

The Complainants claim that the Respondent discriminated against them on the ground of race. The complaints arise out of arrangements made with the Respondent to repair vehicles owned by the Complainants and the events which followed.

Orders were made by the Tribunal pursuant to Section 108 of the Equal Opportunity Act ("the Act") to hold a single inquiry in relation to the complaints on the grounds that they arose out of substantially the same circumstances and, as a consequence, evidence received concerning each complaint played a part in the findings made by the Tribunal in regard to each complaint in turn. The chronology of events bearing upon the manner in which the hearing was conducted are set out at pages 14 to 17 of the transcript, with the relevant pages being attached to this Judgment as Appendix 1. It appears from the transcript that the Commissioner was unable to investigate and form any opinion about the matters in issue owing to the Respondent's failure to respond to the complaint, that the Respondent failed to attend a preliminary hearing on 1 March 1996 of which prior notice was given to him, that the Respondent failed to comply with orders made on that date and that he failed to attend the hearing before the Tribunal on 2 April 1996 or communicate any explanation for his non-attendance, although prior notice of the hearing had been given to him. In these circumstances, and out of fairness to the Complainants, the Tribunal proceeded with the hearing and received evidence from the Complainants in the Respondent's absence. These Reasons for Judgment are based on the evidence received. It seems that the Respondent has consciously and persistently refused to comply with the requirements of the act in regard to the assessment of a complaint.

The Respondent

In the manner allowed for by the Act the complaints were investigated initially by the Commissioner for Equal Opportunity. She was unable to complete the investigation for the reasons mentioned earlier and referred the complaints to the Tribunal for inquiry pursuant to Section 93(1)(a) of the Act together with reports relating to her investigation. These reports were subsequently received in evidence by the Tribunal.

The evidence of the two Complainants, together with written materials forming part of the Commissioner's reports and additional exhibits, established to the satisfaction of the Tribunal that David Callaghan is the Proprietor of Leederville Auto Repairs which at all material times carried on business at 279 Oxford Street, Leederville, within the metropolitan area of Perth. His business card indicates that the Respondent was willing to undertake "all mechanical work - mig welding - engine cleaning - brake and clutch etc". His business card also refers to "all work guaranteed". The evidence showed that it was a comparatively small business although it did seem that he was assisted by at least one other employee.

Tanya Ryder

It will be convenient to begin by looking at the circumstances giving rise to the complaint of Tanya Ryder, this being the first in time of the two transactions in question.

It seems that Tanya Ryder's father, Joseph Patrick Ryder had been dealing with another car yard, Station Motors, for many years and as a result of that connection was introduced to the Respondent, David Callaghan. Mr Ryder was no more than a casual acquaintance of the Respondent but in early September 1994, when his daughter had a problem with her vehicle, a 1980 Mitsubishi van L300, Mr Ryder arranged for the car to be towed to Leederville Autos. Shortly afterwards, Mr Ryder and his daughter went to the Respondent's premises. They were advised by the Respondent that the car needed a new engine which would cost about \$500. Both Mr Ryder and his daughter are of Aboriginal descent and this fact would have been apparent to Mr Callaghan at the time the arrangements for repair of the vehicle were being made.

Having established that the proposed repairs would cost in the order of \$500 the Respondent made it clear that he would require the money to be paid in advance before he commenced work. The Complainant was unable to pay the amount in full so arrangements were made for it to be paid for by instalments of \$100 per fortnight from the income the Complainant received from the Department of Social Security as a Supporting Parent's Benefit. According to her, the necessary instalments were paid sometimes by her father and sometimes by herself so that by the end of November the "up front" payment of \$500 was paid in full. The Respondent did not give any receipts for the amounts in question.

The vehicle remained at the subject premises but the Respondent was slow to commence work upon it. Both Mr Ryder and his daughter pressed the Respondent for an answer as to when he would commence work but the

Respondent kept putting them off. He said to Mr Ryder "*it will be ready today*", or "*tomorrow*". He did not say at any time that there was any particular difficulty associated with carrying out the work or that the job was likely to prove more expensive than his original estimate had indicated. He said that he was waiting for a replacement engine to arrive.

For the next few months from November 1994 until March 1995, the Complainant or her father called at the premises on various occasions. The Complainant said that when she went to the workshop she saw other vehicles in the workshop under repair and the next time she went the vehicles would be gone. She assumed that these vehicles had been repaired. At some stage during that period the engine of her vehicle was removed but it was not replaced and the vehicle was not in working order. The Complainant was in need of a vehicle and her father therefore proceeded to purchase a Datsun 200B for \$500 from the Respondent for her use.

Eventually, as no work had commenced on the Complainant's van, Mr Ryder had the van towed out of the workshop and back to the Complainant's home in Girrawheen. It was left there in her yard, unregistered, and without an engine. Prior to the Complainant taking the van to the Respondent she had registered the vehicle for six months at a cost of \$134.65 but the registration expired in March 1995. The Complainant and her father asked for their money back but the Respondent refused to comply with the request. The sum of \$500 has never been returned and no explanation has been given as to why the Respondent considers he is entitled to retain the amount in question. The Tribunal will come back to the Tanya Ryder case later.

Judith Slater

Judith Slater is a person of Aboriginal descent. She was born on 7 August 1950 and grew up on the Goldfields. She was married in 1967 and since then has lived principally in Perth. As at March 1995 she was working as an Aboriginal visitor at the Midland lock-up on a roster system which meant that she worked two nights a week. She lived at Girrawheen and as one of the requirements of the job was that the visitors should have their own vehicles the ownership and use of a vehicle was important to her.

She was a friend of Mr Joseph Ryder - the father of Tanya Ryder - and it seems that it was on his suggestion that in early March she took her car to David Callaghan of Leederville Autos. The vehicle in question was a 1986 Commodore Sedan.

The Respondent did some repairs to the radiator but, after the Complainant brought the vehicle home, she noticed a knocking sound in the engine and sought the Respondent's further advice. The Respondent told her that it was the bottom half of the engine that was causing the problems and that the whole bottom half of the engine needed to be replaced. He said this would cost roughly \$1300. He insisted that the money would have to be paid up front before he would undertake the necessary repairs.

The Complainant did not have the amount in question so arrangements were made for her to pay by instalments. She paid him \$600 initially and two weeks later she paid him another amount of \$600. At that stage the Respondent asked for another \$250 but when it became apparent that the

Complainant was not willing to go beyond the quoted amount he accepted a further payment of \$100 so that work could commence. He did not issue a receipt for any of the amounts in question but the making of the payments was witnessed by Mr Joe Ryder and the Tribunal is satisfied that the various payments were made.

Both the Complainant and Mr Ryder went to the Respondent's premises from time to time but as the weeks went by it became apparent to the Complainant that nothing was happening. Other cars were being worked on because she could see that "cars were coming and going all the time" but her car was simply pushed from one corner of the Respondent's premises to another. By this time the engine of the Complainant's car had been removed. She also noticed that other customers were not required to pay money up front before repairs were commenced and, indeed, on at least one occasion, the Respondent complained to her of having been paid for repairs with a cheque that bounced. This statement indicated that the repairs in question had been undertaken without prepayment of the quoted price for the repairs.

By June the Complainant was severely inconvenienced by the lack of progress. In addition to being a visitor at the Midland lock up under the Aboriginal Visitors Scheme she was also working at a refuge in Northbridge. The refuge work didn't require a vehicle so she was having to give consideration to abandoning her work under the visitor's scheme. She pressed the Respondent for information as to when her car would be fixed but every day she went to his premises she got this answer "*Don't worry. It will be on the road in a couple of days*". When she asked him where her engine was he was not prepared to tell her and continued to say: "*Don't worry about a thing. It will*

be on the road in a couple of days". She said in evidence that he did not at any stage suggest the repair work was more difficult or likely to be more expensive than first anticipated. He continued to represent that the car would be returned to her, fully repaired and operational, in due course. Mr Ryder confirmed the Complainant's evidence in regard to these matters including the fact that the Respondent did not ask other customers for money up front.

There were other aspects of the situation which were of concern to the Complainant. On one occasion when she was at the Respondent's premises with Mr Ryder an Aboriginal man arrived and sought to make arrangements to have his car repaired. The Respondent said to the Complainant and Mr Ryder: *"He's giving me money up front before I produce the car"*. This was clearly contrary to his usual practice with Non-Aboriginal customers. On another day some Asian people pulled into the Respondent's workshop whereupon the Respondent came over to the Complainant and Mr Ryder and said: *"Here's a go ... bloody chogies ... I'll get something here for nothing"*.

The impasse concerning the Complainant's car had a particular impact upon the Complainant in July. In that month her mother passed away in Kalgoorlie and the Complainant had to make immediate arrangements to join the grieving family. The Complainant asked the Respondent whether he could help her with hiring a car. He promised to do so saying *"I'll try and get a loan of one for you, as quick as possible"*, but nothing came of it. By this time the Complainant was quite distraught as a consequence of the Respondent's failure to honour his various promises and his general indifference to her requests. At the end of July she felt obliged to resign from the Aboriginal Visitors Scheme: *"because I just didn't know how long it would be before my car*

would be on the road again". The Respondent did not make any explicit reference to her race or the fact that she was of Aboriginal descent but she said in evidence that she eventually concluded this was the cause of his neglect because the cars brought in for repair by Non-Aboriginal customers kept coming and going. The Respondent indicated that if she was not happy she could tow the car out of the premises, but by this time it was sitting in the yard without an engine. He offered her the loan of a 1970 vehicle which looked unroadworthy and eventually proved to be so. It was stopped by the police three weeks later and ordered off the road because the registration had expired.

After the Complainant came back from the funeral in Kalgoorlie she went to the Respondent's workshop and demanded action. Two weeks later, the Respondent told her that her car had been sent to Prosser Power for attention. From Prosser Power the vehicle was then towed to Moorepower but they were unable to attend to the vehicle which now lacked an engine. The quotation provided by that organisation was \$2395 to effect the necessary repairs if an engine was provided but otherwise the cost would be \$4000. She didn't have the necessary money so arrangements were made with the firm Mobi Tow for the vehicle to be returned to her house at Girrawheen (without its engine) at a towing cost of \$40. The Complainant eventually obtained a quotation from Osborne Wreckers to supply and fit a new engine at a total cost of \$2020, and work proceeded. In the meantime, she asked the Respondent to return to her the sum of \$1300 she had paid to him but he failed or refused to comply with her request.

Notwithstanding the installation of a new engine, the car was not operational. It was examined by Mr Frank Giovenco, the proprietor of F & A Performance Engines, who concluded that a range of work had to be undertaken to repair the fuel pump, electrical wiring and various parts. Evidence was received from Mr Giovenco at the hearing to the effect that many of these items were a direct result of the car having been left in a neglected condition for so long. For example, fuel left in the engine turns to a white gel which causes the fuel pump not to operate correctly and some of the electrical circuits were effected by an accumulation of moisture. In his opinion, as a skilled mechanic of eighteen years experience, the cost of repairing items falling within this category amounted in total to the sum of \$475.

The position then becomes, on the case presented to the Tribunal in regard to special damages, that, prior to delivering her vehicle to the Respondent, the Complainant had a vehicle in running order, albeit with an undetermined latent problem causing a knocking sound. In order to be returned to the same position, it was argued, she should recover by way of special damages the sum of \$1300 paid to the Respondent in respect of services which were never provided and the sum of \$2495 (being the sum of \$2020 quoted by Osborne Wreckers and \$475 being the total of the items referable to neglect identified by F & A Performance Engines) together with \$40 paid to Mobi Tow and \$160 representing the registration fee for the six month period during which the vehicle was standing idle. This part of the claim amounts to \$3935 in total.

Statutory provisions

By Section 36 of the 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 5 provides the unlawful discriminatory conduct need not be the only reason, nor even the dominant or substantial reason, underlying the action complained of. Thus, a reference to the doing of an act on the ground of a particular matter characterised as discriminatory includes the doing of an act on the ground of two or more matters whether or not the particular matter is the dominant or substantial reason for the doing of the act.

By Section 46 it is unlawful for a person who provides goods or services 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, in the terms or conditions on which the goods or services are provided or in the manner in which the goods or services are provided.

Section 4 of the Act defines "services" to include services of the kind provided by members of any profession or trade.

The decided cases indicate that the Complainant bears the burden of establishing on the balance of probabilities that he or she has been the victim of unlawful discrimination, and in that regard the Complainant may rely on

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 can be drawn between the situation of the Complainant and the situation of a notional person in the same or not materially different set of circumstances. See Bear v Norwood Private Nursing Home (1984) EOC 92-019.

It is not necessary to establish deliberate discriminatory conduct for an act of discrimination to take place because the statutory provisions extend to conduct arising from thoughtlessness and neglect. All that must be shown is a causal connection between the alleged discriminatory conduct and the circumstances of the complaint. See Waters v Public Transport Corporation (1991) 173 CLR 349.

In regard to racial discrimination this Tribunal expressed the following view in Slater v Brookton Farmers Co-operative Company Limited (1990) EOC 92-321 at page 78,186:

“Racial discrimination covers a spectrum of actions ranging from individual overt acts of oppression against members of minority groups to institutional and covert actions which involve structural relations between racial groups. Individual racism is normally considered to involve intended actions while institutional racism is built into the social, economic, political, and cultural relations between minority and majority groups. By the term “institutional discrimination” we refer to the often unintentional consequences of policies and practices which negatively affect the members of a minority group”.

In that case the Tribunal found that discriminatory conduct had occurred because it was apparent from the perfunctory manner in which the interview in question was conducted that the Aboriginal application for the employment position on offer was virtually being treated as a "non-person" who could be ignored. A situation of that kind was thought to fall within the reasoning in regard to covert racial discrimination mentioned earlier. The degree of thoughtlessness and neglect was such that consequences were visited upon the Aboriginal complainant which would not have been visited upon a white applicant for the position in the same circumstances or in circumstances that were not materially different.

Findings

Against this background, the Tribunal turns firstly to the complaint brought by Tanya Ryder. The Tribunal is satisfied on the balance of probabilities that the events described earlier occurred in the manner outlined by the Complainant and her father in their evidence as summarised earlier. Because the two cases were heard in conjunction the Tribunal also takes account of the circumstances surrounding the claim advanced by Judith Slater. Having regard to the evidence of the Complainant in the latter case, the Tribunal is satisfied that the Respondent in both cases failed to repair the two vehicles delivered to him by the two Aboriginal complainants in circumstances which permit an inference to be drawn that he treated them differently to his other customers in the manner and in the terms and conditions upon which he contracted to provide services. He insisted upon being paid in advance and neglected their reasonable requests to proceed with the repairs, although he was apparently able and willing to perform similar services for his other customers.

There are additional facts and matter which permit an inference to be drawn that he was discriminating against them because of their race, notwithstanding that the Complainants' racial descent was not mentioned explicitly by the Respondent. First, no credible explanation was offered as to why the repairs required by the Complainants could not be attended to. The Respondent did not say he was too busy or that parts could not be obtained. He did not say that the work was beyond his competence or that he needed specialist assistance. The circumstances lead to a conclusion that some reason other than explanations of this kind underlay his refusal to honour his promises or comply with his various representations. Second, the surrounding circumstances suggest that the Respondent was inclined to differentiate between his customers on the basis of their apparent racial descent. There is evidence of an adverse reference being made to a prospective Asian customer. There is evidence that the only customers required to put money up front were the Complainants and another customer of Aboriginal descent.

The Tribunal is therefore satisfied that in both cases the complaints have been made out and that the Complainants are entitled to recover damages pursuant to Section 127 of the Act.

The decided cases indicate that the injury complained of in such circumstances is in the nature of a statutory tort where recompense is obtained for the humiliation and any damage to self-esteem involved in the subject transaction. It is necessary that the award be of a sufficient size to substantiate the importance of the principles established by the legislation.

In the case of Tanya Ryder the Tribunal considers that she will be sufficiently compensated by an award of \$1500 by way of general damages and an award of \$684.65 in respect of the special damages detailed above represented by the amount paid to the Respondent and not recovered, together with the relevant towing charge, amounting to an award of \$2184.65 in all.

The injury suffered by the Complainant, Judith Slater, is more substantial. Evidence was received at the hearing that she had been treated for hypertension by Dr Chan towards the end of 1995 apparently as a consequence of the distress she experienced. She gave evidence of the humiliation she experienced in being constantly put off by the Respondent's shallow promises and offhand manner. It was apparent at the hearing that his brutal indifference to her reasonable requests that the repairs to her vehicle be completed was the cause of acute distress, and this was compounded by her inability to attend her mother's funeral.

In these circumstances the Tribunal will award \$5000 by way of general damages. It follows from earlier discussion that in regard to special damages the Complainant should recover the sum of \$3,935.00 in order to be placed in the same position as she was prior to her unfortunate association with the Respondent. Accordingly, as to this claim the Complainant will be awarded the sum of \$8,935.00 in total.

PRESIDENT: Please be seated. Now, I'm calling on for hearing the first matter on the court list which is matter number 2 of 1996; Judith Slater, complainant, and David Callaghan, respondent, proprietor of the Leederville Auto Repairs. Let me begin in the usual way by taking appearances. For the complainant?

MS McCOMISH: Sir, my name is McComish and with your leave I appear on behalf of the complainant.

PRESIDENT: That leave is granted. Now, is David Callaghan present in the tribunal room or any representative for him? It seems the answer to that is no. I will just ask the court clerk to call his name in the waiting room. I'm informed there is no appearance. I think there is a background to this matter in which there have been neither responses nor appearances by David Callaghan, the respondent, and therefore, as a matter of record, I intend to briefly summarise the position as I see it in that regard. Miss McComish, before I do that, perhaps you would like to check your papers as I go along and if you detect any error in my summary of the history of the matter, then perhaps I will give you an opportunity to set the record right once I have finished.

The background to this matter, as I see from the papers, is that in the manner allowed for by the act, by a letter dated the 25th of January 1996, the Commissioner of Equal Opportunity referred to the tribunal her report relating to a complaint lodged under the act on the 25th of August 1995. In her letter to the registrar of the tribunal, the commissioner reported that the complainant had lodged her complaint against Mr David Callaghan, proprietor of Leederville Auto Repairs, alleging unlawful discrimination on the ground of race in the area of goods and services.

Mr Callaghan failed to respond to the complaint and in view of that I have been unable to investigate and form any opinion about the substance of the complaint. Accordingly, the complaint, together with the attached report, was referred to the Equal Opportunity Tribunal under section 93(1)(a) of the Equal Opportunity Act. That report included various papers, including particulars of the complaint in which it was mentioned that the complainant in early March 1995 had sought to have her 1986 Commodore sedan repaired at Leederville Auto Repairs, and various events followed from that. The report also included correspondence directed to Mr Callaghan but, as the commissioner indicated in her covering letter, there had not been a response.

The matter having been referred to the tribunal, the tribunal record would show that on the 16th of February notice of a preliminary hearing was given and on Friday, the 1st of March 1996 a preliminary hearing was held in the presence of myself as president of the tribunal and on that occasion, the respondent not having appeared, I detailed at some length the nature of the proceedings before the tribunal and the purpose of the preliminary hearing, clearly indicating in my remarks that what I had to say would later appear on a transcript which would then be forwarded to the respondent so that he would be left in no doubt as to what the consequences might be of his failing to attend the date for the hearing of the inquiry at which both parties would be allowed an opportunity to tell their story. That transcript, dated the 1st of March 1996 containing those remarks, is self-explanatory and becomes a point of reference for anyone who would have occasion to look at what I have to say this morning and will be a supplement to some of the remarks I make.

The effect of the outcome of that preliminary hearing on the 1st of March was that orders were made appointing this morning, Tuesday, the 2nd of April 1996, as the hearing date at which the matter would be dealt with and with a clear indication to the respondent that if he failed to appear this morning and take other steps which would inform the complainant and the tribunal as to the nature of his response to the claim, there was a risk that orders might be made against him in his absence.

Now, consequent upon that, it appears from the tribunal file that, by letter dated the 6th of March 1996, the registrar of the tribunal, in the manner anticipated by my remarks at the preliminary hearing, sent to Mr Callaghan a copy of the transcript of the proceedings of the 1st of March and a copy of the commissioner's report which, of course, contained full details of the nature of the allegation of discrimination on the ground of race which was being advanced against him.

It seems that he did not provide any written response to the claim, being one of the matters required of him by me, as appears from the transcript of my remarks on the 1st of March, and I'm informed by the registrar that the only communication that has been received by the respondent was a telephone communication from him to the front reception desk of the commission, and therefore the tribunal, yesterday in which he asked the question as to whether he should attend this morning and he was informed that it was indeed his obligation to do so. I simply mention that incident because it is an indication that he was aware of this morning's hearing date and that is also a matter to be considered when we look at the position of his non-attendance this morning.

I also finally mention, of course, that the listing of this matter for hearing was advertised in the normal court list in The West Australian newspaper this morning and that too, of course, is an indication to the public at large that the matter would proceed this morning. So it is against that background that the question of how we should now proceed, given that the respondent has failed to appear, should be considered. Let me turn back to you, Miss McComish, and just ascertain, firstly, whether there is any feature of that narrative or summary I have given which you wish to comment on.

MS McCOMISH: No, sir.

PRESIDENT: I will just quickly turn to my fellow tribunal members. All right. It seems, from those who have some knowledge of the matter, that the summary I have provided does seem to set the matter in its proper sequence. Against that background and taking into account the remarks I made on the 1st of March as they are reflected in the transcript, Miss McComish, I turn to you and, firstly, invite your submission or comment as to how we should now proceed given the absence of the respondent.