

EQUAL OPPORTUNITY TRIBUNAL  
OF WESTERN AUSTRALIA

Matter Number: 1 of 1999

IN A MATTER OF A COMPLAINT BY:

**JENNY ISAACS**

**Complainant**

**- against -**

**STEVEN ROSS**

**Respondent**

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**REASONS FOR DECISION**

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Before:	Mr N Hasluck QC	President
	Ms R Kean	Member
	Mr S Rowe	Deputy Member

For the Complainant: Mr A. Macdonald

For the Respondent: In person

Heard: 18 October 1999

**REASONS FOR DECISION** 21 December 1999

## REASONS FOR DECISION

The Complainant, Jenny Isaacs, claims that the respondent, Steven Ross, discriminated against her on the ground of race. Ms Isaacs is a person of Aboriginal descent and of appearance. The complaint arises out of circumstances detailed in a written complaint lodged by Ms Isaacs with the Commissioner of Equal Opportunity dated 31 July 1997 ("the written complaint").

At all material times Ms Isaacs was a shift worker with Telstra. It appears from the written complaint that on Friday 18 July 1997 Ms Isaacs attended Burswood Casino. She left the casino at about 2.45 am with the intention of getting a taxi to her place of residence at 20 Chilgrove Way, Balga. She approached the first taxi in the line of taxis outside the casino, being car 784. The Tribunal pauses to note that it was common ground at the hearing before the Tribunal that the respondent, Steven Ross, was the driver of this taxi.

The written complaint continues as follows:

"Once inside the taxi, I sat in the back seat. The taxi driver asked where I was going. I said 'To Balga'. He then asked what sort of night did I have. I said it was okay. After a couple of minutes he asked me to get out of his cab. He hadn't even started his car. I asked why did I have to get out and he just said, 'Look, get out. I don't want any trouble. Just get another cab.' I said, 'But you have to give me a reason,' and he said, 'I asked you to show me \$20.' I said, 'No, you didn't,' and he just repeated it again and said, 'Get out and get one of the cabs behind me. There's plenty there. I don't want any trouble.' So as I had no choice I got out and was extremely upset as all I wanted to do was go home. I was tired and had a migraine headache. I went back into the casino and rang Swan Taxis and spoke to a supervisor by the name of Dawn. I told her what had happened as best I could as I was very distressed by this time."

The written complaint indicates that arrangements were made with the taxi supervisor for another taxi to pick Ms Isaacs up from the front door of the casino but, after a while, Ms Isaacs decided to speak to the doorman at the casino. By this time, on her account, having been refused a ride for "no valid reason" she knew that she was going to take the matter further. She showed the doorman that she had money in her purse and arrangements were then made for a security guard to escort her to the taxi rank so that she could get a car to take her home. She was taken home by the next available driver, this being a Mr George Van der Meer.

Ms Isaacs' written complaint says of the driver she first approached (now known to be Mr Ross):

"My complaint with the driver in question is that the fact that I'm Aboriginal and that I live in Balga. He decided I was not a worthy customer. He assumed I had no money even though I had \$800 on me as I had got my tax back on the Thursday, 17th. So to me, the cab driver had no valid reason for telling me to get out. I was not drunk, abusive or penniless. The humiliation he put me through was totally unnecessary and I strongly feel that I didn't deserve to be treated so rudely."

On the printed section of the complaint form in which complainants are asked to signify the type of discrimination alleged, Ms Isaacs ticked the box marked "Race" and also ticked another box marked "Other", adding the explanation in handwriting: "The fact that I live in Balga - which has a stigma for a bad area."

Correspondence initiated by the Commissioner of Equal Opportunity in response to the written complaint established that Mr Ross was the driver of taxi 784 at the relevant time and this fact has never been denied. The Commissioner of Equal Opportunity was unable to resolve the dispute and the matter was eventually referred to this Tribunal.

As a consequence of directions given at a preliminary hearing before the Tribunal, Points of Claim were filed on behalf of Ms Isaacs which echoed the facts and matters set out in her written complaint. The Points of Claim reflected a plea that Mr Ross unlawfully discriminated against her on the ground of her race in the area of provision of a service by treating Ms Isaacs less favourably than in the same circumstances, or circumstances not materially different, Mr Ross treated or would treat a person of a different race, contrary to sections 36 and 46 of the Equal Opportunity Act 1984 as amended ("the Act").

The Tribunal pauses to note that at a later stage reliance was also placed on section 5 of the Act, the effect of which is that the ground of discrimination relied on - in this case race - need not be the dominant or substantial reason for the doing of the act complained of.

Particulars concerning the refusal of the taxi service included an allegation that "the respondent imputed to the complainant a characteristic generally imputed to Aboriginal people, namely, they cannot or will not pay their fares upon arrival at their destination, or are otherwise troublesome passengers."

It follows from the narrative to this point that the claim by Ms Isaacs recognised that the driver made no overt reference to the would-be passenger's Aboriginality. The plea was that the driver's words and actions, although not outwardly referable to her race, amounted to discriminatory conduct on the ground of her race or, alternatively, imputed to her certain characteristics generally imputed to Aboriginal people.

Mr Ross did not have legal representation in his various appearances before the Tribunal, although at the hearing before the Tribunal a supporter, Mr Weygers, was granted leave to sit with him and provide some assistance in regard to the formulation of questions for cross-examination and the presentation of arguments. At a preliminary hearing on 16 September 1999 the President of the Tribunal directed that Mr Ross not be required to file Points of Defence. The case was to be heard on the basis that Mr Ross admitted he was the driver of the taxi at the relevant time but otherwise denied the allegations made against him. This direction, in effect, amounted to a re-affirmation of the conventional position, already known to counsel for Ms Isaacs, that the complainant bears the burden of proof, and was therefore obliged to satisfy the Tribunal on the balance of probabilities that discriminatory conduct of the kind alleged in the written complaint and the Points of Claim had occurred on the night in question.

In the meantime, some proceedings had been commenced in the Court of Petty Sessions arising out of the same incident. A complaint was brought against Mr Ross pursuant to regulations made under the Taxi Act 1994 that, being a taxi driver plying for hire, he failed to accept a hirer as a passenger in the taxi he was driving when the hirer was neither unclean, abusive nor intoxicated. This charge came on for hearing before Bromfield SM on various hearing dates and, as a consequence, the hearing before this Tribunal was delayed until the other proceedings had been disposed of.

The charge against Mr Ross under the taxi regulations was eventually dismissed but not before a transcript of the evidence given in those proceedings had been brought into existence reflecting

the testimony given by Ms Isaacs, Mr Ross, Mr Van der Meer, Mr Green (an employee of Burswood Casino), Mr Hutchins (an officer of the Department of Transport) and various character witnesses. As some of these witnesses were not available to give evidence before the Tribunal, the transcript of the earlier proceedings in the Court of Petty Sessions was received in evidence by this Tribunal pursuant to the special powers allowed to the Tribunal in that regard by section 119(a) of the Act.

The legal issues being addressed by the Magistrate were of a different order to the legal issues arising under the Equal Opportunity Act following lodgement of the written complaint. Further, the findings made by the Magistrate were dependent upon a different standard of proof, namely, proof beyond reasonable doubt. It follows from these considerations that the Tribunal did not give any attention to or place any weight or reliance upon the reasoning or findings of the learned Magistrate. The transcript was received simply as a point of reference in regard to the consistency of statements made by Ms Isaacs and Mr Ross, and as a point of reference concerning the actions of Mr Van der Meer and the practices of the taxi industry described by Mr Hutchins, the investigation co-ordinator at the Department of Transport.

The Tribunal relied principally upon the testimony presented to it at the hearing before the Tribunal on 18 October 1999 by the parties and their witnesses and the various exhibits adduced in evidence. Those exhibits, in addition to the transcript of the proceedings in the Court of Petty Sessions, included a video tape of a programme put to air by a commercial television station in which both Ms Isaacs and Mr Ross were questioned about the events of the night in question. The video tape was thought to be relevant on the basis that it went to the consistency of statements made by the parties.

At the hearing before the Tribunal Ms Isaacs gave evidence that was generally consistent with the facts and matters set out in her written complaint. She said that she does not drink and affirmed that she was not drunk or disorderly when she approached and entered car 784. Her stance before the Tribunal, as reflected earlier in her written complaint and before the Magistrate, was that, in speaking to the driver, she did not give a precise address but simply asked to be taken to Balga.

Under cross-examination she said that she had a headache at the time she entered the car, not migraine, although this was not entirely consistent with the description given in the written complaint. She was not sure whether the driver had a clear view of her before she entered the taxi by the back door.

Unfortunately, in the absence of legal representation, the respondent's cross-examination was conducted in a confused and rambling fashion which made it difficult for Ms Isaacs and for members of the Tribunal to discern whether some different version of the crucial exchanges was being contended for by Mr Ross. It gradually became apparent, however, that Mr Ross intended to say that he was troubled by the absence of a precise address in Balga, especially in circumstances where there were two alternative routes to a distant suburb, and the passenger was not only female but also had failed to provide evidence that she could pay for the fare. Ms Isaacs was adamant that concerns of this kind were not raised with her, although it was apparent from her own version of what occurred that shortly before she left the car the driver claimed to have previously asked for \$20. On her evidence, she left the car at his request.

The Tribunal also heard evidence from Mr Geoffrey Green, a security officer employed by Burswood Casino at the relevant time. He recalled seeing Ms Isaacs on the night in question and being told about the difficulties she had experienced with the driver of car 784. According to him, she was well-dressed, displayed no signs of intoxication and had money in her purse. Mr Van der Meer, the driver who eventually conveyed Mrs Isaacs to her residence in Balga, did not give evidence before the Tribunal but his evidence to the Magistrate was to this effect:

"I pulled up at the casino...after a couple of minutes a security guard or doorman at the casino approached me and opened the door, the back door, and he said, 'Can you take this lady home? She's got plenty of money?' I said, 'Right. If she got money I will take her home.' ...the lady got in the car and I saw that she was very upset; she was crying and she had her hand full of money. I saw \$50 notes. I asked her where she want to go. She said, 'To Balga' so I proceeded to drive towards Balga and on the way I asked her the address where she wanted to go. She told me the address. I can't remember what it was now, and when we got to Balga she paid me the fare and she asked me for a receipt, which I gave her, with my number on it, and I said goodbye to her and I left again...(she was) sober, properly dressed, neat. Nothing wrong there."

Mr Ross said in evidence that he has been a taxi driver since 1985. He said that in the course of his career as a taxi driver he had been involved in or was aware of incidents which expose drivers to the risk of complaints being made against them if they fail to obtain a precise address. For example, if a female passenger fell asleep the driver might have to awaken her during the course of the journey if he didn't get the precise address at the outset, and this could give rise to a complaint. He said in evidence that he himself had been involved in disciplinary proceedings by the Taxi Control Board because he failed to get a precise address.

According to Mr Ross, these considerations immediately came to mind when Ms Isaacs got in



the back seat of his car and simply asked to be taken to Balga. He told her he had to have a precise address and, having made his position clear to her, on his account, she left the taxi of her own free will. He denied her version of the crucial exchanges. He agreed under cross-examination that he probably would have abandoned his insistence upon a precise address, if she had \$50 or some substantial amount in her hand to cover the fare, and to that extent discussion about money sometimes took place on such occasions. He agreed that before she got into his car he had seen her approaching the car. He did not suggest in his evidence that she was drunk or disorderly. He denied having asked her to leave the taxi, and said it was her decision to get out, which she did, apparently because she was unwilling to provide the address he asked for.

The Tribunal pauses to say that although this account was broadly consistent with the evidence given by Mr Ross in the Court of Petty Sessions, and while being interviewed on commercial television, nonetheless the summary of his evidence just given imposes upon the testimony a degree of coherence that was not immediately apparent at the time the testimony was being delivered. Mr Ross was not a satisfactory witness. His version of events was given in a confused and rambling manner in which various asides and digressions and strong opinions on the difficulties confronting a taxi driver in the modern world were bound up with the central narrative, and it became very difficult to sort out what he clearly remembered about the night in question from his general views about traps for the unwary, and the sort of precautions taxi drivers had to take in order to protect themselves from unwarranted complaints.

Nonetheless, it did seem that Mr Ross's previous experiences had left a mark upon him. It also seemed that as at 18 ~~October~~<sup>July</sup> 1997 he did harbour a strong belief that before giving a lift to a

female passenger late at night or in the small hours of the morning he should cover himself by asking for an exact address or by making sure that money was available to meet the fare.

Mr Ross also called a number of character witnesses in support of his case to say that he was a fair-minded man, he was someone who had lived with and provided support to various Aboriginal friends, and was not the kind of man to discriminate against passengers in his taxi on the ground of their race. Some of these witnesses were associated with the Council of Civil Liberties and had no real knowledge of how Mr Ross was likely to conduct himself as a taxi driver. The Tribunal was not inclined to give much weight to evidence of this kind. It did play some part, however, when the time came for the Tribunal to determine whether inferences adverse to Mr Ross should be drawn in the circumstances of the present case.

The Tribunal has already noted that the complainant bears the burden of satisfying the Tribunal on the balance of probabilities that the provisions of the Act concerning discrimination on the ground of race have been infringed. Section 5 indicates that it will be sufficient if the factors underlying the conduct complained of include factors referable to discrimination on the ground of race, but reasoning along this line remains subject to the requirement that a causal connection must be made out between the discriminatory conduct alleged and the adverse consequences relied on for relief. In other words, in order to give proper weight to the words "on the ground of" appearing in section 36 of the Act, the aggrieved person has to satisfy the Tribunal that the conduct complained of was based on or is referable to the unlawful consideration of race. See *University of Ballarat v Bridges* [1995] 2 VR 418 at 436. Inferences can be drawn from the primary facts in order to substantiate a plea of racial discrimination, although discrimination cannot be inferred when more probably innocent explanations are available on the evidence.

*Fenwick v Bevridge Building Products Pty Ltd (1986) EOC 92-147; Walley v Homeswest (1999) EOT(WA)* unreported at page 33.

Various difficulties confront the complainant, Ms Isaacs, in the circumstances of the present case. The matter complained of arises out of a comparatively brief verbal exchange in the early hours of the morning between herself as a would-be passenger and the taxi driver, Mr Ross. There were no witnesses to the crucial exchange and there is no direct corroboration in the form of admissions made subsequently. Moreover, there is a degree of ambiguity in the situation because, even on the complainant's own account of what took place, the language used by the driver was not overtly discriminatory.

These considerations mean that Ms Isaacs had to rely ultimately upon inferences. It is true that there are certain objective facts from which inferences relevant to the central issue can be drawn. Taxi drivers are obliged to convey passengers to their destination upon request unless the would-be passenger is intoxicated or disorderly. The evidence is quite clear - and the Tribunal makes such a finding - that Ms Isaacs was well conducted, not intoxicated, and had sufficient money in her purse to cover the fare. Independent evidence to this effect came from Mr Green and from the taxi driver who took her home eventually, Mr Van der Meer. This suggests that there was some other reason for the apparent reluctance of Mr Ross, as the driver of car 784, to convey her to Balga. Against this background, counsel for Ms Isaacs invited the Tribunal to accept her version of what transpired and to draw an inference that the underlying reason for the driver's refusal to provide a taxi service, and his request that she leave his car, was discrimination on the ground of her race as a person of Aboriginal descent and appearance.

The Tribunal is prepared to accept that Ms Isaacs had a clearer recollection of what took place at the relevant time than Mr Ross. She was crisp and consistent in her answers to the questions put to her. Mr Ross was rambling and diffuse. Nonetheless, as the Tribunal has already noted, it did seem that Mr Ross, in a rather confused way, held strongly to a belief that he was entitled to insist upon a precise address. Ms Isaacs herself concedes that the only address given to the driver was "Balga". In these circumstances there was obviously room for a misunderstanding between the parties, leading to a disagreement. If Ms Isaacs entered the taxi with a migraine headache she may have been in no mood to find out what exactly was troubling the driver.

The Tribunal has carefully weighed up the credibility of the witnesses and their respective versions of what took place. Although it tends to prefer the account given by Ms Isaacs, the Tribunal is not satisfied that her account represents precisely what was said and done at the relevant time. In the Tribunal's view, when the crucial exchanges are reduced to their essence, it seems that Ms Isaacs asked to go to Balga and encountered resistance. This was followed by some rather confused talk about money and when it became apparent that the driver would not proceed without a precise address, the would-be passenger vacated the vehicle. From this, the Tribunal is asked to infer that the refusal of service was based on the ground of race.

On the balance of probabilities, the Tribunal is not satisfied that such an inference can be safely drawn, and especially in circumstances where a more innocent explanation is available for what occurred, namely, that the driver, affected by his previous experiences, held to the view that he was entitled to insist upon a precise address. Such a stance may not be sufficient under the taxi regulations to refuse the service, but that is not the issue presently before the Tribunal. The

question for the Tribunal is whether the refusal of a service in the circumstances of the present case amounted to an infringement of those provisions of the Equal Opportunity Act concerning discrimination on the ground of race.

It was quite apparent to the Tribunal that Mr Ross was quarrelsome by nature and not given to communicating his thoughts with clarity. It is quite possible that his refusal to move his vehicle was based on his belief that he was entitled to obtain a precise address and that it was a difference of opinion on this point, albeit not adequately communicated to Ms Isaacs, that led to the parties proceeding at cross-purposes, and eventually to Ms Isaacs leaving the car in a state of distress. It is significant that in both her written complaint, and in the points of claim filed on her behalf, that Ms Isaacs herself saw the bone of contention as being her nomination of "Balga" as her destination. She drew the inference that the mention of this place led to the driver immediately attributing to her certain adverse characteristics, but there is little in the way of objective or corroborative evidence to support such an inference even if her version of events was accepted in its entirety.

In summary, then, the Tribunal is not satisfied that it would be safe to draw inferences of the kind contended for by counsel for Ms Isaacs in the circumstances of the present case where there is a degree of ambiguity as to what exactly took place between the parties during the course of the relevant conversational exchange. The inferences cannot be drawn because the primary facts are not sufficiently clear, and it would be inappropriate according to the decided cases to draw such adverse inferences where alternative and more innocent explanations are also available. It follows that the Tribunal is not satisfied on the balance of probabilities that discrimination on the ground of race occurred. It also follows that the claim will be dismissed.