**EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA**

Matter No 3 of 1997

IN THE MATTER OF A COMPLAINT BY:

STEPHEN BRUCE NEWMAN

Complainant

and

CITY OF GOSNELLS

Respondent

REASONS FOR DECISION

BEFORE:	Mr L W Roberts-Smith, QC	(Deputy President)
	Ms R Kean	(Member)
	Mr A Italiano	(Deputy Member)

Counsel for the Complainant: Mr A Macdonald,

Counsel for the Respondent: Mr M Diamond.

HEARD: 3 February 1998

REASONS FOR DECISION: Delivered: 9 March 1998

In July 1994 the complainant Mr Newman and his wife separated. At that time they were living in a house in the municipality of the City of Gosnells ("the Council"). The house was in their joint names and they had a mortgage over it.

It is not necessary at this stage to describe the circumstances of their separation. Suffice to say that Mr Newman's evidence to the Tribunal was that his wife and children left him suddenly and he was traumatised by the event.

He was at that time employed as an industrial officer with the Civil Service Association on a salary of approximately $40,000.00 per annum.

He left that employment in October 1994.

In the meantime, in August 1994, he received from the Council a 1995 rate notice. The due date for the first payment of the rates was 28 September 1994.

The rate notice charged an amount of $482.48 calculated at 8.1390 cents in the dollar for the improved residence plus a charge of $84.40 for domestic rubbish, making a total of $566.88. The notice provided a discount of $36.19 so that if the rates were paid by 28 September 1994 the total amount payable would be $530.69.

The rate notice was addressed to:

> "Newman Stephen Bruce
> Newman Karen Denise".

Sometime in 1994 (the date is unclear) Mr and Mrs Newman commenced proceedings in the Family Court of Western Australia in relation to custody, access and property issues.

In March 1995 Mr Newman received a letter dated 9 March 1995 from the Town Clerk of the City of Gosnells in the following terms:

> "Dear Sir/Madam
>
> Re: Assessment No. 122987 - Balance due $615.13
>
> Please note that it is Council's intention to commence legal action for the recovery of the above overdue rates which now include a 10% penalty.
>
> To avoid the additional expense and embarrassment of legal action full payment must be made within 10 days.
>
> Yours faithfully
>
> C Whitely
> Town Clerk"

Unlike the rate notice itself which was addressed to both Mr and Mrs Newman, this letter was addressed only to Mr Newman.

On 14 March 1995 Mr Newman wrote to Mr Whitely referring to the letter dated 9 March and advising that:

> "...the above premises are currently subject to a property settlement in the Family Court of Western Australia.
>
> The above account should be forwarded to K D Newman... for payment."

In April 1995 Mr Newman was served with a summons for the unpaid rates. The summons was issued for the full amount of the rates owing plus costs and named Mr Newman only as the defendant.

In early May (Mr Newman says on about the 2nd) he telephoned Mr Passmore, who was the Council officer with responsibility for this file and told him the property was the subject of Family Court proceedings and that a hearing had been set down for 8 June 1995. It is common ground that Mr Passmore agreed to await the outcome of those proceedings although he suggested in evidence that was conditional on Mr Newman keeping him informed of their progress whereas Mr Newman said there was no such condition, merely a request that he keep Mr Passmore informed.

On 12 May 1995 the Family Court proceedings were concluded with final orders made by consent. Those orders dealt with a number of issues including custody, access and maintenance; as to the property settlement the orders required Mr and Mrs Newman to do all things necessary to effect the sale of the former matrimonial home and that the proceeds of sale be distributed as follows:

(a) in payment of all costs of sale including agents' fees and commissions;

(b) adjustment of rates, taxes and the like; and

(c) the further proceeds apportioned between the husband and the wife according to a stipulated percentage.

Shortly after the orders were made, in late May or early June 1995, Mr Newman telephoned Mr Passmore to inform him that the Family Court proceedings had been concluded and that the property would be placed on the market pursuant to the court orders. In June Mr Newman arranged for an agent to have the property listed for sale.

In July 1995 he telephoned Mr Passmore again to inform him how the marketing was going. He testified that he told Mr Passmore that interest in the property was low and that he was making every effort to effect a prompt sale.

In his evidence and in his affidavit tendered to the Tribunal Mr Newman said it was on this occasion that he asked Mr Passmore why the summons had been served only upon himself and had not issued in the joint names of himself and his wife. He said that Mr Passmore replied with words to the effect that: "because the man's name appears first on the rates notice the man is served with the summons".

On the other hand in his affidavit and evidence Mr Passmore said that conversation took place in the course of the first telephone discussion between them and that he did not say that it was because the man's name

appears first but rather that the summons had been issued against Mr Newman and not his wife because Mr Newman's name had appeared first on the rates notice.

In August 1995 Mr Newman was served with a judgment summons for the unpaid rates plus interest and costs. He was surprised and angry with this because it was his understanding as a result of his previous discussions with Mr Passmore that the Council was going to wait before taking further action. He attempted to telephone Mr Passmore to again explain the circumstances but Mr Passmore was on leave at that time and he was put through to a Mr Congreve.

He says he asked Mr Congreve whether or not the Council had contacted his wife about paying the rates and was told that it had not. He then followed up that conversation with a letter to Mr Congreve dated 29 August 1995 outlining the history of the matter and his position as he understood it. In the letter he explained that the property had only been on the market for two months and he did not think it would take an unreasonable time before it would be sold. He offered to pay half of the outstanding rates prior to the sale of the property provided that his wife agreed to do likewise. He wrote:

> "As I explained to you by telephone I am not able to pay this amount until the house is sold and the disbursement is shared equally between myself and my ex-wife.
>
> I am also aggrieved that my ex-wife is not part of these proceedings. You have chosen to pursue me when, at law, my ex-wife is joint owner in (sic) the property and will share in the proceeds from the sale of the property. I find it discriminating to target only the male in such matters.
>
> May I suggest that you contact Mrs Newman with the proposal that she pay half of the account prior to the house being sold. For my part I will be prepared to pay half prior to the sale of the house if Mrs Newman will do likewise. Her address is ..."

His evidence was that in November 1995 he received a notice dated 17 November 1995 from the Armadale Magistrates' Court that a hearing of the Council's action for recovery would take place on 8 December. Mr Newman attended that hearing and during the course of it was examined by Mr Passmore as to his ability to repay the outstanding rates. Initially Mr Newman told the Tribunal that this involved him having to state publicly that he was unemployed, had substantial debts and was on medication for diabetes and depression. Subsequently in the course of his evidence it became clear that although he expressed he had been prepared to explain his medical condition he had not been required to descend into any detail about that. He testified that he felt humiliated and embarrassed by having to answer questions about how he purchased groceries and paid bills.

The hearing was adjourned indefinitely because the Council accepted that he was not able to repay the debt at that time.

The property was eventually sold in February 1996 and settlement took place on 15 March of that year. The outstanding rates were paid to the Council at settlement out of the proceeds of sale in accordance with the orders of the Family Court.

Mr Newman's complaint was that the Council chose to pursue only him for the unpaid rates when it was clearly aware of the situation regarding the property settlement between his wife and himself. He had kept the Council informed of the difficulties confronting him in paying the rates and the developments regarding the Family Court proceedings and ultimately the orders made by that court and the progress towards the sale of the property. He pointed out that on at least two occasions he requested the Council to contact his wife directly with a view to recovering some or all of the rates from her.

Mr Newman said that throughout 1995 he had to contend not only with the Council's conduct towards him but also the emotional distress associated with his marriage breakdown and employment situation. In his affidavit

dated 26 August 1997 and in his evidence to the Tribunal on 4 February 1998 he related in some detail and with some apparent feeling and distress the anxiety and humiliation he felt when he attended and gave evidence at the hearing in the Armadale Magistrates' Court in December 1995.

There was in this case very little factual dispute between the complainant and the respondent.

In his affidavit and evidence to the Tribunal Mr Passmore confirmed most of what had been explained by Mr Newman. He explained further that although the letter of 9 March 1995 had been signed by the Town Clerk Mr Whitely, it was Mr Passmore who was responsible for sending that letter to Mr Newman. He says the letter was addressed to:

> "S B Newman as this was the name which appeared first on the rates notice and in the rates book."

Mr Passmore said that he had lately been shown the letter from Mr Newman dated 14 March 1995 but had no knowledge of receiving it and a search of the Council records had revealed it was not on file. He said that if the letter had been received by the Council it would have been referred to him and if he had received it he would have contacted Mr Newman to discuss it.

As it was, he says, having not received a response to his letter of 9 March 1995 he issued a summons against Mr Newman seeking payment of the outstanding rates. He said the summons was issued against Mr Newman because his was the name which appeared first on the rates notice and in the rates book.

He confirmed that in early May 1995 Mr Newman had contacted him by telephone after he had been served with the summons. In the course of that conversation Mr Newman advised him that he and his wife had separated and the property was the subject of Family Court proceedings and that a settlement would take place on 8 June 1995. He told the Tribunal that he

agreed to suspend the legal proceedings for a period but requested that Mr Newman keep him informed of developments.

Mr Passmore testified it was during that same conversation that Mr Newman asked him why only he had been issued with the summons. Mr Passmore said he explained the summons was essentially designed to be issued against the one person because if two parties are issued with the same summons there would be additional costs for which the ratepayers (as the debtors) would ultimately be responsible. He said he also explained that the summons was printed by computer. When an assessment number was entered the computer printed the summons in the first name as it appeared in the rates book. He stated in his affidavit and evidence that he did not say

> "because the man's name appears first on the rates notice the man is automatically served with the summons"

but rather he told the complainant that

> "because Mr Newman's name appears first on the rates notice he had been issued with the summons".

According to Mr Passmore Mr Newman agreed to keep him informed of developments but he could recall only one further conversation with him. That was in early June when Mr Newman told him the property was on the market. He said he heard nothing further from Mr Newman in August and so with the matter still outstanding he issued a judgment summons.

Mr Passmore said that after that he contacted Mr Newman to discuss the contents of the letter he had sent to Mr Congreve. He said that as a result of that discussion he told Mr Newman it would not be necessary for him to attend court on 29 September and that he would have the case adjourned for 4-6 weeks to see if the property would sell. He said he arranged for the case to be adjourned to 17 November. Although he could not recall, he said he might have spoken to Mr Newman again, as in fact the case was adjourned a second time to 8 December 1995. On that date he attended the Armadale

Magistrate's Court and examined Mr Newman as to his means to pay the debt. According to Mr Passmore Mr Newman was very reluctant to disclose his financial situation and stated that he was not in receipt of any income and had refused to accept any social security payments. Mr Passmore said that from the answers provided by Mr Newman he decided that the latter could not make any offer of repayment and on that basis requested the court adjourn the case indefinitely. He confirmed that Mr Newman did suggest that he was being discriminated against, but Mr Passmore told him that was not so, and that it was common practice for the one person to be issued with a summons.

Mr Macdonald who appeared for the complainant tendered an affidavit of Mr Philip Webb, Rates Supervisor of the City of Gosnells, in response to a request for information made by the complainant.

In that affidavit Mr Webb advised that the respondent received 3178 local authority account enquiries from settlement agents in relation to newly acquired property jointly owned by a male and a female during the period 1 January 1994 to 1 January 1996 and over the same period issued 683 Local Court Summonses against ratepayers for outstanding rates and charges where the property was jointly owned by a male and a female.

Mr Webb stated that the City's usual practice was to record in its rate record the names of joint owners in the same order as they are listed in the Local Authority Account Enquiry. He observed that of the total 3178 enquiries received during that period, 2959 listed the male first and the female second. He went on to say that the City's usual practice is to name as defendant the first-named owner of a jointly-owned property as recorded in the rates record in actions for recovery of unpaid rates and charges.

Thus, of the 683 Local Court summonses issued during that period, there were 647 in which the male owner was named as defendant and 36 in which the female owner was so named.

Mr Newman's complaint is that the City of Gosnells unlawfully discriminated against him on the ground of his sex in the manner in which it provided him with services. It is a claim not of direct, but of indirect discrimination caused, he contends, by the application of a policy which had an unlawfully discriminatory effect against him as a male.

Indirect discrimination on the ground of sex is dealt with in s.8(2) of the *Equal Opportunity Act* ("the *Act*") as follows:

> *"...a person in this subsection (referred to as "the discriminator") discriminates against another period (in this subsection referred to as the "aggrieved person") on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition -*
>
> *(a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;*
>
> *(b) which is not reasonable, having regard to the circumstances of the case; and*
>
> *(c) with which the aggrieved person does not or is not able to comply."*

Discrimination in the provision of a service is dealt with in s.20 of the *Act* which relevantly to this case provides that:

> *"It is unlawful for a person who, whether for payment or not provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, marital status or pregnancy -*
>
> *(a) -*

(b) -

(c) *In the manner in which the first mentioned person provides the other person with those goods or services or makes those facilities available to the other person."*

In s.4 of the *Act* the term "services" is defined as including services of the kind provided by a government or public authority or a local government body.

Prior to the hearing the parties agreed on a statement of issues. They were agreed to be:

1. Whether the respondent was providing a "service" within the meaning of section 20 of the *Equal Opportunity Act 1984.*

2. If the answer to 1 is yes, whether the respondent required the complainant to comply with a requirement or condition with which a substantially higher proportion of females than males were able to comply, and with which the Complainant did not or was not able to comply.

3. If the answer to 2 is yes, whether the requirement or condition was unreasonable in all of the circumstances.

4. If the answer to 3 is yes, what amount of compensation or other remedy is the complainant entitled to receive.

(Despite the formulation of these issues by the parties in the terms set out above the Tribunal notes that strictly, that in 3 should refer to a requirement or condition being "not reasonable").

Provision of a Service

It is obviously the case as was submitted by counsel for the complainant that Councils provide services to the ratepayers and residents of their

municipality, the collection of garbage, the provision of facilities such as libraries, parks and sporting venues may constitute the provision of a service which attracts the operation of the *Act*: ***I W v City of Perth & Ors.*** [1]

It must also be accepted that s.18 of the *Interpretation Act 1984 (WA)* requires preference to be given to the construction of a written law that would promote the purpose or object underlying that law rather than a construction that would not promote that purpose or object. The intended effect of s.18 is reinforced by the rule of construction that beneficial and remedial legislation such as the *Equal Opportunity Act* is to be given a liberal construction: per Brennan CJ and McHugh J in ***R W v The City of Perth.*** [2]

It can be accepted that the provisions of the *Act* concerned with discrimination and the provision of goods and services should therefore be construed as widely as their terms permit and that having regard to the inclusive definition in s.4 of the *Act*, the word "services" is a word of complete generality and should not be given a narrow construction unless that is clearly required by the context. [3]

The *Local Government Act 1960 (WA)* was repealed by the *Local Government Act 1995* which became operative on 1 July 1996. For the purposes of this case therefore the relevant local government statutory provisions were those contained in the *Local Government Act 1960* and the following references in these reasons to the *Local Government Act* are references to the 1960 *Act*.

Section 522(1)(a) requires each municipal Council to establish "a municipal fund". Section 523 of that *Act* further provides that the ordinary revenue of a municipality consists of money payable to the Council and includes money paid in respect of rates. It then requires the Council to carry ordinary revenue into the municipal fund.

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1 (1997) EOC 92-892 per Brennan CJ, McHugh J at 77,289.
2 Supra at 77,288 and also Gummow J at 77,304.
3 ***I W v City of Perth*** Supra per Dawson and Gaudron JJ at 72,295-296.

Section 529 of the *Local Government Act* then authorises a Council to incur expenditure from the municipal fund amongst other things for the purpose of carrying out the powers and duties and exercising the functions conferred upon it by the *Act*.

The various functions and services towards which a local government Council may apply its ordinary revenue are set out in s.530(c) of the *Local Government Act*. Those services are expressed to include the construction and maintenance of streets, places of recreation, pleasure resorts, water courses and foreshores, tourist facilities, kindergartens, community centres, infant health centres and swimming pools.

Such expenditure is authorised:

> *"when in the opinion of the Council the expenditure will directly or indirectly benefit the inhabitants of its district."*

Under Part XXV of the *Local Government Act* each Council is required to cause to be recorded particulars relating to a rateable property in its district in the rate book of the municipality. Those particulars are to include the full name and postal address of the owner of the land.

Section 5442(1) of the *Local Government Act* provides that:

> *"The Council shall as soon as practicable after the rate book has been made up cause to be served upon every person whose name is in the book as an owner or on his attorney or agent a notice of valuation and rate. "*

Section 560 of the *Local Government Act* then provides that:

> *"(1) Subject to the provisions of the Rates and Charges (Rebates and Deference) Act 1992 rates imposed under this Act and recorded in a rate book together with the costs of proceedings, if any, for the recovery of the rates are a first charge on the land rated... and are recoverable by the Council from:*

> *(a) the owner at the time of the completion of the rate book..."*

Finally, relevantly to the instant case s.565(1)(a) of the *Local Government Act* provides that:

> *"A Council may recover rates which have been imposed under this Act or another Act and are payable to the Council and payment of which is in arrear as well as the costs of the proceedings, if any, for the recovery of them from the person liable to pay them either by complaint of the clerk in a court of summary jurisdiction or by action of the suit of the Council in a court of competent jurisdiction."*

It was contended on behalf of the complainant that the provisions of the *Local Government Act* set out above demonstrate "a clear connection" between the receipt by the Council of rates revenue under s.523 of the *Local Government Act* and the continuing application of that revenue towards the provision of services and facilities within the municipality. It was argued that essentially the ratepayer pays for the facilities and services which the Council provides even though it was acknowledged that it may not be possible to trace the particular rate payment received from any one owner or group of co-owners through to the provision of a particular service.

Paragraph 3 of the complainant's Points of Claim asserted that the City of Gosnells provides a service to ratepayers and residents in the municipality including the complainant by collecting and administering rates and applying those funds to the provision of other services for the benefit of ratepayers and residents in the municipality. Perhaps surprisingly in the circumstances that paragraph was admitted by the respondent in its points of defence dated 13 March 1997.

However by the time it filed its outline of submissions to the Tribunal dated 31 December 1997 the respondent was asserting that in taking legal action against the complainant for non-payment of rates the Council was not providing goods nor was it providing services to him. It was contended on behalf of the respondent that the Council was taking action pursuant to

s.565(1)(a) of the *Local Government Act* to enforce the non-payment of rates in a court of summary jurisdiction against a person liable to pay them and that action could in no way be described as the provision of a service.

Under the circumstances and having regard to the nature of these proceedings, the Tribunal does not consider itself compelled to regard the admission at para.1 of the Points of Defence as foreclosing the issue whether or not the claim of payment against Mr Newman solely and the subsequent court action against him for the enforcement of payment was or was not conduct that could be characterised either as a service or as a manner of providing a service within the meaning of the *Act.*

It was contended by Mr Diamond on behalf of the Council that although provisions of the *Act* have to be given a liberal and beneficial construction a court or tribunal is not at liberty to give them a construction that is unreasonable or unnatural: ***I W v The City of Perth & Ors.***[4] Perhaps more importantly the Tribunal should not approach the task of construction with any presumption that conduct which is discriminatory in its ordinary meaning is necessarily prohibited by the *Act*, because the *Act* is not a comprehensive anti-discrimination or equal opportunity statute: ***I W v The City of Perth & Ors.***[5] The Tribunal accepts those submissions.

Counsel for both the complainant and the respondent conceded that the Council performs a number of functions some of which may be characterised as "services" and others may not. In particular, those functions performed by government bodies and officials which involve the general public and which are "controlling" functions carried out in compliance with a statutory duty will likely not be characterised as "services" within the meaning of the *Act*. On the other hand it was also common ground that if part of the performance of the statutory function and duty is of the same character as the provision of the service that is and could be provided by a private person then such a

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4 Supra per Brennan CJ and McHugh J at 77,289.

5 Supra per Brennan CJ and McHugh J at 77,290.

function may well be covered by this anti-discrimination legislation. Counsel for the respondent, however, argued that the statutory duty of a local government Council to collect revenue and to enforce the payment of that revenue from ratepayers could not be described as the provision of a service and that although other functions may clearly be so characterised (such as the collection of garbage, provision of libraries, parks and sporting facilities etc) - and discrimination in the provision of those services may well be unlawful under the *Act* - the mere fact that ratepayers ultimately benefit from the process by having those identified services provided to them may not be sufficient to bring the collection and enforcement of rates itself within the scope of the *Act*. The Tribunal accepts the submissions of the respondent in this regard.

Unlike ***Savjani v Inland Revenue Commissioners*** [6] there is no element in this case of the Council determining whether the complainant was entitled to any amelioration or reduction of rates nor the giving and disseminating to ratepayers of advice to enable them to claim any form of rate relief not other benefit - there is here no "service" of that kind.

This case is more akin to ***R v Immigration Entry Clearance Officer Ex Parte Amin*** [7] in which the House of Lords held an immigration entry officer was not providing a "service" to potential immigrants but was rather fulfilling the function of controlling them. In the instant case it is difficult to see how the Council's enforcement of the payment of rates through the prosecution of a ratepayer if necessary can on any reasonable view be characterised as the provision of a "service" to that ratepayer or (at one further remove) a "manner" of providing such a service.

In ***Soares v Commissioner of State Revenue and the State of Western Australia*** [8] this Tribunal examined a number of the authorities and

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[6] *Savjani v Inland Revenue Commissioners* 1 All ER 1121.

[7] *R v Immigration Clearance Officer; ex p. Amin* (1983) 2 AC 818.

[8] *Soares v Commissioner of State Revenue and the State of Western Australia* (unreported) EOT, WA, 9/1997, 22/8/97.

concluded that although there may be circumstances in which it could be argued that the Commissioner was providing advice as to liability for State stamp duty (where his or her advice was sought on that) and which might therefore enable that particular circumstance to be characterised as a "service" within the principle of cases such as ***Amin***, nonetheless the ordinary course of assessment and imposition of stamp duty is properly to be regarded as the performance of a coercive statutory duty for what is clearly a governmental purpose and could not be properly characterised as the provision of a service. So it was in that case the Tribunal held that the assessment and collection, in accordance with the *Stamp Act* 1921 (WA) of duty chargeable under that *Act*, does not constitute the provision of a service within the meaning of section 20 of the *Act.*

In the Tribunal's view, in seeking the payment of rates and in subsequently issuing and pursuing court proceedings for recovery of them the Council was exercising a statutory power or duty of the kind contemplated by Brennan CJ and McHugh J in ***I W v The City of Perth*** and was acting as a coercive arm of government rather than a provider of services and hence that action was outside the scope of the *Act*. Nor could the process be regarded as the provision of a benefit to the complainant: it stretches any ordinary usage of the language to describe the bringing and pursuit of legal proceedings against a person as a "benefit" to that person - and indeed it is precisely because Mr Newman regarded it as a positive detriment to him that he was moved to make his complaint at all.

So too this is not a case in which the particular Council activity involved the giving of advice to the complainant in a form which could be characterised as the provision of a "service".

This activity was clearly the performance of a coercive statutory duty for a local government purpose - that is, the recovery of rate revenue - in essence similar to that in ***Soares***. Further, the Tribunal is unable to accept the submission of counsel for the complainant that this could properly be

described as a "manner" of providing any or all Council services to the complainant. In reaching this conclusion the Tribunal has not overlooked the point that on the rate notice initially received by Mr Newman there were two components; one was for general rates and the other one was specifically identified as an amount payable in respect of garbage collection. Even so, the Tribunal is of the view that making full allowance for the purposive interpretation of this legislation the requirement of payment (even of that discrete amount, much less the whole), and the subsequent enforcement of that payment by court proceedings cannot properly be described as "a manner" of performance of the particular service of garbage collection nor of unspecified Council services generally, within the meaning of the *Act*. Nor does the Tribunal accept the complainant's argument that the collection and application of rates for the benefit of the complainant and other ratepayers is either a service or a manner of providing a service.

Although this conclusion necessarily means the complaint must fail, the Tribunal considers it only fair to deal with the other submissions advanced.

"Requirement or Condition"

Once again there was no great difference between the submissions of counsel for the complainant and counsel for the respondent in relation to this particular issue; the difficulty was in the application of the relevant legal principles and statutory provisions to the circumstances of this particular case.

The Tribunal accepts that the words "requirement or condition" should be construed broadly so as to cover any form of qualification or prerequisite. However the actual requirement or condition in a particular case must needs be formulated with some precision. [9] For the purposes of the *Act* a

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9 *Australian Iron & Steel Pty Ltd v Banovic & Anor* (1989) EOC 92-271 at 77,737 per Dawson J.

requirement or condition need not be explicit; it is sufficient if implicit in the conduct which is said to constitute discrimination. [10]

> *"In the context of goods and services a person should be regarded as imposing a requirement or condition when that person intimates expressly or inferentially that some stipulation or set of circumstances must be obeyed or endured if the goods are services are to be acquired, used or enjoyed."* [11]

It must be acknowledged that a "requirement or condition" involves something over and above that which is necessarily inherent in the goods or services provided. Furthermore the identification of the service itself as well as a requirement or condition are questions of fact to be determined by the Tribunal. [12] It was the complainant's contention that the "requirement or condition" imposed as part of the provision of services by the Council to its ratepayers was that in order for a joint owner of a property to avoid being named as a defendant in proceedings for the recovery of unpaid rates he or she must be listed second on the Council's rate notice (which necessarily meant had to be listed second in the Council's rate book). The Tribunal notes that if this formulation is appropriate in substance it would be more accurately expressed as a requirement or condition that the ratepayer not be listed first.

On the other hand the Council's contention was that if there was a "requirement or condition" that the Council required the complainant to comply with it was a requirement that in order to be sued for non-payment of rates the complainant's name had to appear first on the rates notice (and therefore first in the rates book). On the basis of that proposition the Council contended that the complainant was able to comply with this requirement and was accordingly unable to satisfy s.8(2)(c) of the *Act*.

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10 *Waters & Ors v The Public Transport Corporation* (1991) EOC 92-390 at 78,674 per Mason CJ and Gaudron J.

11 *Waters* Supra at 78,701 per McHugh J.

12 *Waters* Supra at 78,675 per Mason CJ and Gaudron J and at 78,693-694 per Dawson and Toohey JJ.

The Tribunal is driven to take much the same view of the respondent's submissions in this respect as it was compelled to take of the complainant's submission in respect of the issue whether or not being sued by the Council was a "benefit" to the ratepayer being sued.

Interestingly enough s.8(2) of the *Act* does not stipulate the objects for which an aggrieved person is required to comply; however having regard to the purposes of the legislation and indeed to considerations of common sense it must be directed either to the gaining of a benefit or the avoidance of a detriment. If that view be correct (as the Tribunal considers it to be) then in this case the relevant "requirement or condition" could not be a requirement that in order to be sued the complainant's name had to appear first - it could only have been that in order not to be sued the complainant's name had to appear after the first name in the rates book (and hence after the first name on the rates notice).

The first question posed by s.8(2) of the *Act* therefore is whether or not the Council required Mr Newman to comply with "a requirement or condition". That question is objective; it is simply a matter of fact. Was there or was there not a requirement or condition imposed by the Council for the complainant to obtain a benefit or avoid a detriment? The Tribunal is of the view that the avoidance of having a claim made against one for outstanding rates and subsequently the avoidance of court proceedings against one for the enforcement of payment of those rates plus additional court and other enforcement costs does fall into that category.

"Substantially Higher Proportion"

The next condition which has to be established by a complainant under s.8(2) of the *Act* is that a substantially higher proportion of females is able to comply with the requirement or condition than males.

Being mindful of the cautionary observations of the High Court in ***I W v The City of Perth*** to the effect that this legislation must be construed strictly

according to its terms and not with any assumptions of what normally constitutes discrimination or otherwise, the Tribunal notes that there is nothing in s.8(2)(a) which goes to the underlying reasons why a higher proportion of persons of the opposite sex to the aggrieved persons may or may not be able to comply with the relevant requirement or condition

In ***Banovic*** [13] there was an underlying discriminatory reason why the women complainants were disproportionately unable to comply with the requirement because the company had pursued management practices that resulted in women constituting only a very small proportion of its iron-worker workforce and consequently the requirement in that case was unreasonable because in the circumstances it repeated the discriminatory effect of that historically discriminatory practice. [14] However for the purposes of the statutory comparison per se it was beside the point that the respective sex groups were themselves the product of discrimination.[15]

In his points of claim the complainant asserted that as a result of the Council's practice of listing male joint owners first on rates notices and pursuing only first-listed owners for recovery of debts incurred and owed by joint owners, he was unable to comply with the requirement that he be listed second on the rates notice so as to avoid sole liability for the whole of the joint debt incurred.

Thus expressed the contention is not supported by the evidence. It is not correct to contend there was a Council policy of listing male joint-owners first. The policy was simply to record the names of the joint owners in the rates book in exactly that order in which they were notified to the Council by the purchasers or their agents. That, however, does not dispose of the issue either generally or under section 8(2)(a) of the *Act.*

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13 Supra.
14 *Banovic* per Dawson J at 77,741.
15 McHugh J at 77,750.

In the case of a complaint of indirect sex discrimination the Tribunal must determine for itself as a matter of law the appropriate base groups which will reveal whether or not sex is a significant factor in compliance with the requirement or condition.[16]

The base group should be defined so as to identify the particular group of persons to whom the requirement or condition is directed. What is then required is a comparison which will reveal whether or not sex is significant to compliance. That involves ascertaining the number of complying men as the proportion of other men within the base group and the number of complying women as a proportion of women. [17]

The complainant's submission was that in this case it would be appropriate to take the base group as the number of Local Court summonses issued by the Council against ratepayers for unpaid rates for the period 1 January 1994 to 1 January 1996 where the property was jointly owned by a male and a female and the first-named owner in the rate record was also named as defendant. That base group comprised 683 cases; that is, the group was made up of 683 males and 683 females.

The evidence established that of those, in 647 instances the male owner was named as defendant and the female owner was named as the defendant in 36 cases. In every instance the defendant was the first-named owner on the rate notice.

On those figures the proportion of male owners issued with a summons who could comply with the requirement to be named second if the demand and subsequent enforcement proceeding were to be avoided was 5.27%; the proportion of female owners issued with a summons who could comply with the requirement of being listed second so as to avoid the issue of a summons was 94.73%.

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16 *Banovic* supra at 77,734 per Gaudron and Deane JJ; *Kemp v the Minister for Education & Anor* (1991) EOC 92-340 at 78,368.

17 *Kemp* Supra at 78,370.

The complainant therefore contended that a substantially higher proportion of females than males could comply with the Council's requirement.

Council for the respondent made no submissions on the issue of the base group nor indeed on the observations of s.8(2)(a) but preferred instead to base its submissions at this point on the argument that if there was a requirement or condition of the Council then it was reasonable within the meaning of s.9(2)(b) of the *Act*.

The Tribunal accepts the complainant's submissions with respect to the proper application of s.8(2)(a) in the circumstances of this case. Thus if the requirement or condition is correctly stated as being that in order to avoid being named as defendant in proceedings for the recovery of unpaid rates a joint owner must be listed other than first on the Council's rate register then it is clear on the evidence that a substantially higher proportion of females than males can comply with it.

"Not Reasonable"

The respondent's policy was to pursue the first-named owner of the property for unpaid rates regardless of that person's sex. It seems the rationale for the policy was to avoid the duplication of costs which would have been incurred had proceedings been issued against all joint owners.

Considerations of unlawful discrimination aside, the legal position was not disputed. That simply is that when two or more persons are in joint occupation of premises any one of them is liable for non-payment of rates. [18]

It has been held that:

> *"The test of reasonableness is less demanding than one of necessity but more demanding than a test of convenience. The criterion is an objective one which requires the court to weigh the nature and extent of the discriminatory effect on*

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18 *Westminster City Council v Tomlin* (1989) 1 WLR 1287 per Croome-Johnson LJ at 1295-6.

the one hand against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account." [19]

The requirement or condition should be appropriate and adapted to the activity in question. It may be that an alternative requirement or condition could have avoided or ameliorated the disadvantage experienced by the complainant [20]

It is the requirement or condition which is to be determined as reasonable or not reasonable under s.8(2)(b) - that is, if the evidence does establish that the Council required the complainant to comply with a requirement or condition with which a substantially higher proportion of females than males could comply the complainant must then establish on the balance of probabilities that the requirement or condition itself was not reasonable. It is essential however not to overlook that the sub-section postulates that determination being made "having regard to the circumstances of the case".

The question whether a requirement or condition is not reasonable is a question of fact.

In our view it was not objectively unreasonable for the respondent Council to require compliance with a requirement or condition that if a joint owner of a rateable property wished to avoid having enforcement action taken against him or her the ratepayer should ensure his or her name was listed other than first in the rates book - for that is all it would take.

The singular point of distinction between this case and, for example, ***Banovic*** is that the order in which the names of joint owners were registered on the

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19 ***Secretary of the Department of Foreign Affairs & Trade v Styles & Anor*** (1989) EOC 92-265 per Bowen CJ and Gummow J at 77,642; see also ***Waters*** Supra at 78,694 per Dawson and Toohey JJ; 78,677 per Mason CJ and Gaudron J; and at 78,685 per Brennan J; ***Commonwealth of Australia v The Human Rights & Equal Opportunity Commission*** (1995) EOC 92-753 at 78,605 per Lockhart J; and ***Finance Sector Union v The Commonwealth Bank of Australia*** (1997) EOC 92-889 at 77,243.

20 ***Finance Sector Union*** Supra at 77,242.

rates book was in no way dependent on any action or conduct of the Council. It was entirely open to the joint owners themselves (or their agents) and wholly within their control to determine the order in which their names would appear on the Offer and Acceptance form and on any formal notification to Council of their acquisition of the property. That is indeed what happened in this case.

It was Mr Newman's own evidence that so far as he could recall it was he who wrote his name first on the Offer and Acceptance form for the purchase of the property. The first notification given to the Council of the proposed purchase was in the form of a Local Authority Account Enquiry. The details which were included on that were taken from the Offer and Acceptance form. It was the respondent's practice to record in its rates record the names of joint owners in the same order as that provided to it by purchasers or their agents. So far as the Council was concerned sex was of no consequence. No distinction was made on the ground of sex. The names were recorded in the order in which they were submitted by the parties or their agents. Once recorded in the rates register - irrespective of the sex of the first-named joint owner - it was the policy of the Council to proceed against that person. We say "was" because the Council has now changed its policy. The Council now makes claim for unpaid rates against both (or all) joint owners and issues court proceedings for recovery against both (or all) when enforcement action becomes necessary. In our view that is a sensible and desirable change. Not only is it a fairer policy but it is likely in the end to be more effective for the Council even though involving some additional cost along the way. Of course that additional cost will ultimately have to be borne by the defaulting ratepayers themselves.

To say the present policy appears to us to be fairer does not dictate a conclusion that the previous policy complained of by Mr Newman was unlawfully discriminatory. As we have already pointed out the High Court

has made it quite clear [21] that considerations of what is "unfair" or "discriminatory" in ordinary usage are not determinative of whether conduct is unlawfully discriminatory within the meaning of the *Act.* In ***I W v The City of Perth*** Brennan CJ and McHugh J referring to the purposive construction of the legislation enjoined by s.18 of the *Interpretation Act* said (at ALR 702):

> *"In applying s.18 of the Interpretation Act however it must be kept in mind that the Act like many anti-discrimination statutes defines discrimination and the activities which cannot be the subject of discrimination in a rigid and often highly complex and artificial manner. As a result conduct that would be regarded as discriminatory in its ordinary meaning may fall outside the Act. The object referred to in s.3(a) of the Act must therefore be understood by reference to the definitions of discrimination which occur in various parts of the Act."* (Footnotes omitted.)

But we have thus far dealt only with the broad and objective aspect of the requirement or condition and as we have already noted the substance of the test of unreasonability is applicability of the requirement or condition having regard to the circumstances of the particular case.

In this case the Council had notice of the complainant's circumstances regarding the Family Court proceedings involving the matrimonial property. The Council was also aware the order of the Family Court provided for the sale of the property and that all rates taxes and charges would be settled in accordance with the order. Subsequent to the issue of the Family Court order the complainant kept the respondent Council informed of the progress of the sale of the property.

The complainant's wife as joint owner was jointly liable for the unpaid rates. The Council had knowledge of her address - it had been provided to them by the complainant who suggested to the Council that his wife be contacted and that a rates notice be sent to her. However, the Council neither

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[21] *I W v The City of Perth* Supra.

attempted to contact the complainant's wife nor did it seek to recover the whole or any part of the debt from her.

It was open to the Council either to await the sale of the property in accordance with the Family Court order or alternatively to proceed against both of the joint owners. Instead, notwithstanding his communications with the Council, it continued to pursue Mr Newman alone and made no demand at all of Mrs Newman.

In the circumstances of this case the Tribunal is of the view that the continued pursuit of Mr Newman exclusively was not reasonable and we accordingly consider that consequently the application of the condition or requirement to him having regard to those circumstances was not reasonable.

"Not Able to Comply"

There was no dispute in this case that clearly Mr Newman was a person who was not able to comply with the requirement or condition that to avoid having legal proceedings taken against him solely he should have been named other than first in the rates register.

Award

Should we have found the complaint substantiated this would have been a case in which an award of damages by way of compensation would have been appropriate pursuant to s.127(b)(i) of the *Act*.

In his Points of Claim the complainant claimed that as a consequence of the unlawful discrimination against him by the Council he had suffered loss and damage. These were particularised as:

(i) stress, anxiety and humiliation;

(ii) time and expenses incurred in responding to legal action(ie the enforcement action taken by the Council);

(iii) loss of credit rating.

No evidence was adduced to prove nor quantify any expenses incurred by the complainant in responding to the Council's legal action against him. Nor was there any evidence of loss of credit rating as a result, or any quantification of that. There was, however, evidence from Mr Newman of significant stress, anxiety and humiliation suffered by him as a result of the Council proceeding against him alone.

The respondent confined its response in its Points of Defence to a simple denial that the complainant had suffered any loss and damage as alleged.

The Tribunal has previously observed that although it has been generally accepted that for purposes of assessment of damages discrimination cases should be treated as a species of tort it would be wrong to take too pedantic or technical an approach. [22] It is now well established, for example, that the proper scope of awards under anti-discrimination legislation is both different in nature from, and much wider than, the scope of damages awards in tort. Perhaps the most obvious area in which this is apparent is that of humiliation, emotional distress (falling short of nervous shock), embarrassment, hurt feelings and the like (see ***Allders International Pty Ltd V Anstee & Ors*** (1986) EOC, 92-157; [1986] 5 NSWLR 47). It is important that awards aimed at compensating for injured feelings should not be minimal because that would tend to trivialise or diminish the respect for public policy (***Hall & Ors v A & A Shieban Pty Ltd & Ors)*** (1989) EOC, 92-250 and ***Alexander v Home Office*** (1988) 1 WLR 968).

As with any other loss of injury, compensation will be recoverable where and to the extent that loss of injury is shown to be caused by the wrongful act and is sufficiently proximate to it. (See ***Erbs v Overseas Corporation Pty Ltd*** (1986) EOC, 92-181, ***Cook v Lancet Pty Ltd & Anor*** (1989) EOC, 92-257,

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[22] *McCarthy v Transperth* [1993] EOC 92-478.

Marshall v Marshall White & Co Pty Ltd (1990) EOC 92-304 and ***Allegretta v Prime Holdings Pty Ltd*** (1991) EOC, 92-364.

It is notoriously difficult to assess damages under this head and awards in other cases are useful as only the most general guide. They range from relatively modest amounts compensating for the immediate humiliation occasioned by the discriminatory act (as eg the $1,800 awarded in ***Allegretta,*** supra) to somewhat larger amounts for more long-term and more significant effects (as eg $2,000 in ***Marshall v Marshall White & Co Pty Ltd,*** supra and $5,000 in ***Gibbs v Australian Wool Corporation*** (1990) EOC 92-327; $11,000 for injury to feelings in ***Erbs v Overseas Corporation Pty Ltd,*** Supra) to significantly greater awards for more serious effects in both their impact and duration. Examples of awards in the last category include ***Murphy v Ramus Pty Ltd*** (1990) EOC, 92-308 in which $12,000 was awarded by way of general damages and ***Hill v Water Resources Commission*** (1985) EOC, 92-127 in which $27,500 was awarded for injury to feelings, pain and suffering and loss of enjoyment of life plus $5,000 for disruption to the complainant's career.

It is important to recognise that damages under section 127(b)(i) are compensatory only - ie they are awarded in respect of and must reflect (so far as a monetary award ever can) actual loss or damage suffered by the complainant. Compensation cannot be awarded merely for having been unlawfully discriminated against.[23] Nor is anger as such a compensable head of damages.[24] Whilst it has been held that a claim for the trauma of court proceedings subsequent upon an act of unlawful discrimination is not compensable, that was in circumstances in which those proceedings were an indirect consequence of the discrimination in that they were a result of the complainant's use of indecent language rather than the respondent's discriminatory act.[25] That is not this case. Here the court proceedings (and

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[23] *Oldham v Wire* (1986) EOC 92-172.

[24] *Whitehead v Criterion Hotel, Geelong* (1985) EOC 92-129.

[25] *Calman & Ors v Haloulos* (1986) EOC 92-163.

the trauma occasioned by them) were an integral part and a direct consequence of the Council's pursuit of Mr Newman to the exclusion of his wife.

There is here no claim for loss of income, so the impact of Income Tax is not a consideration.

We accept that Mr Newman became upset and aggrieved at some stage after the Council issued court proceedings against him alone for recovery of the full amount of the rates (plus penalty and costs). He was at that time emotionally vulnerable and distressed because of the combination of the separation from his wife and children, his employment uncertainty, his extremely straitened financial circumstances and the stress of the Family Court proceedings. He is not to be compensated for those factors, but the impact of the Council's action against him (for which, had that been found to be unlawful discrimination, he would be entitled to compensation) had greater effect than in other circumstances it would have done.[26]

As the Tribunal has already observed, awards of damages for unlawful discrimination vary enormously. Previous cases afford only some broad guidance at best. An award must be based on and be in respect of damage or injury in the particular case. Having regard to these considerations and in a general way to awards for injury to feelings, stress and humiliation in other cases [27], and on the basis of Mr Newman's evidence of his distress and humiliation (which we accept) we consider that were it necessary to order

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26 The "egg shell skull" rule is applicable to awards under anti-discrimination legislation: see eg *Kiel v Weeks* (1989) EOC 92-245; *Watkins v Fryer & Anor* (1994) EOC 920667; *Lyon v Godley* (1990) EOC 92-287, 77,896; *Vanderhorn* (1992) EOC 92-402.

27 eg *Boase v ABC* (1995) EOC 92-729, $1,000; *Evershed v City of Geraldton & Ors* (1995) EOC 92-745, $7,000; *Harwin v Pateluch* (1995) EOC, 92-770, $7,000; *Filas v Fontounis & Anor* (1996) EOC 92-780, $8,000; *Rohan v Thomas* (1996) EOC 92-784, $2,500; *Hambleton v Gabriel the Professional Pty Ltd* (1996) EOC 92-791, $3,000; *Schlipalius v Petch & Anor* (1996) EOC 92-810, $5,500; *Hosking v Fraser t/a Central Recruiting* (1996) EOC 92-859, $1,500; *Jennings v Lee* (1997) EOC 92-866, $3,000; *JM v QFG & Ors* (1997) EOC 92-876, $7,500; *Hopper v Mt Isal Mines Ltd & Ors* (1997) EOC 92-879, $10,000.

payment of damages under section 127(b)(i) of the *Act* a proper award would be a sum of $2,500.00.

Conclusion

By virtue of the Tribunal's finding that the conduct complained of by the complainant was not a "service" or a manner in which the Council provided a service to Mr Newman it follows that the complaint has not been made out and must be dismissed.