

EQUAL OPPORTUNITY TRIBUNAL  
OF WESTERN AUSTRALIA

Matter Number 4 of 1997

IN THE MATTER OF A COMPLAINT BY:

ROBERT GORDON SAYLOR

Complainant

- against -

ARROWGLEN PTY LTD

Respondent

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REASONS FOR DECISION

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BEFORE:    Mr L.W. Roberts-Smith, QC    Acting President  
             Mrs E. Brice                            Deputy Member  
             Ms M. Fadjiar                            Deputy Member

Counsel for the Complainant:                            Mr A. MacDonald

Counsel for the Respondent:                            Mr C. Luckman

HEARD:        22 and 23 September 1997

REASONS FOR DECISION            Delivered: 14 November 1997

Mr Robert Saylor, a 37 year old Aboriginal man, complains that Mrs Kristin Davies unlawfully discriminated against him on the ground of his race in the manner in which she provided him with a service at the Ampol Petrol Station, Malaga on the night of Saturday, 27 May 1995.

Mr Saylor is readily identified by his appearance as Aboriginal.

His complaint is that Mrs Davies was the console operator on duty at the petrol station that night when he and his then 13 year old daughter, Melanie, went in to get some cash through EFTPOS and to make a small purchase. He says Mrs Davies was rude and offensive to him and that she behaved that way towards him because of his Aboriginality.

It is common ground that Mr Saylor was pleasant and polite when he entered the service station that night and generally in his dealings with Mrs Davies up to a certain point. There is a conflict of evidence about what he actually did initially, although it is also common ground that there came a point at which Mrs Davies was rude to him in circumstances in which such rudeness was quite unjustified by any conduct on Mr Saylor's part. Thereafter, Mr Saylor became increasingly upset and angry. The end result was that the police were called. There was a physical struggle between him and two police officers. Mr Saylor was arrested, handcuffed and put in the back of a police vehicle and later taken to Central Police Station where he was charged with disorderly behaviour and resisting arrest.

On 25 September 1996, Mr Saylor appeared before a magistrate in Perth Court of Petty Sessions on those charges. He pleaded guilty to the charge of disorderly behaviour and the charge of resisting arrest was withdrawn. The disorderly behaviour charge was dismissed without conviction under section 137 of the Police Act,

but he was ordered to pay the prosecution's costs of \$30.

The complaint alleges unlawful discrimination under sections 36 and 46(c) of the Equal Opportunity Act 1982 ("the Act").

Relevantly, section 36(1) provides that a person discriminates against another on the ground of race if on the ground of the aggrieved person's race, the discriminator treats that person less favourably than in the same circumstances or in circumstances that are not materially different, the discriminator treats or would treat a person of a different race.

Section 46 makes it unlawful for a person who provides goods or services or makes facilities available to discriminate against another person on the ground of that other person's race:

- "(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;
- (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
- (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."

As noted, it is only paragraph (c) of section 46 which is said to be relevant here.

The complaint was originally brought against the staff member concerned, but seems subsequently to have been treated by the Commissioner for Equal Opportunity as a complaint against Mr Geoffrey Joyce who was described as the proprietor of the service station.

The Commissioner's attempts to conciliate the complaint were unsuccessful and on 5 February 1997, she referred it under section 93(1)(b) of the Act to the Tribunal for determination. As referred, the respondent was described as the "Ampol Service Station Malaga."

The complaint was heard on 22 and 23 September 1997. At the end of the hearing, it was apparent that the service station was in fact a franchise operation, the owner of which was Arrowglen Pty Ltd, of which Mr Joyce was one of two shareholders and directors. The description "Ampol Service Station Malaga" is not a registered business name.

Mr MacDonald (who appeared for the complainant) asked for leave to amend the complaint so as to substitute the name Arrowglen Pty Ltd for that of Mr Joyce, as respondent. Mr Joyce consented to that on behalf of the company and leave to amend was granted accordingly.

Counsel for both parties accept that should Mrs Davies' conduct that night be found to constitute unlawful discrimination then the respondent would be vicariously liable for such discrimination under section 161 of the Act.

Section 161(2) provides a statutory defence to an employer or principal against a finding of unlawful discrimination under section 161(1), but that would not avail the respondent here because there is no evidence at all of the respondent having taken any steps to prevent its employees from doing acts which would amount to unlawful discrimination under the Act.

Thus the only relevant question in this case is whether Mrs Davies' behaviour towards Mr Saylor that Saturday night was grounded on the fact of his Aboriginality.

Mr Saylor does not have to show his Aboriginality was the only, the dominant or even a substantial reason behind Mrs

Davies' conduct - it would be sufficient for him to show that it was one of the reasons for that conduct (section 5).

Nor does he have to show that she intended to discriminate against him on the ground of his race, although the existence of any such purpose or intent would certainly be relevant: Waters v The Public Transport Corporation (1991) 113 CLR 349.

What Mr Saylor does have to show if his complaint is to succeed is that there was a causal connection between Mrs Davies treatment of or conduct towards him on the night of the 27th of May 1995 and the fact that he is an Aborigine: Slater v Brookton Farmers Co-op Company Limited (1990) EOC 92-321.

Mr Saylor must establish this on the balance of probabilities. What this means was explained by Dixon J in Briginshaw v Briginshaw (1938) 60 CLR 336 at 354 when he said that in civil cases:

*"The truth is that when the law requires proof of any fact the Tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality..."*

*"...It is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the Tribunal, but reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony or indirect inferences."*

The Full High Court has also approved and applied this explanation in Rejfeek v McElroy (1965) 112 CLR 517.

In similar vein, the Supreme Court of Massachusetts has described the civil onus of proof in these terms:

*"The burden of proof that is on the plaintiff in this case does not require him to establish beyond all doubt or beyond a reasonable doubt that the insured died from accidental injury within the policy. He must prove that by a preponderance of the evidence. It has been held not enough that mathematically the chances somewhat favour a proposition to be proved; for example, the fact that coloured automobiles made in the current year outnumber black ones would not warrant a finding that an undescribed automobile of the current year is coloured and not black, nor would the fact that only a minority of men die of cancer warrant a finding that a particular man did not die of cancer..."*

*"The weight or preponderance of evidence is its power to convince the Tribunal which has the determination of the fact of the actual truth of the proposition to be proved. After the evidence has been weighed that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth derived from the evidence exists in the mind or minds of the Tribunal, notwithstanding any doubts that may still linger there."*

Sargeant v Massachusetts Accident Co. 307 Mass. 246, 250.

One feature of this case is that there is no evidence whatsoever of any express reference by Mrs Davies to Mr Saylor's race and nor on anyone's account was anything said by her which could be taken as a reference to his Aboriginality or any characteristic pertaining or generally imputed to Aboriginal persons.

Thus, as Mr MacDonald concedes, Mr Saylor's case depends entirely upon the drawing of an inference that Mrs Davies' treatment of him was grounded, at least in part, on his race.

In the absence of direct evidence of unlawful discrimination a complainant may rely on circumstantial evidence or inferences drawn from primary facts (in the sense described in Chamberlain v The Queen (No. 2) (1984) 153 CLR 521) as explained in Shepherd v The Queen 97 ALR 161). Discrimination cannot be inferred when a more probable and innocent explanation is open on the evidence: Fenwick v Beveridge Building Products Proprietary Limited (1986) EOC 92-147; Allegetta v Prime Holdings Proprietary Limited (1991) EOC 92-364 at 78504.

There is frequently some inherent tension between the inquisitorial role of this Tribunal and the social purpose of the legislation (that being to prohibit unlawful discrimination and to provide a remedy to those who suffer from it) on the one hand and the principles referred to above relating to the onus and burden of proof. By its very nature unlawful discrimination is often not directly evidenced nor readily demonstrable. The problem is one of longstanding. It was expressed by Einfield J in Erbs v Overseas Corporation Proprietary Limited (1986) EOC 92-181 (a case of discrimination in employment on the ground of pregnancy) and reiterated by his Honour in Bennett & Another v Everett & Another (1988) EOC 92-244 at 77271.

The problem has not been confined to Australia. For example, in 1968 one Canadian commentator remarked that:

*"It must not be forgotten that human rights legislation prohibits acts which depend upon the fact of the existence of a certain motive. This is a matter particularly within the mind of the respondent... (he) can give many different reasons why he denied a certain person an hotel, an apartment or a job. The person who has been denied access is faced with an almost impossible task of disproving the reasons given to him."*

Walter S. Tarnopolski "The Iron Hand in the Velvet Glove; Administration and Enforcement of Human Rights Legislation in Canada" (1968) 46 Canadian Bar Review 565 at 574.

Beatrice Vizkelety (legal counsel to the Quebec Human Rights Commission) in her book "Proving Discrimination in Canada" (Carswell 1987) observes (at page 7 and following) that:

*"Whilst it is true administrative tribunals are not bound by the ordinary rules of evidence, this flexibility usually goes only to the admissibility of evidence, not to its weight."*

She goes on to point out that:

*"Indeed in addition to the rules of natural justice which require boards to decide without bias...and to give parties an opportunity to be heard...it is also recognised that they cannot base their decisions on an absence of evidence, on completely irrelevant or other 'illegal' evidence such as hearsay. Their's is a balancing act between two competing values: the desirability of preserving an informal approach on the one hand and a duty to ensure that all parties are treated fairly on the other."*

*In other words, the powers of human rights boards are not unfettered. They are limited by considerations of fairness towards the parties. The informality which characterises board procedures may allow greater flexibility in the rules of evidence followed at hearings, but it does not lessen the standard of proof required of the parties when making out their case. This standard, in some, is consistent with that which would be applied by the courts."*

A similar view has previously been expressed by this Tribunal in DL (representing the members of people living with AIDS WA Inc.) & Others v Perth City Council & Others (1992) EOC 92-422 at 79011-2 - a decision ultimately set aside by the High Court in IW v City of Perth & Others 146 ALR 696, but not on this point - and see also Gaze "Problems of Proof in Equal Opportunity Cases" Law Institute Journal August 1989 page 731.

By the time the complaint came on for hearing in this Tribunal the events which the witnesses were called on to describe had occurred 2½ years previously. They were



being asked to describe events which initially they had had no particular cause to note at the time and subsequently when the circumstances became difficult those involved were experiencing different emotional responses. Under the circumstances, it is not surprising that there would be differences in their detailed recollections of the events.

We do not propose to canvass all the evidence, but it is helpful to give an outline of the substance of the accounts given by the various witnesses so as to afford some understanding of the factual findings which we make below.

Mr Saylor gave evidence that on the evening of 27 May 1995 he and his family had dinner at his house in Mirrabooka, after which he exercised for an hour. He was fairly relaxed. About 6.45 pm they decided to withdraw some money, but were undecided whether to spend that on videos or have a bet at the TAB. They eventually chose to watch videos and went to the Ampol Service Station to get the money, arriving there at about 7 pm or shortly after.

Mr Saylor and Melanie went inside. He said that he browsed around looking for some chocolate for his youngest child while Melanie handed Mrs Saylor's credit card to Mrs Davies who was behind the cash register. It seems Melanie forgot to tell Mrs Davies how much she wanted and Mr Saylor noticed that Mrs Davies was waiting so he told Melanie that she had better tell Mrs Davies the amount she wanted. At this point, Mrs Davies said, "Well, about time. I'm not a mind reader" which made Mr Saylor feel a bit uncomfortable, but he let it pass. He did not think much of it at the time. He said by then he had decided on a chocolate bar for his youngest child and he proceeded with his own transaction.

He said he was directly in front of the counter where the EFTPOS machine was and the bars of chocolates and other confectionery were directly in front of him.

He said at that point he gave Mrs Davies his keycard which he'd been having trouble with from time to time. It did not work when she put it through the machine on either the first or second occasion and at that point she said to him that it did not work and perhaps he had better go up to the teller machine up the road. He then attempted to clean the card by wiping it on his shirt and before she tried it, she said, "If it doesn't work this time, you can go to the teller machine up the road." In fact, the keycard did work on that occasion.

Mr Saylor said that Mrs Davies seemed not so much angry but a bit irritated at this stage.

He said she asked what kind of account she should enter. He said "savings." She asked him how much he wanted and he said "\$8." When she handed the machine to him to enter his PIN number, he noticed there was \$9 displayed on the read-out and he said to her that he had not asked for \$9, he wanted \$8 which is all he had in the account at the time. He said she said to him, "Well, I'm not a mind reader. I don't expect to read your mind at the time. You've got to tell me what you want."

He said he had selected the chocolate which he was ready to buy and that was when she put in the \$9. Mrs Davies said to him, "Well, you need the extra \$1 for the chocolate" and it was then she said, "I'm not a mind-reader. You'll have to tell me what you want."

According to Mr Saylor he told her he did not think she had any right to assume that he wanted \$9 when he specifically asked for \$8 and she became quite annoyed at this comment. In any event, although she seemed a bit annoyed, things were still going along quite well, as he

described it, and he then said to her, "Are you having a bad day?" He said this to ease the tension. She then said to him, "Well, I was having a good day until you came along and ruined it for me." He said he was quite shocked at this comment and he said to her that she should not treat her customers in a rude, abrupt manner whether they're right or wrong, but she should always feel that the customer was right. At that stage, he decided to take her name and address so he took out his notebook and a pen and asked for her boss's name, and informed her that he was going to make a formal complaint. She said that was quite all right and gave him her name and address and then he said she called the police. He said he was quite surprised at this because he was still behaving in a calm and courteous manner and so he said, "Well that's all right. I'll tell the police what happened when they arrive."

Mr Saylor then said that just prior to taking her name and the manager's name he turned to his right and saw a man standing there. He said to the man that he had just witnessed what happened and asked him to "go witness" for him. Mr Saylor said, "That's when the man informed me he was Mrs Davies' husband."

He said there were no other people in the shop at that stage and the only other customer had been one who came in whilst he was cleaning his keycard. Whilst he was doing that, the man was waiting behind him and Mr Saylor turned to him and allowed him to go first while he cleaned his card. The man completed his transaction and walked out and that was when he gave the keycard back to Mrs Davies.

He said that whilst he was waiting for the police to arrive he was just standing with his arms folded and then three white people came in and were served without incident and in quite a well-mannered way. He said they walked out and another man came in who was also served in a civil manner in total contrast, as he saw it, to how his

daughter and himself had been treated and that upset him. He then became very angry and said to Mrs Davies that he did not think she should have treated him and his daughter in such a disrespectful manner when she treated these other white customers in a well-mannered way.

He said that another white customer came in and he turned to that customer and said, yelling, "What's the difference between you and I? You've got two arms and two legs. I mean, why should you be treated any different to what myself and my daughter was treated." The man made some placatory response and walked out. Mr Saylor said that's when he became very angry indeed. He paced up and down. He was yelling, but yelling to himself. He was recalling many things that had happened to him over the years and was yelling them out. He said he was very angry at this stage, although he was not directing his anger at either Mr Davies or Mrs Davies, apart from one particular incident where he walked to the counter and said to her, "You're nothing but an 'effing' racist woman" or words to that effect. He admitted to swearing at that time.

He said he continued to pace up and down, but he knew the police were coming and kept telling himself that he had to calm down, he had to cool off, which is what he did. He said by the time the police arrived, he was standing motionless and was fairly calm.

When asked whether he could recall anyone saying anything to him during this period he said he could not recall Mr Davies saying anything, but Mrs Davies made some comment that he had better settle down because the 24 hour surveillance video tape was on. His reaction to that was to say that was quite all right because it should show how he was treated, how he had come into the place in a quiet, well-mannered way and was treated badly.

Mr Saylor said Melanie had walked out after he did his transaction and his wife came in a little later while he was pacing up and down, trying to cool off.

He said he recalled his wife coming in and asking what was happening and he said he was yelling at her, saying "I shouldn't be treated like this..." and he vaguely remembered her asking what happened because something must have triggered him off. He could remember a few other voices telling him to calm down, or suggesting to her to calm him down, but he was very angry, although he reiterated his anger was not directed at anybody in particular. He described what he was doing as more or less getting it off his chest.

He said he was quite calm when the police arrived and as they walked in, he moved to the door to meet them. They asked what was going on and he proceeded to tell them. He said he didn't realise that he was yelling and maybe a bit angry still at the time, but his voice was raised. They told him to come outside and tell them about it. As they walked through the door, he stopped and half-turned and called out to Mrs Davies, "I hope you're happy with the way you treated me tonight" and turned to walk outside. He said that was when, without reason and without explanation, the police officers grabbed him.

He said there was in fact something of a struggle, the police officers grabbing him by both his arms. They carried him for about 5 to 10 feet and tried to throw him to the ground. At that point he became very distressed and was yelling to them that he had not done anything wrong. His family were watching this happening. They were screaming and yelling. His two youngest children ran back to the car screaming. His eldest boy and his daughter tried to pull the police off him, while the police continued trying to throw him to the ground. He said he was yelling all the time, saying "I didn't do anything. I didn't do anything" but they kept trying to

trip him to the ground. Every time they tried to trip him, he put a foot forward and regained his balance and this went on for a couple of minutes until another customer held his legs down. He then stopped struggling. He was handcuffed, put in the police van and eventually taken to East Perth Police Station where he was photographed, fingerprinted and released on bail.

Mr Saylor said that was the only time he had ever been charged with anything in his 37 years.

He explained that some months later he went to court where he was charged with resisting arrest and disorderly conduct. He pleaded guilty to the disorderly conduct and the charge of resisting arrest was dropped.

Mr Saylor said that he had been frequenting the businesses around Malaga for about 6 months and that included the Ampol Service Station which he had used on a number of occasions. There had never been any problem. Indeed, he'd even been served by Mrs Davies before once or twice, although on those occasions he never spoke to her, just doing his business and walking out.

When asked whether she had said anything to him to explain herself that night, he said she didn't say anything, but her husband had told him that she was sick for a couple of days. She had a headache. However, he still felt that was in direct contrast to how she treated the other customers who came into the service station.

In cross-examination Mr Saylor agreed that at no point was there any openly racist remark made at any stage.

He said when he went into the store he did not notice any other customers at all, although he was not paying any particular attention.

He said he remembered asking Mrs Davies the price of the chocolate bar. He said he just held it in front of him whilst standing at the counter. It turned out to be \$1, which was the price he was looking for. When asked whether he held up any crisps and asked the price of them he said not that he could recall, and then said he had not.

When it was put to him that he had asked the price of something which Mrs Davies could not tell him and so needed to swipe it over the electronic bar-code reader, he said that was the bar of chocolate and it was only on the one occasion.

It was put to him that there were two or three occasions when he asked her the price of various items, but he maintained his insistence that there was only one and that was with the block of chocolate. When it was put to him again he said that he honestly could not recall, but he was looking for a block of chocolate and he had his mind on a \$1 block. He said he could not say whether he asked her two or three times, but he thought he asked her once.

He did not recall that Mrs Davies was in the process of actually serving other customers at the time. He said he did not see anybody.

It was Mr Saylor's recollection that he was directly in front of the counter where the chocolates were and had remained there most of the time and in the meantime his daughter was getting served. He could not recall anyone coming in at that time apart from the one customer who came in whilst he was cleaning his keycard.

He said that it was when he got into an altercation with Mrs Davies that Melanie walked out. It was his recollection that he did not have to wait for anybody else to be served before him. There wasn't anybody there. He did not have to wait at all.

Further in cross-examination when asked what he did when he first went into the service station, he said that he recalled browsing around. He did not actually pick anything up when he immediately walked into the place. He browsed around.

So far as other customers were concerned, it was Mr Saylor's memory that there was only the one customer he let go whilst he was cleaning his keycard, then three other people came in and then another person, so that during that time, there were only the five people actually that he noticed and recalled.

So far as the confusion about the money was concerned, it was his assumption that Mrs Davies was going to take the \$1 out of the \$8 for which he had asked, although he conceded there was no discussion with her as to how precisely that transaction was going to be done, apart from him saying he wanted to buy the \$1 chocolate and that he wanted \$8 cash. What was in his mind was that he would receive the \$8 and pay the \$1 for the chocolate out of that. It had to be done that way because he only had \$8 in the account.

When it was put to him that when he asked her, "Are you having a bad day?" all she said was, "I was having a good until you came along" and that she did not in fact say, "But you have ruined it for me", Mr Saylor was positive that he specifically remembered words to that effect.

He also maintained that he had been perfectly polite and reasonable up to that point and was not upset at that stage. He said that was when he asked for her name and address she was not upset by that. He got his notebook out and she said, "Certainly" and then she grabbed his notebook, wrote her name and pushed it back to him. He said that was done in an abrupt and rushed manner and it was at that point she called the police.



When it was put to him, he agreed that Mr Davies had said to him that Mrs Davies had been rude, but had added that she was "not feeling well, she's not normally like that."

Mr Saylor said it was only after he found out that the person standing there was Mrs Davies' husband that he became angry and began pacing up and down in front of the counter. He became even more angry when he saw how she treated the other people who came in afterwards.

He agreed that at the stage Mrs Davies asked her husband to take the children outside he was angry and told her that she was racist. He said he recalled using the "eff" word then and he regretted using it. He said when Mrs Davies asked her husband to take the children out he became even more angry because he took that as an insult insofar as she could (as he saw it) treat his children in the manner she had and yet not have her children subjected to unpleasantness.

In evidence he explained that whilst he was pacing up and down he was trying to let people know what he'd been through over the years and that was his way of saying it. It was not directed at anyone; it was more or less directed at himself. He agreed he was yelling and maybe incoherent. He remembered saying things about work and about football, about nightclubs, pubs, all sorts of things in relation to what he'd experienced over the years.

In re-examination, he elaborated on this somewhat, explaining:

*"...I have gone to many places over the years and, you know, you walk in first - you walk in first and expect to be served first and other guys come in after you and they serve them first, but nothing's said about it. You know, many times. I've gone to nightclubs - I've gone to nightclubs in my late teens and early twenties and, you know, I have been dressed really well, dressed really well, as well as the*

other guy and he gets in and I don't and the reason is, 'Oh, well, you're not dressed well enough.' That has happened many times, not only in nightclubs, pubs, hotels, for some reason. No reason given, you know. I've gone to shops where blokes have followed me around thinking I'm - well, the only reason I think is that they think I'm going to take something without paying for it, you know. I mean, that happens to everybody, but I have experienced it - I have felt I have experienced it more so than anybody, you know.

...as I say, it has been said to me since, people can be - - can treat other people differently in more subtle ways, you know. As I say, I've gone to nightclubs where I've been better dressed than some other guy and he has been let in. How do you take that? How do you take it? I've never questioned it over the years. I've just said, oh well, you know, 'I will go to the next nightclub' or the next one or the next one, you know, but where do you stop? Where do you draw the line? That's what I have felt, you know."

In short, he reiterated that in the past when he felt he'd been discriminated against, he had just brushed it off and walked away and he'd done that thousands of times over the years. On this occasion he actually got angry and felt he'd done the right thing by asking for Mrs Davies' name and address and informing her that he was going to make a formal complaint. The next thing, she rang the police for no apparent reason and he could not understand that.

In her evidence, Melanie Saylor said that when she walked into the Ampol Service Station and up to Mrs Davies at the front counter, she asked Mrs Davies if she could draw out some money and then gave her her mother's keycard. She said Mrs Davies stood there looking at her and then her father said that she had better tell Mrs Davies the amount she wanted, and she did, to which Mrs Davies responded, "About time. I'm not a mind-reader." Melanie Saylor said she didn't take much notice of that and just let it brush past. She said at that stage her father was standing next to her, looking at the chocolates. Just once he asked Mrs

Davies what the price of a particular chocolate was and she said, "\$1."

Melanie said when she received her money from Mrs Davies, she stood there waiting for her father. His keycard didn't work so she walked out of the service station while he was wiping it on his shirt. She did recall that Mrs Davies said something about if the keycard didn't work the third time, there was an ATM down the road. She recalled that while her father was wiping the keycard on his shirt, he let another customer go through.

Melanie Saylor said that after she left the service station she was walking back to the car and her mother asked her, "What's going on in there?" and she looked back and saw that her father was writing something in his notebook. She said to her mother it looked as though her father was taking Mrs Davies' name and number. They both then walked back into the service station.

She said that when they went inside, her father was telling Mrs Davies that she should treat customers with respect and that if she's having a bad day, she should not take it out on customers. Ms Saylor testified that she heard Mrs Davies say that she was going to ring the police and then some other customers came in. She said she heard Mrs Davies tell the police there was a man causing a disturbance in the shop.

She said that when she had gone back into the petrol station her father was raising his voice; it was just a loud kind of yelling, but nothing else. He was pointing at Mrs Davies and then started pacing up and down. She said that a man walked in and her father asked him, "What's the difference between me and you?" The man said nothing.

She thought she could recall three people coming into the service station after she returned - they were two men and a lady.

She did remember another man being in there with two little children. That turned out to be Mrs Davies' husband and her children. She heard her father ask whether he could be a witness and the man replied, "Sorry, mate, she's my wife." She said Mrs Davies asked her husband to take her children out because she didn't want them to see or hear what was going on and her father then said, "It's all right for my kids to see and hear this, you being racist" (or something) "to us, but it's not all right for your kids to hear it."

She said her father was just pointing and yelling at Mrs Davies, not in an abusive way, but in a loud kind of voice to get whatever point he was trying to make over to her and that was when she asked her husband to take her children out, which he did. She said her father was going on about racism.

She then described the arrival of the police and how they struggled with her father and eventually arrested him.

In cross-examination, she said there were no other customers in there prior to the man who came in after her father and who he allowed through whilst he was wiping his keycard.

She maintained her earlier evidence that it was after her father told Mrs Davies that she should treat her customers with respect and that just because she was having a bad day was no reason to treat people the way she treated him, that Mrs Davies said she was going to call the police.

She said she recalled Mr Davies saying to her father that it would be hard for him to go witness because he was Mrs Davies' husband and he would "be in the dog-box" for the

rest of his life. She also recalled him saying that Mrs Davies was not well and was not normally like that, but she'd been sick and she only came into work because she'd been feeling better earlier.

She also agreed when it was put to her that before the police arrived Mrs Davies had said to her father that she was not a racist, it would not have mattered who had come in; the way she was feeling that evening, she would have said the same thing to anybody.

The last witness for the complainant was his wife, Mrs Christine Saylor. She said that after they arrived at the service station that evening, her husband and Melanie went inside to withdraw cash from the EFTPOS and she and her two other boys stayed in the car. Her husband and daughter were inside for quite a while and then Melanie came back out and Mrs Saylor asked her what was taking her father so long. She had been wondering that because there were no other customers inside and no other cars parked there at the time. According to Mrs Saylor, Melanie then said that he was taking Mrs Davies' name and the number of the service station. At that, Mrs Saylor decided to go inside, so she and Melanie did so. She saw her husband pacing up and down with his voice raised and she asked what was going on. Mrs Davies asked who she was and she explained that she was Mr Saylor's wife. Mrs Davies then asked her to try and calm him down, to which Mrs Saylor said, "No, you must have done something pretty bad to get him like this." Mrs Saylor said that she could see her husband was still pacing and then Mrs Davies telephoned for the police. Then her husband had said he was going to wait to tell his side of the story, but he could guarantee that the police would arrest him straight away.

Mrs Saylor was quite insistent that she heard Mrs Davies say first that she was going to call the police and then she did so. She did, however, add that Mrs Davies must also have said that earlier because when she walked into

the petrol station Mrs Saylor heard her husband saying, "You ring the police and I'll wait here, but I can guarantee I'll be arrested straight away."

She said that when Mrs Davies did ring the police she told them there was a man there creating a disturbance.

Mrs Saylor said she was present when her husband approached Mr Davies and asked him if he could be a witness. She said that her husband asked Mr Davies if he could be a witness to what had happened and Mr Davies replied, "Sorry, mate, I can't. She's my wife and I'll be in dog-box." Those, she said, were his exact words. She said she was there also when a man came in to pay for his petrol and her husband asked if there was any difference between himself and that man besides colour and that customer said, "No", paid for his petrol and left.

Mrs Saylor said that Mr Davies only left with the children when his wife asked him to. Mr Saylor then said that Mrs Davies had abused him and his daughter in front of the children and now she was asking her husband to take her own children out because she didn't want them subjected to what was going on. According to Mrs Saylor her husband said something to the effect that it was all right for his family to be subject to what had happened, but not for hers.

She said that when the police arrived they ran straight in and grabbed her husband and told him to come outside. She said her husband wanted to explain his side of the story and they said he could explain it outside. They took him by the arms and he was trying to keep his balance as they were taking him outside. She said as they were going through the doorway, he turned around and pointed at Mrs Davies and said, "I told you I'd be arrested straight away" and then there was a struggle, with the police trying to get him on the ground, which they eventually did

with the assistance of a customer. The children were screaming and crying while all this was going on.

Mrs Saylor testified she was standing at the back of the police van when Mr Davies came outside and told the policeman that Mr Saylor shouldn't be arrested, it was not his fault because he'd come in there quite happy; it was his wife's fault because she was rude to Mr Saylor to begin with.

She said one of the police officers went back inside the petrol station and reprimanded Mrs Davies about being rude to Mr Saylor, telling her that she should not treat customers like that and now because she had had a bad day it had gone too far. She said the police officer came out and said that he'd "had a go at her" for treating Mr Saylor like that, but now because it had gone as far as it had, they had to take him to the police station.

In cross-examination, she was adamant that there were no other cars there at the time her husband and Melanie were first inside the petrol station.

Asked about what Mr Saylor was saying inside the service station she said he was just talking about what happened to him when he was younger, working for Westrail and playing football.

She continued to maintain that she heard Mrs Davies saying that if her husband did not leave the store, she would ring the police. Her husband was very upset, but he wanted the police to be called so he could give his side of the story.

She insisted that she was standing right next to her husband when her husband asked Mr Davies to be a witness. She said this was inside while Mr Davies was standing at the Coca-Cola machine. On the other hand, she did not see three young people being served in the store and she saw

no other customers inside the shop apart from one man with red hair.

Mrs Kristin Davies has had some years experience working in service stations and roadhouses at various locations around Western Australia.

The 27th of May 1995 was not her rostered day to work but she had previously reached an arrangement with another staff member of the service station to work his rostered day in exchange for him working one of hers.

Unfortunately on that particular Saturday she was coming down with the flu. She had a headache, a temperature, a runny nose and a sore throat. She had taken some Orthoxocol and Panadol to treat it and thought she would start to feel better as the day wore on, but in fact found it was getting worse. The problem was there was really no-one else to cover her shift because she was already covering for someone else.

She started work at 3 pm and was rostered on until midnight.

Her husband and two children arrived to visit her around about 7 pm; her two children were then aged 9 and 7 respectively.

She said that she did not recall Mr Saylor walking into the shop at all; she first noticed him looking around the showroom. She was serving customers at the time and she could recall that she had in front of the counter maybe five, six or seven people. She could recall seeing Mr Saylor over to the side in between the aisles looking at what she thought were the packets of crisps.

She saw Melanie Saylor standing in front of the counter. There were customers in front of her and she was standing behind them. She said she noticed Melanie because she was a young girl.



She said Melanie came up to the counter and just handed her card to Mrs Davies, who asked what she wanted. Melanie didn't say anything. She was looking down as though she was thinking of something. Mrs Davies asked her again what she wanted and she then said she wanted some money out. Mrs Davies said she then said to Melanie, "You're going to have to tell me how much you want because I can't read your mind." Melanie then did give her an amount and she completed the transaction and gave the girl the money.

Mrs Davies said more customers came in and she served them. She could recall her husband coming in with the two children. She said she was busy. More people started to come into the shop and so her husband and children stood over to the side to wait for her.

She said that while she was serving those customers, she had her first interaction with Mr Saylor. She remembered him calling out and asking for a price on some item. She could not recall exactly what it was, but was almost positive it was crisps. She said she was able to tell him the price. She thought it was a bit rude, him calling out that way while she was serving people, but then he did it again and then a third time. The third time she said she didn't know the price and she told him he would have to come to the counter because she would have to scan it. She was quite sure it was not a chocolate that he was asking about at that stage because that came later. She said she remembered she was actually serving customers at the time, but Mr Saylor did not wait for her to finish with one customer before making his request. She said she knew the last time he definitely did not wait because she was in the middle of a transaction and had to interrupt that to scan the item. It was an EFTPOS transaction and while she was waiting for that to go through, he handed her the chips. She escaped the transaction on the computer (but not on the EFTPOS machine), scanned the item

and told him the price. He then walked back over to the chips and she continued serving the other customers.

Her next contact with Mr Saylor was when he came to the counter. Between those occasions she had served approximately three, four or five other customers. She said Saturday night is normally a busy night at the Ampol Service Station at Malaga (evidence confirmed by Mr Joyce) and it was that night.

She recalled that when Mr Saylor came to the counter to be served he picked up a chocolate bar and asked how much it was. She told him it was \$1. He then put it on the counter and he handed her his EFTPOS card and said he would like \$8 cash. She said she tried to scan the card two or three times - she was not sure exactly - but it would not work and so she handed it back to Mr Saylor. He stepped a little way to the side so she could serve the other customers and then he moved back up and asked if she could try it again. She said she told him she would try it one more time, but then if it did not work, he could try using the teller machine across the road. She said the reason she told him this was because it was not uncommon for cards not to work on the service station machine, but to work on teller machines because the latter are more sophisticated.

She said she tried it a third time and surprisingly it worked straight away. She said that she then entered \$1 for the chocolate bar and \$8 cash as Mr Saylor had asked her. She said that when she handed the handpiece to Mr Saylor, he noticed it had \$9 on the read-out and that is when he commented, saying that he did not want \$9, he only wanted \$8. She thought she said then, "I'm not a mind-reader" although she also thought she said something beforehand. She explained to Mr Saylor why she had done it the way she had. Mr Saylor told her that he did not have \$9 in his account. He could only get \$8 out.

She said he was not annoyed with her at all during this time and in fact seemed quite calm. She described him as being very polite in his actions.

After she told him she was not a mind-reader, she said he was very polite about it, but what he said next made things worse as far as she was concerned. He asked her if she was having a bad day. She testified that her response to that was, "I wasn't until you came in." Specifically asked whether she said, "But you have ruined it for me", she was adamant she did not.

After her response to his query about whether she had had a bad day, she said Mr Saylor asked for her name, which she told him. She said he wanted to see the manager and she explained that the manager would not be in until the morning. She said she thought she asked whether he would like her to write her name down for him and so she did write her name, the phone number of the garage and the manager's name.

According to Mrs Davies, after she had written down these details, Mr Saylor turned to her husband and asked if he could be a witness to what just happened. Her husband replied that he could, but explained that she was his wife and the gist of it was that he had a loyalty to her. She testified that she said it was fine for him to go ahead, it didn't worry her. She also said that her husband explained that she had not been feeling well and she did not normally treat people that way.

She again explained that up to that point in time, Mr Saylor did not appear upset or angry, but was fine and actually very polite. However, after he had this conversation with her husband, he seemed to get agitated.

She said she went on serving other customers after that and Mr Saylor began to ask why he had been treated this way. He couldn't understand why she had treated him the

way she had. Her husband once again said that she was not feeling well and it was about that time her husband looked at her and mouthed to her that, "You were rude."

She said that after that, Mr Saylor then started to talk about how he had been treated as a child and the racism he had experienced. She said he talked about how he had noticed that she was treating other customers differently. That, she said, was because she'd been trying to make a bit more of an effort after her experience with him and he noticed this and made a comment about the way she was treating white people. She said she was shocked because that was the first time he had mentioned the question of race and she had never been called a racist before and was somewhat taken aback. She agreed that she had been rude to him, but she said, "The racist bit got to me" and she told him she was not a racist.

She said her husband also said that she was not a racist and again explained to Mr Saylor that she was not feeling well.

By this time, Mr Saylor was starting to get very agitated and very loud and was swearing.

He walked to and from the counter in between customers coming in to be served, but there was one occasion when a customer was actually quite embarrassed because Mr Saylor commented to him on the way Mrs Davies was serving that customer nicely by contrast with the way she had served Mr Saylor.

She said when Mr Saylor started getting upset and swearing she asked her husband to take the children out. She also told Mr Saylor she would like him to leave and said that if he did not, she would have to call the police.

To that, Mr Saylor responded that that was fine, he would wait until the police came; he really wanted to get his side of the story across. Mrs Davies agreed in evidence

that at that stage he had really done nothing actually wrong. Her husband took the children outside and put them in the car and returned to the inside of the service station. She said she called the police after that.

She was quite clear that she had not called the police immediately after he had requested her name and details. She was clear about that because she had no reason to do so; he had not done anything wrong. It was only after he became loud and abusive that she called the police and even then, did not call them straight away because she was hoping he would go.

Although she could not be precise about it, Mrs Davies did recall Mrs Saylor came into the store and at that stage, Mr Saylor was quite abusive. She said he got worse after she'd called the police. He continued to talk about how he'd been treated in the past. She said when Mrs Saylor came in, she tried to encourage her to talk to her husband and calm him down. Mrs Saylor responded that she did not know what they had done to her husband, but it took a lot to get him angry like that.

By this time, Mrs Davies said her husband was explaining to Mr Saylor that up until then he had done nothing wrong, but if he continued like that when the police came, it was likely to be him who got into trouble, not Mrs Davies.

Mrs Davies said that all this time there were customers coming in and out of the store. She said there was a time when there was just herself, Mr Saylor and her husband in the store and that was the time she called the police. She was quite sure Mrs Saylor was not there when she telephoned them. She could recall that was so because when Mrs Saylor came in she wanted to know what was going on and that was when it was explained to her that the police had been called.

When Mr Davies took the children out of the service station this appeared to make Mr Saylor even more angry. He said something to the effect that it was all right for Mrs Davies to show that sort of racism to his daughter or his family, but it was a different story when her children were being subjected to that sort of thing. However, Mrs Davies testified that had nothing to do with Mr Saylor's race - she had asked her husband to take the children out because he was swearing and she did not want the children hearing that.

In his evidence, Mr Grant Davies confirmed that his wife had not been well that day.

He said that when he and the children arrived there to see if there was anything they could do for her before they went home, they noticed she was quite busy so they stood to one side of the counter while she served customers.

He said he did notice Mr Saylor when he walked in, mainly because the latter was happy. He seemed nice and had a smile on his face, although Mr Davies didn't really take all that much notice because there were a lot of people around. He next saw Mr Saylor when he gave Mrs Davies his EFTPOS card. Mr Davies noticed that because the card would not swipe. He observed that his wife tried it two or three times and then handed it back. He saw Mr Saylor stand to one side because his wife still had other customers to serve and she did so whilst Mr Saylor was wiping his card.

Mr Davies said Mr Saylor had put a Twix (chocolate) bar on the counter and he asked Mrs Davies if she would try the card once again. She told him that if it didn't work that time, he would have to use the teller machine down the road. He said that Mr Saylor asked for \$8 cash. Mrs Davies asked him whether he still wanted the Twix bar and he replied that he did. Mr Davies said that when Mrs Davies handed Mr Saylor the EFTPOS hand-piece, he must

have noticed there was more on it than he had asked for because he said to her that he did not want \$9, he only wanted \$8. She then made the comment that she could hardly be expected to know that and he thought her words were along the lines that, "Well, I'm not a mind-reader." He said they completed the transaction and Mr Saylor said to Mrs Davies in a very nice way, "Are you having a bad day?" and she replied in a not very nice way, "I was until you came along."

Mr Davies said Mr Saylor was quite taken aback with that and indeed, so was he. He was shocked at what she'd said because it was quite rude. Mr Saylor started to ask her why she was treating him this way. Mr Davies could not really recall what Mrs Davies said at that time, but her eyes met his and he knew she realised she had done wrong.

The next thing Mr Davies recalled was another customer coming in and Mrs Davies serving him. Mr Saylor then asked him something and then said that he wanted to speak to the manager and Mrs Davies wrote her name and the manager's name down and gave it to him.

Mr Davies said at that time, Mr Saylor was agitated and around that time asked if he (Mr Davies) could be a witness to what had happened. Mr Davies said something along the lines of that would be difficult because she was his wife. Mr Saylor then became angry. Mr Davies said he did try to talk to Mr Saylor for quite some time after that, but denied saying anything to the effect that he would be "in the dog-box."

He said that after he told Mr Saylor that he was Mrs Davies' husband, Mr Saylor became very agitated and kept questioning her as to why she was treating him the way she had. Mr Davies said at that time he did explain to Mr Saylor that his wife was not well.

Mr Saylor however went on to say how he'd been discriminated against or racially abused during his life. He talked about when he worked at Westrail and when he played football. Mr Davies said his wife then asked Mr Saylor to leave the garage and he refused. She told him that she would have to call the police if he did not leave. He said Mr Saylor said it would be good if the police were called because he wanted to tell them his side of the story.

He said Mr Saylor by then was swearing a bit, although this was not directed at anyone in particular.

It was his recollection, and he was positive, that Mrs Davies had called the police before Mrs Saylor came into the service station. He recalled that when she did come in, he could remember her saying, "I don't know what you've done to upset him, but once you get him going like this, there's no stopping him."

He said that when Mr Saylor started using bad language, Mrs Davies told him to take the children out and he did that. He was away for a couple of minutes, took them to the car and then went straight back inside.

According to Mr Davies, there was a constant stream of customers all the time.

When he returned he tried to talk to Mr Saylor, particularly about the fact that he wanted to tell the police his side of the story. He tried to explain to Mr Saylor that if the police came the only person who would get into trouble was him because although Mrs Davies had been very rude to him, she had not done anything wrong which would result in her being arrested by the police. If the police did come, they may well consider him to be disturbing the peace and if anyone got into trouble, it was likely to be him.



Cross-examined by Mr MacDonald, Mr Davies said that he really was not taking much notice what was happening in the shop at the outset. There was a constant stream of customers in and out of the shop and he could not recall Mr Saylor holding up objects and calling out for prices and the like. He said he only recalled him initially because he seemed to be happy. He did not recall Mr Saylor again until the latter was at the counter talking to Mrs Davies and trying to conduct a transaction to get his \$8.

Mr Davies said Mr Saylor's behaviour and attitude at that stage were "very good and very polite", but that his wife was rude and abrupt to him. He said that when Mr Saylor asked Mrs Davies whether or not she was having a bad day, he thought that the query was actually quite genuine and he was surprised at his wife's answer. Mr Davies said Mr Saylor had done nothing to deserve the response he got.

Mr Davies said that when the police arrived he did explain to them that Mr Saylor had not done anything wrong and that his wife had been very rude to him.

The final witness for the respondent was Mr Greg Joyce who was the company director responsible for the operation of the Ampol Service Station Malaga.

He gave evidence of the video surveillance of the service station, both inside and outside, and explained how Mrs Davies had brought this matter to his attention on that night and as a result of which he had viewed the video tape of the events the following morning.

Mr Joyce explained that although the tape was initially put aside because it was expected the police would probably want to collect it, in fact they did not do so and there was no request made for it until some months later, by which time it was no longer there and he assumed it had been re-used, as was the practice.

Although Mr Joyce described his observations from a viewing of the tape, that was of no great assistance to the Tribunal because on balance, the brief description he was able to give of what he saw on the tape was probably just as consistent with Mr Saylor's account of what he had been doing after he became angry that evening, as with Mrs Davies' account of the events generally.

Nonetheless, it is obvious the tape itself would have been of considerable assistance to the Tribunal. It could have been expected to show at least the number of customers entering and leaving over the period, the sequence of events from the arrival of Mr Saylor and Melanie, the point at which Mrs Davies telephoned the police and whether or not Mrs Saylor was present at that time. It may well have shown much more than that. The Tribunal was concerned that the tape was not available. It was obvious from the outset that the tape would be important objective evidence. Indeed, Mrs Davies had made specific reference to the surveillance cameras taping the events as they were actually occurring.

Despite the Tribunal's concerns about the disappearance of the tape, Mr Joyce's explanation of how that must have come about was not challenged and nor was that issue pursued to any extent by counsel for the complainant. In the circumstances, we do not consider that any particular inference can properly be drawn from the absence of the video tape.

It will be apparent from the outline of the evidence already related that there is much common ground between the various witnesses including the complainant and Mrs Davies. One of the areas of apparently significant conflict, however, is whether or not there were other customers present at particular stages. On the face of it, for example, there might be thought to be marked conflict between Mrs Saylor's evidence that there were no other customers at all, and the evidence of Mr and Mrs

Davies that there was in effect a constant stream of customers. Having considered all of the evidence, we have come to the conclusion that the conflict is more apparent than real and is explicable by differences in individual recollections of differing stages of an incident that developed over a period of quite possibly something in the order of 15 to 20 minutes at least, and over which time the number of customers in the service station shop area fluctuated constantly.

On the evidence as a whole we are satisfied (and find) that the events occurred as follows:

Mrs Davies was suffering from flu that day. By about 7 pm she had been working for some 4 hours. It being a Saturday evening the service station was quite busy. Mr Davies and their two children had called in to see if there was anything they could get Mrs Davies before they went home. Because Mrs Davies was busy attending to customers at the counter, they stood to one side to wait for her. Mr Davies saw Mr Saylor enter the shop area and noticed he seemed happy. Beyond that Mr Davies paid no particular attention to him.

Mr Saylor was looking for an item of food or confectionery to buy his youngest child. He wanted something that would cost no more than \$1. He browsed around the shelves which were between the customer entrance and the counter area looking at the various items, including packets of crisps.

In the meantime, Melanie had gone directly to the counter. There were other customers in front of her and she had to wait for them.

Mrs Davies noticed Melanie because she was a young girl standing behind the other customers.

Whilst Mrs Davies was serving those others customers, Mr Saylor called out to her on probably at least two

occasions asking the price of particular items, one of which was a packet of crisps. Mrs Davies was able to tell him the price of one item, but not another so he brought that to the counter where she scanned it, interrupting a transaction for another customer while she did so.

The other customer having been served it was Melanie's turn. She gave Mrs Davies her mother's keycard, but did not say what she wanted. By this time Mr Saylor had joined Melanie at the counter. He was looking at the chocolates which were displayed directly in front of the cashier's position. He noticed Mrs Davies was waiting for Melanie and so he told her to tell Mrs Davies what she wanted. Melanie asked for \$8 cash. Mrs Davies made some comment to the effect of, "It's about time. I'm not a mind-reader." Neither Mr Saylor nor Melanie thought anything of that remark and let it pass, although Mr Saylor felt a bit uncomfortable about it.

Whilst Mrs Davies was completing the transaction for Melanie, Mr Saylor had selected a chocolate bar. He asked Mrs Davies the price of it and she told him \$1 so he decided to buy it and placed it on the counter in front of him.

When Melanie's transaction was completed, Mr Saylor gave Mrs Davies his keycard. She swiped it twice but it did not work. She suggested he might have to try a teller machine up the road. He took the card back and attempted to clean it by wiping it on his shirt.

There had been no other customers in the shop after those served before Melanie, but another customer came in while Mr Saylor was wiping his card. Mr Saylor stood aside and allowed the customer to be served. That customer then left the shop and Mr Saylor gave his card back to Mrs Davies. As she took it she said to him that if it did not work that time he would have to go to the teller machine up the road. She told him that because it had been her

experience that quite often when cards did not work on the service station machine, they did on the teller machine because it was technically more sophisticated.

It was about this time that Melanie, who had been waiting for her father, left him at the counter, walked out of the shop area and began to walk towards their car. She was in no particular hurry.

Mr Saylor's card did work the third time and Mrs Davies asked him what kind of account he wanted to use. He nominated a savings account. She asked him how much cash he wanted. He said \$8. There was no other discussion about the transaction at that point.

When Mrs Davies handed the EFTPOS hand-piece to Mr Saylor for him to enter his PIN, he noticed the display panel showed \$9. He told Mrs Davies that was not right. She replied that he needed the extra \$1 for the chocolate. He said he had asked for \$8, not \$9, and \$9 was no good because he only had \$8 in that account. She then said, "I'm not a mind-reader. You can't expect me to read your mind. You've got to tell me what you want" or words to that effect. She was irritated and annoyed.

In a deliberate effort to ease the situation, Mr Saylor said to her, "Are you having a bad day?" to which she responded by saying in an abrupt and rude way, "Well, I was having a good day until you came along."

There was a conflict between Mr Saylor and Mr and Mrs Davies whether Mrs Davies said to him at that time, "...until you came along and ruined it for me" but in our view, nothing turns on the exact form of words used. The intent of the remark was quite clear and was understood by the three of them.

Mr Saylor was shocked at the rudeness of Mrs Davies' response, as indeed was her own husband.

Mr Saylor told her she should not treat her customers rudely, whether she thought they were right or wrong. He decided he would make a complaint about it so he asked for her name and that of the manager. He took out his notebook and a pen and told her of his intention. He was speaking courteously and politely.

Mrs Davies realised she had been rude and was in the wrong. She offered to write the details he wanted in his notebook, and did so.

Mr Saylor queried why he had been treated that way.

Whilst this was happening, other customers came in. There were three other customers, all of whom were served by Mrs Davies without incident and in a well-mannered way.

Another customer came in and was served likewise.

These four customers were all white people.

Mr Saylor saw the courteous way Mrs Davies treated them as being in stark contrast to the way she had treated him and his daughter. It was this perception which caused him to become angry and he began to talk loudly and heatedly about his past experiences of racism.

He became increasingly loudly agitated, angry and upset. He told Mrs Davies that she should not have treated him and his daughter so disrespectfully when she treated those other white customers in such a well-mannered way.

He was angry and began pacing up and down, yelling out things that had happened to him while working at Westrail or playing football or at nightclubs, pubs and other places.

Mrs Davies had by now become concerned. She told him that if he did not leave she would call the police. She

thought that would make him go. It had the opposite effect. Mr Saylor knew he had done nothing wrong; he knew it was he who had been treated rudely. His response was that he would wait for the police so he could tell them what happened.

It was probably at this point that Mrs Saylor and Melanie came into the shop. From the car, Mrs Saylor had seen her husband with his notebook and had asked Melanie what was going on. When Mrs Saylor looked into the shop area of the service station there were no other customers present and she could not understand why her husband was taking so long. Melanie looked back and seeing her father with his notebook assumed he was taking Mrs Davies' name.

Mr Saylor was pacing up and down yelling when Mrs Saylor and Melanie entered. He was telling Mrs Davies to ring the police and saying he would stay there and speak to them, but he could guarantee that they would arrest him straight away (the implication being he expected them to arrest him as soon as they saw he was Aboriginal). Mrs Saylor asked what was going on. Mrs Davies asked who she was. When Mrs Saylor said she was Mr Saylor's wife, Mrs Davies asked her to calm him down. Mrs Saylor said they must have done something pretty bad to get him that upset.

Mrs Davies repeated that if Mr Saylor did not leave she would call the police.

Both Mrs Saylor and Melanie told the Tribunal they were present when Mr Saylor asked Mr Davies if he would be a witness for him. That is not consistent with the accounts given by Mr and Mrs Davies. On their evidence, that occurred very much earlier in the incident and prior to Mrs Saylor and Melanie coming into the shop area together.

We have had some difficulty with this. Having carefully considered all the evidence, however, we think it more

likely Mrs Saylor and Melanie's recollection of that aspect is more accurate. Although it is possible Mr Saylor may have asked a bystander if he could be a witness to what happened in the context simply of making a complaint that he had been rudely treated it makes much more sense for him to ask that in the context of his perception not only that he'd been racially discriminated against, but having been told that the police would be called.

Mr Saylor turned to Mr Davies (whose identity he of course did not know at that stage) and said as he had seen and heard what had taken place, would he be a witness for Mr Saylor. Mr Davies said that would be somewhat difficult as he was the lady's husband.

Again, although there is a conflict of evidence as to whether or not Mr Davies told Mr Saylor he could not be a witness because she was his wife and he would be in "the dog-box" we do not think anything turns on that: it is clear on any view that Mr Davies' response was that it would be difficult for him to be a witness for Mr Saylor because Mr Saylor was complaining about Mr Davies' own wife. Their belief that he said if he were to do so he would be "in the dog-box" was probably reasonably accurate although it may well have been based on no more than an impression of Mrs Saylor and Melanie of what it was that Mr Davies was telling them.

What is clear is that when Mr Saylor continued to ask why he had been treated that way, Mr Davies explained that his wife was not feeling well that day and would not normally behave as she had done. There was a continuing exchange between them in the course of which Mr Saylor repeatedly asked why he had been treated rudely by her and Mr Davies repeatedly tried to explain that his wife was unwell and would not normally behave like that.



At some point Mr Saylor approached the counter and told Mrs Davies, "You're nothing but a f... racist" and he continued to yell out and swear. She denied she was a racist as did Mr Davies.

Mrs Davies then told her husband to take their children outside.

This inflamed Mr Saylor even more. He told them it was all right for his children to have to see how he was treated, but it was not all right for Mrs Davies' children to be subjected to unpleasantness.

At about that stage another white customer entered the shop.

Mr Saylor confronted him, yelling out, asking what was the difference between the two of them other than their colour and why should he be treated any differently to Mr Saylor and his daughter. The customer made some placatory response, completed his transaction and walked out.

Mrs Davies acknowledged that in fact she had treated the subsequent customers well. She said that was because she had realised (and her husband had made it clear to her) that she had been rude to Mr Saylor(although that was only because she was not feeling well) and she was making a positive effort to be more courteous and polite. We accept that.

It was when Mr Saylor confronted this last customer that Mrs Davies decided to call the police.

Mr Saylor was insistent that she called the police immediately after she gave him her name and that of the manager. We do not accept that. On Mr Saylor's own evidence, there was no reason for her to have done so at that stage.

At a point when there were no other customers present, Mrs Davies telephoned the police. She told them there was a man at the service station causing a disturbance.

Mr Saylor was still pacing up and down, yelling out about his past experiences.

Mr Davies was trying to placate him. He explained that although Mrs Davies was in the wrong because she had been rude that was not something which the police would deal with. On the other hand, it might well happen that if the police arrived and saw Mr Saylor behaving in a loud and angry way, he might find himself in trouble with them.

The police did arrive.

They came straight into the shop area. By that time, Mr Saylor was some distance away from the counter near the main entrance door. He moved to the door to meet them. They asked what was going on. He started to tell them. His voice was raised and he was still angry. The police asked him to accompany them outside. As they walked through the door with one police officer on either side of him, Mr Saylor turned towards Mrs Davies and called out, "I hope you're happy with the way you treated me tonight." As he did that, the police officers grabbed hold of him to move him outside. He struggled with them. The struggle continued outside with the police officers trying to get him on the ground and Mr Saylor trying to stay on his feet. They eventually got him on the ground with the assistance of another customer. He was then arrested, handcuffed and placed in the police vehicle.

As Mr MacDonald confirmed at the hearing, the complaint of unlawful racial discrimination is directed not to Mrs Davies' action in calling the police, nor to what happened to Mr Saylor when the police arrived; it is a complaint that Mrs Davies' rudeness towards Mr Saylor in the course of his EFTPOS transaction was unlawfully discriminatory in

that she was rude to him (and so treated him less favourably than she would have treated a non-Aboriginal customer) on the ground of his race.

On the evidence, we are not satisfied that was so. Indeed, we are satisfied that as a result of the discomfoting symptoms of the flu from which she was then suffering, Mrs Davies was more easily irritated and annoyed that evening than she would otherwise have been. She was, no doubt, somewhat short-tempered. She was irritated when Melanie Saylor handed over her mother's keycard for processing, but then stood at the counter without saying what she wanted. Mrs Davies' irritation showed in her response to Melanie.

It showed again some minutes later, first when Mr Saylor's keycard did not work on the first two attempts and it began overt annoyance and frustration when there was confusion about whether the amount of Mr Saylor's transaction was \$8 or \$9.

There was an unfortunate simple misunderstanding about that. Each of them had a different understanding and expectation of what was to be done. It was a minor misunderstanding which in other circumstances would have been of no moment and nothing would have come of it. Mr Saylor's genuine attempt to make light of it and to ease the situation was met with an abrupt and rude response from Mrs Davies, a response which shocked not only Mr Saylor, but Mrs Davies' own husband.

It was that response, compared to the well-mannered and courteous treatment which Mrs Davies then accorded subsequent non-Aboriginal customers which immediately led Mr Saylor to believe he was again being treated less favourably than others because of his race. That certainly was his perception and we accept it was genuinely held.

We have no reason not to accept Mr Saylor has experienced many instances of racial prejudice and discrimination in the course of his life. The sorts of experiences to which he was referring at the time are, most unhappily, all too familiar to the members of this Tribunal. But the question for us is whether Mr Saylor's perception of the basis of Mrs Davies' treatment of him was in fact right - that is to say, whether or not on this occasion Mrs Davies was rude to him because he is Aboriginal.

In our view, Mr Saylor's perception, although genuine, was wrong.

We are satisfied on the evidence that Mrs Davies did not treat him differently because of his race. Her acknowledged rudeness to him was the product of irritability, frustration and annoyance, caused in turn by her feeling unwell. She would have responded in exactly the same way in those particular circumstances had she been dealing with a non-Aboriginal customer. Her better treatment of subsequent customers was not because they were white, but because she realised she had been rude to him and was making a deliberate effort to behave better.

Given this conclusion, the claim of unlawful discrimination has not been made out and the complaint must be dismissed.