

**EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA**

Matter Number No. 15 of 1997

IN THE MATTER OF A COMPLAINT BY:

MICHELLE MACLEAN

Complainant

- against -

BAYSWATER CAR RENTAL PTY LTD

Respondent

REASONS FOR DECISION

BEFORE: Mr N.P. Hasluck, QC President

Complainant: Appeared in Person

Respondent: Mr Kluck
 Appeared for Respondent

HEARD: 5 June 1997

REASONS FOR DECISION: Delivered 22 August 1997

The Complainant, Michelle MacLean, has alleged unlawful sex discrimination in the area of advertising pursuant to sections 8, 68 and 161 of the Equal Opportunity Act 1984. The complaint arises out of certain advertisements placed by Bayswater Car Rental Pty Ltd in order to advertise the business of that company as a hire car operator.

By letter dated 16 May 1996, the Complainant lodged a complaint with the Commissioner of Equal Opportunity. In that letter she said she wished to express her outrage and disappointment concerning certain advertisements that had been placed in *The West Australian* newspaper by Bayswater Car Rental. As matters developed, there was no denial at any stage by Bayswater Car Rental that it was responsible for the advertisements and the Tribunal will therefore proceed from the premise that Bayswater Car Rental accepts responsibility for the content of the advertisements.

The advertisements enclosed with the Complainant's letter appeared on the 13th and 16th May 1996. The former advertisement displays a schedule of car hire rates applicable to various categories of vehicle, displays the name of the Respondent firm and above the schedule, portrays a young woman with bare shoulders and her head thrown back with a blissful expression on her face. A cartoon bubble with the caption "No Birds" appears above the woman's mouth. Above that appears the additional caption in larger and bolder type "Standby Rates!" The second advertisement is in virtually the same form although, upon close inspection, the photographic image is a different woman. The Complainant's letter of complaint went on to say:

"The caption 'No Birds' is what I find most offensive and discriminatory against women (sex) - however I must also mention that the implied 'nudity' and the 'sexual' innuendo these photos also express is very offensive and degrading towards women (sexual)...I am sure if I were to go deeper in investigating this matter I would find that what this advertiser is doing is probably illegal and a violation of my human rights as a woman. What I want is to see a stop to

this type of advertising here in Australia and I hope that the Human Rights and Equal Opportunity Commission will properly rectify this matter and see to it that advertisers are more 'politically correct' and responsible in their advertising."

In the course of investigating the allegation the Commissioner prepared a statement of circumstances and allegations which was settled in conjunction with the Complainant prior to being referred to the Respondent firm. The statement referred to the allegations just mentioned and also contained the passage "in conclusion Mrs MacLean believes that the advertisements discriminate on the basis of sex because they could reasonably be understood as indicating that women will be treated less favourably to men." It formed part of her case that the term "no birds" is a colloquial expression meaning "no women". The Complainant accepted, however, as appears from her letter to the Commissioner of Equal Opportunity dated 19 July 1996, that Bayswater Car Rental did in fact hire cars to women.

The statement was then submitted to Mr Dirk Kluck in his capacity as Director of Bayswater Car Rental Pty Ltd by the Commissioner of Equal Opportunity with reference being made to sections 8, 68 and 161 of the Equal Opportunity Act as the statutory provisions which were relied upon by the Complainant.

The Tribunal pauses to note that by section 8 of the Act a person discriminates against another person (called "the aggrieved person") on the ground of the sex of the aggrieved person if, on the ground of the sex of the aggrieved person, or a characteristic that appertains generally to or is generally imputed to persons of the sex of the aggrieved person, the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

The provision outlining the nature of sex discrimination does not operate in isolation. It is generally considered in conjunction with related provisions describing the areas in respect of which relief can be obtained if discrimination occurs. In other words, the Equal Opportunity Act does not contain a blanket prohibition upon sex discrimination. It defines the concept and then moves on to indicate various areas in which relief will be available if discrimination occurs in that context as, for example, discrimination in the workplace, in partnerships or in trade organisations, in education, in access to places and vehicles, in accommodation or in regard to the provision of goods, services and facilities. In regard to the last matter, by section 20 it is unlawful for a person who provides goods or services to discriminate against another person on the ground of the other person's sex by refusing to provide the other person with those goods or services or to discriminate in the terms or conditions on which or in the manner in which the first-mentioned person provides the other person with those goods or services.

Thus, for example, if a merchant or trader, who was in the habit of providing services to the public flatly refused to provide those services to a female member of the public on the ground of her sex then section 8 and section 20 when considered in combination would afford a right of relief to the complainant. It follows that if, in the circumstances of the present case, the Complainant had sought to hire a vehicle from Bayswater Car Rental but was told that no vehicle would be hired to her simply because she was a woman then a right of relief might be available. In that hypothetical case she would have been treated less favourably than a person of the opposite sex was treated. Section 161 facilitates the claim for relief because it imposes vicarious liability with the result that a company can be held liable for the unlawful act, of its servant or agent.

Section 68 of the Equal Opportunity Act deals with advertisements. It provides that it is unlawful for a person to publish or display, or cause or permit to be published or displayed, an advertisement or notice that indicates, or could reasonably be understood as indicating, an intention to do an act that is unlawful by reason of a provision of this Act. It follows from earlier discussion that it would be unlawful to indicate an intention to discriminate on the grounds of sex in regard to the provision of goods and services. It is important to note, however, that, again, various provisions have to be considered in combination before an advertisement can be said to reveal an unlawful intention. The advertisement has to be linked to an area of activity such as the supply of goods and services which may result in a person being aggrieved if discrimination occurs. Subject to these limitations, a person remains free to express his or her views via advertisements, even though some readers might regard the views expressed as controversial or offensive. Indeed, recent decisions of the High Court suggest that legislation purporting to curtail freedom of expression could in some circumstances be challenged as unconstitutional. This analysis suggests that section 68 of the Equal Opportunity Act is not aimed at the content of advertising per se but, rather, is confined to advertising that foreshadows an act of discrimination which will have a detrimental impact upon a person likely to be affected by the act, known as the aggrieved person.

The Respondent firm, Bayswater Car Rental, responded to the allegation by letter dated 25 November 1996. The reply reads in part:

"The 'No Birds' theme is a continuation of a series we have used for many years, with little complaint. The relevance of 'No Birds' is that Bayswater saves money by not employing delivery girls. Most people understand the inference intended and appreciate the humour. 40 per cent of our clients and half our staff are women."

The Commissioner of Equal Opportunity, by letter dated 28 November 1996 advised the Complainant that she was of the opinion that the matters raised by the Complainant lacked sufficient substance to sustain a complaint and the Commissioner had therefore determined to dismiss the complaint. The Complainant then exercised her right to have the matter referred to this Tribunal.

The matter came before the President of the Equal Opportunity Tribunal at a preliminary hearing held on 5 June 1997 on which occasion the Complainant appeared in person and Mr Kluck as a Director of Bayswater Car Rental appeared on behalf of the Respondent. On that occasion the President ascertained from the Complainant that she had not herself hired a car from Bayswater Car Rental. The Complainant indicated that she had hired a car for a friend who came to Perth for a visit from Indonesia but she personally, the Complainant, did not incur any hire charge as a result of that transaction.

When it emerged that the Complainant had not been involved in any transaction with Bayswater Car Rental and had no present or other intention of doing business with the firm, the President invited some discussion from the parties, and from the Complainant in particular, as to whether the Complainant's complaint could be sustained. The Complainant relied principally upon the "threat" of discrimination allegedly implicit in the words complained of but did not identify any specific customer or class of customers who was likely to be adversely affected by an act of discrimination on the ground of sex contrary to sections 8 and 20 of the Equal Opportunity Act, other than women generally, or women such as herself who might be offended by the words and images in question. During the course of the discussion, the President drew attention to section 125 of the Equal Opportunity Act which is in these terms:

- "1. Where, at any stage in an inquiry, the Tribunal is satisfied that a complaint is frivolous, vexatious, misconceived or lacking in substance, or that for any other reason the complaint should not be entertained, it may dismiss the complaint.
2. Where the Tribunal dismisses a complaint under subsection (1) it may order the complainant to pay the costs of the inquiry."

The hearing closed on the basis that each party would be allowed 21 days to make submissions bearing upon the question of whether the complaint could be made out and with a clear indication from the President of the Tribunal that at the expiration of that period, and in the light of any submissions received, the Tribunal would make a determination as to whether the complaint should be struck out pursuant to section 125 or be allowed to proceed further. The Complainant was also invited to take legal advice which might assist the substantiation of the complaint she had brought before the Tribunal.

The Tribunal did not receive any submissions from the Complainant within the 21 day period or any indication that she had taken further legal advice and wished to proceed with the complaint with the assistance of legal advisers. On the other hand, the Respondent made a brief submission by letter dated 12 June 1997 to the effect that the complaint was inconsequential and she could not be regarded as an aggrieved person within the language of the Act. He also sought an order for costs in the event of the complaint being dismissed.

Before proceeding further, it will be useful if the Tribunal looks briefly at decided cases and legal principles relevant to the exercise of the power contained in section 125 of the Equal Opportunity Act.

The Tribunal has previously determined that this is a question of law which falls within the power allowed to the President of the Tribunal by section 105(3) of the

Act. In Yarran v Westpac Banking Corporation (1992) EOC 92-440 the Tribunal reviewed various authorities relating to the exercise of the powers contained in section 125 and noted that courts and tribunals within the legal system of this State are generally allowed to control any abuse of process and that section 125 is a manifestation of that credo, although the exercise of the power must be exercised in accordance with the criteria reflected in the statutory provision. Section 125 should be regarded as a means whereby the Tribunal can control and if necessary terminate summarily proceedings which do not have any reasonable prospect of success or are misconceived or otherwise lacking in substance or merit.

The Tribunal has also looked previously at the question of standing in Ryan v The Shire of Shark Bay (1992) EOC 92-405. The review of the statutory provisions in the light of decided cases undertaken in that case suggest that access to the courts must be restricted to those who have a personal interest in the litigation. The presence of a personal stake in the outcome of the controversy is a way of securing that concrete adverseness which sharpens the presentation of issues upon which a court depends for the illumination of difficult issues. Baker v Carr (1982) 369 U.S. 186

This may be illustrated by a decision of the High Court in Australian Conservation Foundation Inc v The Commonwealth of Australia (1979) 54 ALJR 176. In that case the High Court held that the Foundation had no standing to maintain proceedings challenging the validity of governmental decisions to approve a tourist resort in Queensland which might adversely affect the surrounding environment. In the absence of special damage or adverse detriment to the complainant itself, a private body had no standing to bring an action to prevent what was alleged to be a breach of public law as a matter of principle.

In the course of a lengthy judgment, Gibbs J said that in the absence of clear words it was impossible to impute to Parliament an intent to confer on any private citizen the right to espouse the observance of proper procedures of administration in the conduct of government activity. A person might have a special interest in the preservation of a particular environment. However, an interest for present purposes does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule unless he or she is likely to gain some advantage other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if the action succeeds, or to suffer some disadvantage other than a sense of grievance or a debt for costs if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented does not suffice to give its possessor locus standi. The assertion of public rights, and the prevention of public wrongs by means of legal remedies is the responsibility of the Attorney General who may proceed ex officio or on the relation of a private individual with sufficient standing. Later standings have reflected a similar approach.

The Tribunal pauses to note that the structure of the Equal Opportunity Act and especially in regard to those provisions concerning the processing of complaints and resolving disputes by the Tribunal presume the presence before the Tribunal of parties with an interest. This is illustrated by the reference in section 8 of the Act to a person called an "aggrieved person." This therefore suggests that there must be something in the nature of a matter in interest between the parties and a matter of interest is often, although not necessarily, revealed by the presence of a transaction. It has already been noted that the Complainant has not been involved in any transaction with the Respondent firm and has no present intention of being involved in a transaction. She accepts that the Respondent firm does in fact hire cars to women.

Section 18 of the Interpretation Act requires preference to be given to the construction of a written law that would promote the purpose or object underlying that law. Thus, the decided cases generally suggest that the Equal Opportunity Act should be interpreted in a broad and beneficial manner. Nonetheless, it must be kept in mind, as noted earlier, that the Act does not seek to prohibit discriminatory conduct generally. It is addressing specific instances of discrimination in a number of identified areas of activity. The requirements concerning advertising have to be linked to specific areas of activity in which discriminatory conduct is rendered unlawful. The principle of beneficial construction must be viewed in this light as is borne out by the following passage from the joint judgment of Brennan CJ and McHugh J in the recently-decided decision of the High Court in IW v The City of Perth (31 July 1997/unreported). The learned judges said:

"Those legislatures have also deliberately confined the application of anti-discrimination legislation to particular fields and particular activities within those fields. No doubt most anti-discrimination statutes are legislative compromises, resulting from attempts to accommodate the interests of various groups such as traders, employers, religious denominations and others to the needs of the victims of discrimination. As the evils of discrimination in our society have become better understood, legislatures have extended the scope of the original anti-discrimination statute. Many persons think that anti-discrimination law still has a long way to go. In the meantime, courts and tribunals must faithfully give effect to the text and structure of these statutes without any preconceptions as to their scope. But when ambiguities arise, they should not hesitate to give the legislation a construction and application that promotes its objects. Because of the restrictive terms of a particular statute, however, even a purposive and beneficial construction of its provisions will not always be capable of applying to acts that most people would regard as discriminatory."

When the principles emerging from the decided cases are applied to the circumstances of the present case, it immediately becomes apparent that various obstacles stand

in the way of the Complainant's complaint. She herself has not been involved in any transaction with Bayswater Car Rental and does not intend to engage in business with the firm. Thus, when section 8 and section 20 of the Act are considered in combination, it is difficult to see in what manner Bayswater Car Rental can be said to have infringed the Act in regard to the Complainant herself. Services have not been provided to her and therefore one cannot determine whether there was any discrimination in the manner in which services were provided. Section 68 deals with advertisements which might be said to reflect an intention to do an act that is unlawful but the unlawful act can only arise if there is a transaction or contemplated transaction of the kind covered by the statutory provisions. The advertisement has to disclose an intention which will have specific consequences but in the circumstances of the present case it is difficult to see how such a finding can be made. Accordingly, for this initial reason, the Tribunal considers that the present complaint is both misconceived and lacking in substance because it has no reasonable prospects of success.

Even if the Tribunal be wrong in that regard, however, the further question still remains as to whether the advertisements complained of evidence less-favourable treatment or an intention to do an act that is unlawful. The advertisement in its terms is somewhat ambiguous. It does not expressly reveal an intention to proceed in a discriminatory manner. The Respondent has provided an explanation as to why the caption has been used which must also be brought to account, because previously decided cases establish that the tribunal must be cautious about drawing inferences of an intention to discriminate where the facts relied on are ambiguous and an innocent explanation is available to explain the circumstances complained of. Fenwick v Beveridge Building Products Pty Ltd (1986) EOC 92-147 . The tribunal therefore concludes that the complaint has no reasonable prospects of success.

Finally, as indicated earlier, the provisions of the Equal Opportunity Act presume that a person advancing the complaint must have a sufficient interest in the matter to have standing. Again, it follows from the absence of any transaction between the parties that the Complainant does not have a specific interest which can be regarded as the subject of the litigation. For this reason also, the Tribunal considers that the complaint is misconceived and lacking in substance because it has no reasonable prospects of success. The Complainant, to use the language of the High Court in the Australian Conservation Case, is pursuing an intellectual or emotional objection in respect of the advertisement complained of and this does not appear to be one of the fields of activity covered by the statutory provisions. Thus, even on a beneficial construction of the language of the Act, there is not a reasonable prospect that the Complainant can at the end of the day obtain relief.

The Tribunal has given careful consideration as to whether the complaint should be dismissed with an allowance of costs to the Respondents. The Tribunal has decided, however, that the complaint should be dismissed without any order as to costs.
