discuss the matter at all. The conclusion is inescapable that the Respondent's decision to evict the two families was not due to the nature of the particular event or a fair and reasonable determination of responsibility, but due to a belief that racial characteristics imputed to the Complainant and her friend weighed against a continuation of their tenancy.

The Tribunal notes that white residents of the Caravan Park were not asked to leave or censured in any manner, even though, in the absence of admissions or evidence, there was no way of knowing precisely who was responsible for the mess in the ablution block. This supports an inference that the Complainant was treated less favourably than a person of a different race and was therefore the subject of discriminatory conduct within the meaning of the statutory provisions referred to above.

The Tribunal is not persuaded that a notional white tenant would have been treated in the same manner, especially if the Respondent believed that the person actually responsible for the mess was a five year old child. In the case of a tenant with a record of good behaviour, as evidenced by the references provided by the Respondent, it seems reasonable to assume that the Respondent, no matter how strongly he disapproved of the situation he discovered in the ablution block, would have made at least some attempt

either to identify the culprit or to discuss the matter with those possibly to blame before evicting two families simultaneously, especially when the culprit was thought to be a five year old boy. The Respondent's action cannot simply be described or excused as due to momentary anger because, over the days that followed, when he had an opportunity to cool down, he stuck by his decision. It is clear from his evidence that he regarded the incident in the ablution block as "the final straw" even though, as the written references he gave to the Complainant make clear, he had no real cause for dissatisfaction with the Complainant's conduct at the caravan site. The comparison with a notional white tenant reveals that the Respondent treated the Aboriginal complaint less favourably than he would a person of a different race.

It emerges, then, that the Respondent formed a view that Aboriginal people were responsible for the defecation and without putting the relevant allegations to the two resident Aboriginal families directly, or even discussing the matter, he made a decision to terminate the Complainant's tenancy, from which it follows that he discriminated against the Complainant on the ground of her race.

The Tribunal now returns to the other incidents raised as issues in the Points of Claim. The Tribunal finds that the Respondent did order Ricky Williams out of the park in a peremptory fashion. The Tribunal is not prepared to treat this incident, however, as being in the nature of a cause of action or an aspect of discriminatory conduct in respect of which the Complainant may obtain relief. It was not an incident which impacted on her position directly because it seems that Ricky Williams was principally associated with Marlon Williams at the relevant time. Further, it is difficult to compare the

circumstances of censuring a visitor on this occasion with the kind of treatment that may have been afforded to visitors to the neighbouring white family. The incident does tend to confirm, however, that the Respondent was given to acting hastily in his dealings with the Aboriginal tenants.

The incident concerning the use of the word "boongs" is of a different character. Ultimately, this comes down to a question of credibility because there was an outright denial by the Respondent that he had uttered the word complained of or had any such exchange or similar exchange with the Complainant and her friend, Kelly Burleigh. If such an exchange did occur, then clearly this would amount to discriminatory conduct because it detracted from the Complainant's enjoyment of the accommodation available to her at the Caravan Park, and was therefore in the nature of a detriment. The word in question is an epithet which would not have been applied to persons other than those of Aboriginal descent. On the balance of probabilities, the Tribunal finds that the Respondent did make the comment complained of. The Complainant's evidence was corroborated by Kelly Burleigh. The Tribunal regarded both the Complainant and Kelly Burleigh as reliable witnesses. Further, having regard to the finding that the Tribunal has just made concerning the incident of the 19th November 1989, there is reason to believe that the Respondent was irritated by the presence of Aboriginal visitors to the caravan site and might conceivably have made a derogatory comment in a moment of exasperation.

The Tribunal is therefore satisfied on the balance of probabilities that the complaint of discrimination against the Complainant on the ground of her race should be upheld, both in regard to the circumstances in which she was evicted from the Caravan Park and in

regard to the incident just mentioned.

Relief

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 redress 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 complained of. In Alexander v Home Office (1988) 1WLR 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.

In the present case, as a consequence of the eviction, the Complainant and her family, being of limited financial means, were obliged to live in over-crowded circumstances during the course of the following twelve months. The Complainant made some attempt to mitigate the inconvenience of her situation by looking for alternative accommodation but encountered difficulties in that regard. She gave evidence as to her hurt and

humiliation as a consequence of her peremptory eviction from the Caravan Park and she was convinced in her own mind that the eviction was as a consequence of racial discrimination. It cost more to live in the over-crowded accommodation that she and her family were obliged to put up with in the Williams household than to live at the Caravan Park. It seems reasonable to draw an inference that this added to her sense of injury.

There have been a number of cases in this State and elsewhere concerning the removal of Aboriginal drinkers from licensed premises as a consequence of discriminatory conduct and in such cases damages of more than $1,000.00 have been awarded to the Complainant in respect of the eviction. In many of those cases, however, the eviction from the licensed premises arose from a misjudgment on the part of a Hotel Proprietor or Barman or as a result of a momentary confrontation. This appears to be a more serious case because the Respondent was aware from his earlier acquaintance with the Complainant that although she was generally a well-behaved tenant, she was likely to have difficulty in finding alternative accommodation. Further, in the two or three days following the notice of eviction, he had an opportunity to review his position and the fact that he failed to do so might be said to have added to the Complainant's sense of humiliation.

Accordingly, in all circumstances, the Tribunal considers that damages in the sum of $5,000.00 should be awarded to the Complainant in respect of the injury she suffered by way of hurt and humiliation. The Tribunal also requires the Respondent to publish an apology in the Albany Advertiser, a local newspaper, stating that the Respondent as Proprietor of the Caravan Park accepts that the Complainant, Janelle Coyne, was unlawfully asked to leave the Caravan Park known as the Albany Tourist Village Caravan Park in November 1989 and apologises to her for any embarrassment and distress caused as a result of the incident.