**EQUAL OPPORTUNITY TRIBUNAL**
**OF WESTERN AUSTRALIA**

Matter Number 37 of 1997

IN THE MATTER OF A COMPLAINT BY:

**MARK LOCKYER** Complainant

- against -

**CYMOUR PTY LTD Trading as**
**ROSIE O'GRADY'S NORTHBRIDGE** Respondent

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**REASONS FOR DECISION**

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BEFORE: Mr N Hasluck, QC President

For the Complainant Mr Mark Lockyer in person

For the Respondent Mr Christopher Brockwell
As a director of the
Respondent

HEARD: 10 February 1998

**REASONS FOR DECISION** Delivered 1 May 1998

The Complainant, Mark Lockyer, complains of discrimination on the ground of sex in the area of access to places pursuant to Sections 8, 19 and 161 of the Equal Opportunity Act 1984. The complaint is brought against Cymour Pty Ltd trading as Rosie O'Grady's the Irish Pub. The complaint arises out of events that occurred on the night of Saturday 24 January 1997 when the Complainant was asked to leave the queue of patrons waiting to enter Rosie O'Grady's because of his attire.

The facts and matters giving rise to the complaint are reflected in the written complaint lodged with the Commissioner of Equal Opportunity on 1 February 1997. The Complainant alleges that on the night in question at about 8.55 pm he and his female partner were standing in a queue waiting to enter Rosie O'Grady's in Northbridge. He was wearing an expensive, quality shirt that exposed his shoulders and arms. The doorman at Rosie O'Grady's, named Luke, informed the Complainant that his attire was unsuitable as his shoulders were exposed. The Complainant's partner was wearing a summer dress that exposed her shoulders, arms and the tops of her breasts. The Complainant pointed this out to Luke who said that this was "okay" and considered suitable attire to enter the pub. The Complainant then asked "is it okay for her to have her shoulders exposed and not for me?" Luke replied in the affirmative and the Complainant then contended that this was discrimination based on sex. Luke answered "I don't care, those are the rules". The Complainant was then ordered to leave the queue by the doorman, and thus, by implication, he was denied access to the premises.

The Commissioner commenced an investigation of the complaint and established from records held by the Ministry of Fair Trading Business Names Branch that Cymour Pty Ltd was the party carrying on the business in question. The Commissioner then put the allegations to the Respondent and received a written reply dated 2nd May 1997 from the General Manager which included the following passage:

> "May I firstly assure you that in no way was Mr Lockyer refusal of entry based on any gender bias. Rosie O'Grady's in Northbridge has operated successfully for four years because of our management policies setting high standards in both dress and behaviour at all times. In all aspects of our operation, from the quality and style of our décor, to the product and level of service, we aspire to maintain the highest possible standards. To this end, certain restrictions have been made on the dress standards of our patrons, restrictions which are clearly sign-posted at each of our entrance doors. Naturally, there are some anomalies between male and female dress standards, throughout the community, whereby ladies' fashions often include strapless, off the shoulder or dresses and tops with thin straps. However, it is not an accepted standard for men to wear singlets or shirts with cut off sleeves or the like, as part of a smart dress code. Mr Lockyer's attire on the evening in question did not conform with what we believe to be an acceptable code of dress in line with general public standards. May I point out that if Mr Lockyer had been wearing his girlfriend's summer dress he would not have been admitted for the same reason. Our dress codes and standards are applied to all patrons, irrespective of gender, age or anything else ... Mr Lockyer was not refused entry because of his sex, but because he was not dressed to an acceptable standard."

When the Commissioner dismissed the complaint as lacking in substance the Complainant elected to have the matter referred to this Tribunal. In accordance with the statutory procedure the Commissioner submitted to the Tribunal a report reflecting the outcome of her investigations which included copies of the documents mentioned earlier. The parties were then given notice that the matter would be listed for a preliminary hearing on 22 January 1998. The Complainant wrote to the Tribunal prior to the date in question to say that he could not be present on that date. On the return date the Respondent was represented by Mr Brockwell as a director of the company but there was no appearance for the Complainant. Mr Brockwell proceeded to make an application to have the complaint dismissed pursuant to Section 125 of the Act which provides that where, at any stage of 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.

By Section 105(3) the President of the Tribunal is required to determine questions of law or procedure. Further, by Section 120 the Tribunal shall act

according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms and may give directions relating to procedure that, in its opinion, will enable costs or delay to be reduced. Accordingly, having regard to these provisions, the nature of the issue reflected in the original complaint and the documents included in the Commissioner's report, the President ruled that the Complainant's written response to the notice of preliminary hearing should be treated as an application for an adjournment and directed that the matter was to be adjourned until 10 February 1998. Arrangements were made for each party to receive a copy of the Commissioner's report and the transcript of the initial hearing which contained observations by the President directed to the Complainant that he should come to the further hearing prepared to address the Respondent's application that the complaint be dismissed.

At the adjourned hearing on 10 February 1998 the Complainant appeared in person and the Respondent was again represented by Mr Brockwell. The President satisfied himself that both parties had received the documents the subject of the previous directions and had come prepared to address the issues raised by the Respondent's application to have the complaint dismissed pursuant to Section 125 of the Act. It became apparent during the course of discussion that, as indicated by the earlier exchange of correspondence, the application could be dealt with on the assumption that the account given by the Complainant in his complaint as to what took place on the night in question could be accepted as correct, and that there was no real dispute that the Manager of the subject premises did maintain standards of dress and decorum of the kind referred to in his letter to the Commissioner of Equal Opportunity. Thus, as often happens when an application is made to strike out a statement of claim in civil proceedings, the matter essentially in issue was whether the Complainant could succeed if all the facts and matters he relied on were accepted as true.

At this point it will be useful to look briefly at the statutory provisions relevant to the allegation of discrimination raised by the complaint and at a number of

decided cases bearing upon the procedural issues and issues of substantive law.

By Section 8(1) of the Act a person discriminates against another person on the ground of the sex of the aggrieved person if, on the ground of the sex of the aggrieved person, a characteristic that appertains generally to persons of the sex of the aggrieved person or a characteristic that is generally imputed to persons of the sex of the aggrieved person, the discriminator treats the aggrieved person less favourably than, in the circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex. It is apparent from Section 5 that where an act is done for two or more reasons the act of discrimination relied on need not be the dominant or substantial reason for the doing of the act. By Section 161 an employer can be vicariously liable for the discriminatory conduct of his employee or agent.

The concept defined by Section 8(1) is usually described as direct discrimination. Section 8(2) deals with indirect discrimination. This occurs if the alleged discriminator requires the aggrieved person to comply with a requirement with which a substantially higher proportion of persons of the opposite sex comply or are able to comply, which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply. For the sake of completeness, and bearing in mind that the parties were not represented by Counsel, the Tribunal will proceed upon the basis that both forms of discrimination were in issue.

Having defined the concept known as sex discrimination, the Act then indicates the various circumstances in which relief can be obtained if an act of discrimination occurs. For example, reference is made to discrimination against employees and applicants for employment and to those affected by the acts of professional or trade organisations.

Importantly, in the circumstances of the present case, Section 19 provides that it is unlawful for a person to discriminate against another person on the ground of the aggrieved person's sex by refusing to allow the aggrieved person access to or the use of any place that the public is entitled or allowed to enter or use, for payment or not, or in the terms on which the discriminator is prepared to allow the aggrieved person access to any such place or by refusing to allow the aggrieved person the use of any facilities in any such place.

By Section 20 it is unlawful for a person to discriminate against another person on the ground of the other person's sex by refusing to provide services or to make facilities available to the other person.

It emerges from a review of the decided cases that the Equal Opportunity Act does not aim to render unlawful all acts of discrimination. Its object is to eliminate discrimination by reference to certain relationships or other defined areas where, by reason of particular circumstances, a person might be regarded as subject to the inference or abuse of power by another. *Spencer v Dowling* (1997) 2 VR 127 at 142; *Schwerin v City of Sale* (1997) 2 VR 219 at 224. In the recently decided case of *IW v City of Perth* (1997) 71 ALJR 943 Brennan CJ and McHugh J were moved to say that although the Act is to be construed liberally and beneficially, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural. Given the artificial definitions of discrimination in the Act and the restricted scope of their applications, the court or tribunal should not approach the task of construction with any presumption that conduct which is discriminatory in its ordinary meaning is prohibited by the Act. The Act is not a comprehensive anti-discrimination or equal opportunity statute: it is confined to particular fields and to particular activities within those fields.

In the earlier case of *Waters v Public Transport Corporation* (1991) 173 CLR 349 Mason CJ and Gaudron J said in relation to the Victorian statute at page 363 that:

> "The discrimination with which the Act is concerned is the discrimination against, rather than discrimination between, persons with different characteristics. The notion of 'discrimination against' involves differentiating by reason of an irrelevant or impermissible consideration. Anti-discrimination legislation operates on the basis that certain characteristics or conditions are declared to be irrelevant or impermissible."

It follows from a review of these cases that it is not enough for a complainant such as the Complainant in the present case to feel aggrieved by a sense of unfairness, a belief that men and women have been treated differently in the circumstances giving rise to the sense of grievance, for the Tribunal has to be satisfied that the complainant has been treated less favourably by reason of a consideration deemed to be irrelevant or impermissible.

It is also clear from a number of previously decided cases that discrimination of the ground of sex is prohibited irrespective of whether the conduct disadvantages men or women. Thus, for example, in *Tully v Ceridale* (1990) EOC 92-319 it was held that the act of charging male patrons of a club a higher entrance fee than that charged to women was discriminatory. Underlying the Act was the recognition that every human being is equal in dignity and worth and therefore entitled to enjoyment of fundamental freedoms and human rights. Likewise, in *King v Franquin Pty Ltd* (1995) EOC 92-665 this Tribunal held that a group of men including the complainant in that case who were denied admission to a night club had been discriminated against on the ground of their sex because the manager formed a view that a group of men arriving late at night were bound to cause trouble. They were refused entry not because they were actually disorderly but because of characteristics presumed against them because of their gender.

A useful variation on this theme for present purposes is to be found in *James v Eastleigh Borough Council* (1990) 2 AC 751. In that case a man and his wife, both aged 61, went to a public swimming pool operated by the respondent Council allowing free admission to pensioners as an act of benevolence by the local municipality. The plaintiff's wife was admitted free,

being of pensionable age, but the plaintiff was charged for admission because the pensionable age for a man in England was 65, not 60. The House of Lords upheld his complaint of discrimination on the ground of sex and confirmed that if the differential treatment, viewed objectively, depended upon a gender based criterion, albeit with the benign motive of seeking to provide free admission to pensioners, then relief could be obtained. In other words, the motive behind the action complained of is not decisive as to whether an act of discrimination has occurred.

One also finds a useful review of decided cases bearing upon the issue of whether a male complainant is entitled to relief in various circumstances in *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* (1997) EOC 92-890. In that case the medicine Calcitriol was available at a subsidised rate to women who suffered osteoporosis with fracture due to minimal trauma if they were post menopausal but not to men with osteoporosis as men could not satisfy the condition of being post menopausal. The less favourable treatment said to have been received by the male complainants was their inability to obtain Calcitriol at the subsidised rate. The Federal Court referred to the matter back to the trial judge and therefore did not finally rule upon the issue but in the course of its judgment it concurred with the reasoning of the House of Lords in *James v Eastleigh Borough Council* (supra). The court also noted that where a statute requires that the act complained of be "by reason of " or "on the ground of" sex of the aggrieved person then such words imply a relationship of cause and effect between the sex of the aggrieved person (or a characteristic generally imputed to the sex of the aggrieved person) and the less favourable treatment by the discriminator of that person.

It emerges, then, from a consideration of these cases that in certain circumstances relief will be available to complainants who are denied access to public places or facilities on terms less favourable than those accorded to women and it is irrelevant that the policy behind the differential treatment is benign. The decided cases indicate, however, that the fact or event activating the differential treatment must be referable to gender, either

naturally, such as a post-menopausal condition, or by clear implication such as the attribution of a different pensionable age to men and women by law.

The decided cases also indicate that the power to dismiss a complaint allowed to the Tribunal by Section 125 of the Act must be exercised with care. In *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 Dixon J noted at page 91 that prima facie every litigant has a right to have matters of law as well as of fact decided according to the ordinary rules of procedure, which give him full time and opportunity for the presentation of his case to the ordinary tribunals, and the inherent jurisdiction of the court to protect its process from abuse by depriving a litigant of these rights and summarily disposing of an action as frivolous and vexatious in point of law will not be exercised unless the plaintiff's claim is so obviously untenable that it cannot possibly succeed.

This Tribunal undertook a review of the authorities bearing upon this issue in *Yarran v Westpac Banking Corporation* (1992) EOC 92-440 and concluded that a ruling upon such an application falls within the purview of Section 105(3) mentioned earlier. In *State Electricity Commission of Victoria v Rabel* (1998) 1 VR 102 the Full Court of Victoria also reviewed the relevant authorities. Tadgell J noted at page 104 that the jurisdiction is a useful one in that it enabled the board in appropriate cases to deal summarily with complaints that are obviously hopeless or obviously undeserving of relief. Ormiston J noted at page 110 that a complaint should not be dismissed pursuant to a power of this kind unless it is clear beyond doubt that the complaint is lacking in substance, that is "that the complainant has no arguable case which should be allowed to be resolved at a full hearing." Members of the Full Court made it clear that there could be no justification for depriving a complainant of a right to pursue a claim for relief unless it was clear what case the claimant desired to pursue. It is apparent, however, from the Full Court's reasoning that if particulars of the claim or documents equivalent to pleadings reveal as a matter of legal analysis that the claim cannot succeed even if all the facts and matters relied on by the complainant

not in dispute are established then it is open to a court or tribunal to rule upon the matter without receiving further evidence.

When these statutory provisions and principles are applied to the comparatively narrow sequence of events giving rise to the present complaint, it appears that the Tribunal by its President is at liberty on the basis of the materials presently before it to make a determination as to whether the Complainant can succeed. In that regard, the Tribunal is satisfied that in asking the Complainant to leave the queue because of his lack of suitable attire, and thus effectively denying the Complainant entrance to a public place that otherwise would have been accessible to him, the doorman was acting with the authority of the Respondent and consistently with the requirements and established practice of his employer. It follows from Section 161 of the Act that vicarious liability can therefore be attached to the Respondent if the act of exclusion amounted to discrimination on the ground of the sex of the complainant within the language of the Act.

The Tribunal is also satisfied that the Respondent's management policy was formulated and carried into effect by its doorman with a benign intention, namely, to ensure that appropriate standards of dress and decorum were observed on the subject premises. The management did not consciously intend to discriminate against any person wishing to visit the premises on the ground of his or her sex and there is nothing in the facts and matters relied on by the Complainant to raise any inference to the contrary. Nonetheless the decided cases, and especially *James v Eastleigh Borough Council* (supra), establish that an act of discrimination can occur without there being any conscious or malevolent desire to disadvantage or cause inconvenience to a member of one particular sex. Thus, when one turns firstly to the plea of direct discrimination the critical question is whether the conditions of entry to the premises established by the Respondent brought about the result that the Complainant as the aggrieved person was discriminated against on the ground of his sex or a characteristic that appertains generally or is generally imputed to persons of the male sex.

The operative condition of entry as carried into effect by the Respondent's doorman was that those seeking admittance should observe high standards of dress. The Complainant's attire was thought to be unsuitable as his shoulders were exposed, this being regarded as unsuitable in the case of a man but not necessarily unsuitable in the case of a woman. One notices immediately that the policy does not expressly discriminate against one gender. Both male and female patrons were free to enter, if well dressed. The Complainant contends, however, that in regard to certain items of apparel the effect of the policy in practice was to discriminate against men because certain garments would be acceptable if worn by a woman, but not if worn by a man. On another view of the matter, however, the policy can be characterised as a reference not to the gender of the parties involved in the exchange but to conventional standards of dress in the community. Viewed in that light the criteria being applied by the doorman was sexually neutral. For example, garments which might be suitable if worn by one prospective male customer might be regarded as entirely unsuitable if worn by a male companion, especially if the latter had a much bigger physique. The same set of clothes on the body of another person of the same sex could easily be regarded as absurd or obscene, or otherwise contrary to the usual standards of decency. It is apparent from a consideration of an example of this kind that a judgment by a doorman as to the amount of flesh exposed or the overall suitability of the garment is not necessarily a judgment referable to the gender of the person being inspected. It is a judgment referable to standards of decorum.

The Complainant's allegation can also be tested by reference to the example given by the Respondent's Manager in his reply to the Commissioner of Equal Opportunity mentioned earlier. If the male Complainant had appeared at the door of the premises wearing a dress owned by his female companion, the inevitable refusal of entry would not be due to characteristics based on gender, although a dress is usually regarded as an item of female attire, but because of a policy referable to conventional standards of dress in the community. Some members of the community might be inclined to mock or deplore current fashions, especially in an era when fashions change so

rapidly, or to question the need for codes of social behaviour. Other members of the community, such as the Complainant, may at times feel a genuine sense of grievance that their activities are being restricted by standards of dress, as happened in the present case. Nonetheless, as the Tribunal has already noted, it is not enough for a complainant to point to a sense of grievance. The statute does not provide relief in every situation in which a party feels a sense of grievance because of differential treatment. The complaining party has to establish that the act of differential treatment relied on has been rendered impermissible by the rules contained in the statute. Provided those rules are not infringed, the manager of licensed premises used by the public is entitled to run the premises in accordance with what he or she regards as a proper standard of decorum. There will almost certainly be alternative venues available for those who happen to find a particular set of standards too conventional or oppressive. The trend setter momentarily obliged to go elsewhere will find solace in the knowledge, amply illustrated by the history of fashion, that what is inadmissible today often becomes the norm tomorrow.

Put shortly, then, in considering the allegation of direct discrimination on the ground of sex, the decided cases suggest that in the circumstances of the present case the Complainant cannot succeed, even if the facts and matters he relies on are accepted in their entirety, and that his complaint should therefore be dismissed as misconceived and lacking in substance. There may be some circumstances in which a particular garment is so clearly related to one sex or the other that it becomes possible to say that what is outwardly a prohibition of a style or a particular garment is actually a way of subjecting one sex or the other to less favourable treatment, but this is not such a case. The garment in question was not clearly linked to one sex or the other and thus a judgment about the suitability of the garment did not necessarily carry with it the implication that one sex would be treated less favourably than the other. The decision to refuse entry was referable not to gender but to standards of dress.

Similar considerations apply when one turns to the plea of indirect discrimination. Forms of dress and the way particular garments are worn are so various that it becomes difficult to argue persuasively that in the case of a sleeveless shirt or singlet that a person of one sex is unable to comply with a condition with which a substantially higher proportion of persons of the opposite sex are able to comply, especially if the overriding requirement of decorum is referable to community standards. Moreover, it appears from Section 8(2) of the Act that, in regard to a plea of indirect discrimination, it is permissible for the proprietor of the premises to argue that differences in the male and female anatomies make it 'reasonable' that there be different dress requirements. The Tribunal considers that in the circumstances of the present case, viewed objectively, the policy, and thus the action of the doorman, was reasonable. Accordingly, the complaint will be dismissed in regard to the indirect discrimination plea also. There will be no order as to costs.