

**EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA**

No. 15 of 1993

IN THE MATTER OF A COMPLAINT BY:

DANNY KING

Complainant

- against-

FRANQUIN PTY LTD t/as THE RACQUET CLUB

First Respondent

and

MICHAEL BROWN

Second Respondent

JUDGMENT

BEFORE: Mr N.P. Hasluck Q.C. - President
Mr D. Forster - Member
Ms P. Thorley - Deputy Member

Counsel for the Complainant - Ms L. McComish
Counsel for the Respondents - Ms E. Frayne

HEARD: 22 November 1994

REASONS FOR DECISION:

(Delivered: 20 December 1994)

The Complainant, Danny King, claims that the Respondents discriminated against him on the ground of sex. The complaint arises out of an attempt by the Complainant and a group of friends to gain admission to a nightclub known as The Racquet Club on 25 April 1992.

The Racquet Club

Franquin Pty Ltd is a body corporate and at all material times traded as The Racquet Club. The Second Respondent, Michael Brown, was a director and the secretary of the Respondent company and was also the Manager of The Racquet Club.

The Racquet Club carried on business as a nightclub in Piccadilly Square in East Perth and was the holder of a cabaret licence. According to Section 42 of the *Liquor Licensing Act* 1988 the holder of such a licence is authorised to sell liquor ancillary to continuous entertainment. At the relevant time the Racquet Club had a membership list of about 1200 including both men and women in roughly equal numbers. It was common ground at the hearing that any member of the public could obtain admission to the club premises subject to the requirements of the *Liquor Licensing Act*.

Mr Brown said in evidence that he was generally in attendance at the club during trading hours on a Saturday night. His employees included three doormen who were positioned in the forecourt area outside the main entrance to the club. The doormen were there to look out for trouble-makers and to control entry into the club.

Mr Brown said in evidence that it was possible for an advance booking to be made by a group wishing to come to the club and in such a case, subject to an

appropriate standard of dress and demeanour, the group would probably be granted free admission to the premises. Bookings were generally recorded in a booking diary which was held by a receptionist at a counter immediately inside the front doors to the club. According to Mr Brown, bookings might be recorded occasionally on message pads, but he agreed that the booking diary was the main point of reference in regard to advance bookings.

Entertainment at the club included music and bar trade and the opportunity for those attending the club to socialise with a group of other patrons of both sexes. It was not uncommon for people to come to the club after midnight and remain there for several hours.

The Complainant

In April 1992 the Complainant was working at Darlot Gold Mine, being a mining tenement situated between Leonora and Leinster. The employees of the gold mine were a comparatively small community but because they worked night and day shifts there were few opportunities to socialise at the mine site. When a female employee decided to leave the employment her fellow workers resolved to mark the occasion with a get together in Perth. It fell to the Complainant, Mr King, to organise the outing. The idea was that some of those in the social club would go first to a restaurant, and then to the Lone Star Saloon in East Perth. Those who were not able to attend the function at the restaurant would rendezvous with the others at the Lone Star Saloon. At a later stage, those who wished to continue the festivities would go onwards to a nightclub. Mr King knew that most of the people attending the get together would not wish to drink and drive, so he planned accordingly, and hired a small bus and a driver.

The Complainant made some enquiries and found out that The Racquet Club,

which was situated not far away from the Lone Star Saloon, was probably a good place to end the evening. He had not been to the nightclub in question but on the basis of the assurances he received he telephoned the nightclub on Thursday 23 April 1992 and spoke to a person who identified himself as Michael Brown. Mr King then made arrangements for a group of 20 persons, male and female, to enter the club late on the evening of Saturday 25 April 1992. He explained that the group were members of the social club for the Sundowner Minerals Darlot Mine and the reason for the occasion was that one of the female employees was leaving work. The person he spoke to agreed that the group could arrive anytime after 10.00 p.m. and that there would be no door charge.

Mr King's evidence about the booking was corroborated at the hearing by Mr Brown. A page from the booking diary marked "Saturday 25 April" was produced and that page contains an entry "Darlot Goldmine Mixed - 30" in the handwriting of Mr Brown. The Tribunal pauses to note that the same page of the booking diary includes reference to other names. Opposite a booking placed by a female on behalf of a group one finds the notation "Does". Another entry refers to a "Hens night". In each case a tick appears beside the relevant entry. Mr Brown agreed during the course of his evidence that the tick signified that the group in question, clearly a group of women, had in fact arrived at the club in the night in question and were then admitted.

Saturday, 25 April

Mr King arranged for certain members of the group to be collected in a mini bus driven by a Mr Edward Koza. The mini bus began its journey by calling for Mr King at his mother's place south of the river at about 9.00 p.m. The bus then went to the Charles Hotel in North Perth. Some male members of the social club gradually assembled at the rendezvous point with one or two drinks being

consumed while the early arrivals waited for their companions. Mr King said in evidence that during this period of the evening he had one beer to drink. In due course the seven or eight men aboard the bus were driven to the Lone Star Saloon where they met up with other members of the club, those who had either come from the restaurant or from further afield. The evidence showed that the group as a whole comprised about eighteen or nineteen persons including men and women and a number of couples.

When the Lone Star Saloon closed at about midnight some members of the group decided to go straight home. The group in the mini bus being driven by Mr Koza proceeded to the nearby Racquet Club. They knew of the arrangements previously made by Mr King and were willing to finish off the evening at the night club he had chosen.

Events at The Racquet Club

The group aboard the mini bus were dropped off at the entrance to the club. The driver, Mr Koza, went to find a parking place. Mr King said in evidence that he approached the doorman and mentioned the arrangements which had been made with Michael Brown. The doorman referred him to the receptionist inside the club who confirmed the booking in the club diary. At that point, however, she said: "Go back and check with the doorman; it's up to him."

Mr King was surprised by this, but complied. The doorman then said that he could not let a large group of men in. According to Mr King, his words were: "We can't have 20 or 30 men coming in causing trouble." The complainant remonstrated. He said there was only seven of them. During the course of this discussion Mr Brown appeared and pointed out that the group seeking admission, contrary to the information recorded in the booking diary, was not a mixed group

and therefore the doorman was correct in saying that the group of men could not come in. According to Mr King, words were said during the course of this exchange which made it quite clear that Mr Brown, as the person in charge of admission, considered that the group of men might cause trouble. The Complainant invited Mr Brown to inspect the group of seven men who were standing nearby but Mr Brown declined to do so.

Mr King said in evidence that during the course of the exchange Mr Brown asked where the mixed group were. The Complainant explained that there were only seven males and the bus driver. The other members, due to the lateness of the hour, had decided not to come. He said that his group were willing to pay to go in. Mr Brown said that didn't make any difference. He couldn't allow a group of men in as they would cause trouble and he couldn't have this in his club.

Mr King said in evidence that he spoke to Mr Brown in a calm way and assured the Manager of the club that the group would not cause trouble. His plea was ignored. When it became apparent that entry would continue to be refused, Mr King and his group departed. Having regard to the presence of the doormen, and the attitude of the club manager, Mr King concluded that there was no point in persisting with the attempt to gain admission. As the Complainant and his group were leaving the club, Mr King observed two groups of women, numbering four or five each, being granted entry without discussion.

Mr Brown's Evidence

The evidence given by Mr King was disputed by Mr Brown. To the best of his recollection he had a verbal exchange with Mr King as the spokesman of the group. When he asked where the women were who were supposed to form part of the mixed group he was told by Mr King that the women were still at the

restaurant and would arrive soon. Mr Brown said in evidence that he was suspicious of this answer and therefore suggested that Mr King and his group wait to one side until the women arrived. Mr Brown went on to say that having made such a suggestion Mr King and some of those with him immediately became abusive. This reinforced Mr Brown's impression that the group might cause trouble if they were admitted and at that point he refused to let them into the club.

According to Mr Brown, what influenced him to refuse admission was the quarrelsome behaviour of the group rather than any outward sign of drunkenness or lack of sobriety. Indeed, under cross examination, he agreed that if a number of women had arrived soon after he asked the group of men to stand to one side then he probably would have let a mixed group of that kind into the club because, in his experience, the presence of the women would have had a stabilising influence. His evidence suggested that, even on his account of events, there was nothing in the appearance of the men which gave cause for alarm. He refused them admission to the club because they became quarrelsome and he had an innate suspicion that such a group might have been drinking for some time and could cause trouble.

The Tribunal will return to this conflict between the evidence given by Mr King and Mr Brown later. For the time being, it is sufficient to note that various provisions of the Liquor Licensing Act have a bearing on the matter. By section 115 of the Act a licensee who permits drunkenness or quarrelsome or disorderly behaviour on the premises commits an offence. The manager of premises may refuse admittance to any person the manager has reasonable cause to believe is or is known to be quarrelsome or disorderly (within the meaning of section 108) or is behaving in an offensive manner. Thus, it was part of the Respondents' case that Mr Brown was acting in a responsible manner in refusing admission to a group of men who became quarrelsome and acted in an abusive and disorderly way.

The Tribunal will return to the conflict of evidence in a moment. In order to complete the narrative, however, the Tribunal must also look at what happened after the encounter referred to above.

Subsequent events

Mr King said in evidence that he felt humiliated by what had occurred. He had been asked to organise an outing and his plans had been disrupted. As he saw it, without any fault on his part, and as a consequence of discriminatory conduct, he had been turned away. Groups of women were being let into the club but the group he represented had been refused admission on the suspicion that, being a group of men, they were likely to cause trouble. Some of those in his group joked about his inability to organise an outing in an efficient way. At that point, however, someone in his group suggested that they go to another nightclub and in due course the group found its way to premises nearby known as The Backstage Club. They remained at these premises until about 3.30 a.m. and were then driven home in the mini bus. Mr King agreed that the facilities at The Backstage Club in regard to music, bar service and the opportunity to socialise were probably similar to what was available at The Racquet Club and thus, in the end result, he and his group of friends had not suffered any real disadvantage and had experienced a reasonably enjoyable night out. Nonetheless, he considered that it was wrong in principle for he and his group to be refused admission to The Racquet Club and it was for this reason that he subsequently lodged a complaint against the club pursuant to provisions of the *Equal Opportunity Act 1984* ("the Act").

The Tribunal pauses to note that the evidence given by Mr King was substantially corroborated by the testimony given at the hearing by the driver of the mini bus, Mr Koza. The driver himself did not consume alcohol during the course of the

evening. He said in evidence that although he did not note particularly how much or the nature of what was being drunk by the group who eventually arrived at The Racquet Club in his estimation they were not boisterous or acting in any way which would suggest that they were unreasonably affected by alcohol. He observed Mr King talking to the doorman and to another man and Mr King appeared to be acting in a controlled way. The driver also spoke to the doorman and explained that he was driving the group. The doorman told him that as there were no females in the group they would be denied admission.

Formal Complaint

After lodgement of the complaint the Commissioner for Equal Opportunity wrote to The Racquet Club setting out the nature of the allegations and requested a reply. By letter dated 4 August 1992, Mr Brown on behalf of the First Respondent replied to the complaint. His letter refers to arrangements made by a Mr Mark Campagna for a group booking from Gwalia Minerals and suggests that no telephone call had been taken from a Mr King of the Sundowner Minerals Darlot Mine Social Club. The letter went on to say that *"During the evening a group of men arrived and wished to enter under the arrangement I had made with Mark Campagna"*. The letter refers to Mr Brown asking where the girls in the group were and being then advised they were still at the restaurant and would be along later. He was suspicious of the answer and asked the men to wait for the girls to arrive before entering. The letter says that the response to this was a *"mixture of sneers, sarcastic laughter, rude language and unruly behaviour"*. Again, it seems from this letter, that Mr Brown essentially relied upon the fact that, on his version of events, the group became quarrelsome. The letter does not refer to any lack of sobriety or non-observance of dress standards.

It is quite apparent from the terms of the letter that Mr Brown did not refer to the

booking diary before he wrote the letter. Had he done so, he would have observed that in his own handwriting, contrary to the suggestion made in his letter, there was indeed a booking made by the Sundowner group and that there was no reference to a Mr Mark Campagna. Mr Brown agreed at the hearing that he did not consult the booking diary and was not able to give any convincing explanation as to the sources of information which caused him to write the letter of 4 August 1992. The Tribunal was left with the impression that Mr Brown had no clear recollection of what happened on the night in question and, furthermore, had made very little effort to refresh his memory by reference to the contemporary records.

Statutory Provisions

By Section 8 of the Act discrimination occurs if, on the ground of the sex 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 sex. By Section 20 of the Act it is unlawful for a person who provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, by refusing to provide the other person with those goods or services or to make those facilities available to the other person. By Section 5 of the Act discriminatory conduct need not be the dominant or substantial reason for the doing the act complained of.

The Act also contains provisions concerning vicarious liability. By section 161 an employer can be held liable for the conduct of its employee or agent. Acts done on behalf of a corporate body can be treated as discriminatory conduct by the corporate body itself.

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 on the evidence. See Fenwick v Beveridge Building Products (Pty Ltd) 1986 EOC 92-147.

The cases also indicate that a comparison 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. Thus, in one case, where two well-conducted Aboriginal drinkers were evicted from a hotel at the same time as some Aboriginal drinkers who had been involved in an altercation, the Tribunal was prepared to grant relief to the two former drinkers because when their situation was compared to the situation of notional drinkers in the same circumstances - being bystanders when an altercation is taking place nearby - it was not likely that the notional drinker would have been evicted in such circumstances. Thus the Tribunal was able to find that an act of discrimination had occurred. See 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. 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.

Purpose of the Act

The Tribunal also takes account of the observations contained in Tully v Ceridale (1990) EOC 92-319. In that case a male patron at a nightclub was charged a higher entry fee than his female companion. The manager of the nightclub stated that the differential cover charge was never intended to constitute sex discrimination. It applied only on five or six Friday nights in the early months of the year in question. Its purpose was to encourage more women to attend because on certain Friday nights about that time there was a preponderance of men in attendance. The preservation of a balance between men and women patrons tended to ensure a more congenial atmosphere and diminish rowdy behaviour.

In that case the President of the Human Rights Commission held that the male complainant had been subjected to discriminatory conduct. Prima facie, a person of one sex charged a higher entry fee than a person of the other sex is treated less favourably than the other person. The grant of a discount to a female entrant at the same time as a male entrant is charged the undiscounted price necessarily results in the male entrant being treated less favourably than the female entrant. The underlying intention, whether it be good or bad, is irrelevant. There was therefore no escape from the conclusion that discrimination on the ground of sex occurred and that the Act rendered such discrimination unlawful.

The President went on to say that while the underlying objective of the Act is to put an end to discrimination against women it also has as an object the elimination of discrimination against any person on the ground of sex in the provision of goods, facilities and services. Underlying the Act is the recognition that every human being is equal in dignity and worth and therefore entitled to enjoyment of fundamental freedom and human rights. While in the present case women certainly were not disadvantaged and the circumstances may have seemed trivial, the underlying principle of equality was not. The President said that it was sufficient in the circumstances of that case that a declaration be made that the differential

constituted unlawful conduct. It was inappropriate for any further action to be taken.

Findings

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

The Tribunal did not regard Mr Brown as a credible witness. The letter dated 4 August 1992 which he wrote in answer to the complaint advanced against him was obviously written without any conscientious attempt having been made to look at the relevant records, even though the booking diary was in existence and quite clearly the appropriate reference point in that regard. The Tribunal was left with the impression that Mr Brown had put together an answer which he thought would be sufficient and thereafter stuck to that story. The Tribunal concluded that Mr Brown did not have any clear recollection of what took place on the night in question and that the evidence given by Mr King and by Mr Koza should be preferred to the evidence given by Mr Brown.

The Tribunal considered that both Mr King and Mr Koza were reliable witnesses. The Tribunal is satisfied on the balance of probabilities that when the Darlot Gold Mine group arrived at The Racquet Club they were behaving in an orderly way and were not either actually or apparently under the influence of liquor, and certainly not to an extent which might have suggested to the manager of the club that they would cause trouble. The Tribunal is also satisfied that Mr King, as spokesperson for the group, in seeking to gain entry on behalf of himself and his companions, conducted himself in a calm and reasonable way. The Tribunal is also satisfied that groups of women gained admission to the club during the course of the evening.

It follows from these findings that the Complainant and his companions were

refused admission not because they were disorderly or likely to cause trouble according to any reasonable appraisal but simply because of a perception in the mind of Mr Brown and his employee, the doorman, that a group of men might cause trouble. Viewed objectively, there was no reasonable basis for management to adopt such a stance and the Tribunal is therefore obliged to conclude that Mr King and the group of men with him were denied admission because of attributes which were thought to be typical of their sex, namely, that being in a group late at night they must have been drinking and would therefore become unruly. The perception was that a group of women, or, alternatively, a group of men accompanied by women would not behave in a disorderly way. In other words, a comparison was drawn between the situation of the Complainant and his companions and other patrons of the club in a way which worked to the disadvantage of the Complainant, and amounted to discrimination on the ground of his sex. He was excluded not because of his actual conduct but because of characteristics presumed against him because of his gender.

Relief

The Tribunal turns now to the question of relief. Section 127 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. It may also find the complaint substantiated and make an order enjoining the respondent from continuing or repeating any conduct rendered unlawful by the Act or, alternatively, decline to take any further action in the matter.

In the circumstances of this case the Tribunal makes a finding that the complaint has been substantiated for the reasons previously given. However, when the Tribunal looks at the facts of the matter, it is apparent that although the

Complainant suffered some momentary chagrin after being refused entry in circumstances where entry could reasonably have been expected (having regard to his prior booking) it is questionable whether this amounts to a compensable injury. The Complainants group went on to another venue and were able to take advantage of similar services and facilities and gain some enjoyment from the evening. Accordingly, the Tribunal will confine itself to finding the complaint substantiated but will not make any award of damages by way of compensation.

Finally, the Tribunal feels obliged to say that the Tribunal's determination of the issues raised by Mr King's complaint should not be taken to interfere with or cut across the statutory responsibilities of licensees to exercise control over their premises in accordance with the provisions of the Liquor Licensing Act. If a group of men causes trouble, or a manager of the premises has reasonable cause to believe that they will do so, then the men can be excluded or refused entry. In this case, however, on the Tribunal's findings, Mr Brown, as the manager in question, was dealing with a well-behaved group and did not have sufficient cause to refuse entry, and acted in a discriminatory way.

N.P. Harbuck
20. 12. 94

