

JURISDICTION : EQUAL OPPORTUNITY TRIBUNAL OF
WESTERN AUSTRALIA

LOCATION : PERTH

CORAM : MRS N JOHNSON QC, PRESIDENT
DR C GILLGREN and MS L MCGRATH,
MEMBERS

HEARD : 8 OCTOBER 2001

DELIVERED : 17 APRIL 2002

FILE NO/S : ET/2000-00029

BETWEEN : GRAHAM SIMMONDS
Complainant
and
: FLOREAT (WA) PTY LTD T/as ROSIE
O'GRADY'S FREMANTLE
Respondent

Catchwords:

Equal Opportunity – age discrimination

Legislation:

Equal Opportunity Act 1984, s3, s66V, s66ZF, s66ZM, s120 and s123

Liquor Licensing Act 1988, s121

Result:

Application dismissed

Representation:

Counsel:

Applicant: : Mr A Macdonald, Snr Legal Officer, Equal
Opportunity Commission

Respondent : Mr C Brockwell, Director of Floreat (WA) Pty
Ltd

Case(s) referred to in determination:

Alone v State Housing Commission (1992) EOC 92-392

Australian Iron and Steel Pty Ltd v Banovic and Anor (1989) EOC 92
271

Jamal v Secretary Department of Health and Anor (1988) EOC 92-234

King v Franquin Pty Ltd (T/A The Racquet Club) & Anor (1995) EOC
92-665

Lockyer v Cymour Pty Ltd T/A Rosie O'Grady's Northbridge,
Unreported No37 of 1997

Waters and Ors v Public Transport Corporation (1991) EOC 92-390

JUDGMENT OF THE TRIBUNAL:

Introduction

1. The Complainant, Graeme Simmonds, claims that the Respondent, Floreat (WA) Pty Ltd trading as Rosie O'Grady's, unlawfully discriminated against him on the ground of the age of an associate of the Complainant, in the area of provision of services contrary to sections 66V and 66ZF of the Equal Opportunity Act 1984 ("the Act"). It is alleged that the Complainant was refused entry to and service at the Respondent's hotel because he was accompanied at the time by a young child.
2. The Complainant alleges that as a result of the unlawful discrimination he suffered distress and embarrassment. He also alleges that he suffered a sense of rejection on the evening in question and loss of enthusiasm for taking friends and associates to pubs.

Legal Principles

3. Part IVB of the *Equal Opportunity Act 1984* ("the Act") prohibits discrimination on the ground of age. Division 3 of the Act addresses, inter alia, discrimination in relation to the provision of goods and services. Section 66ZF(1) of the Act is in the following terms:

"It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's age –

- (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."*

4. Discrimination on the ground of age is relevantly defined in section 66V(1) to include treating the aggrieved person, on the ground of age, less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who is not of that age. Section 66V(2) extends the operation of the provision to include treating the aggrieved person less favourably on the ground of the age of any relative or associate of the aggrieved person.
5. It is not necessary to show that the alleged discriminator intended to discriminate. However, the act which amounts to discrimination must be deliberate; that is, advertent and done with the knowledge of the characteristic of the complainant said to be the ground on which the discriminatory act is performed: *Jamal v Secretary Department of Health and Anor* (1988) EOC 92-234 at 77 196 per Kirby P, at 77 200 per Samuels JA; *Australian Iron and Steel Pty Ltd v Banovic and Anor* (1989) EOC 92 271 at 77 732-77 733 per Gaudron and Deanne JJ, at 77 737 per Dawson J; *Waters and Ors v Public Transport Corporation* (1991) EOC 92-390 at 78 674 per Mason CJ and Gaudron JJ, Deane J agreeing, cf McHugh J at 78 698. The Complainant bears the onus of proof and must prove his case on the balance of probabilities: *Alone v State Housing Commission* (1992) EOC 92-392 at 78,788.
6. However, even if the Complainant establishes that he was treated less favourably because of the age of the person accompanying him that is not an end to the matter. Not all discriminatory acts are unlawful. Division 4 sets out a number of exceptions to Part IVB of the Act. The Respondent bears the onus of establishing that its conduct falls within the exception: section 123 of the Act. Relevantly, section 66ZM provides:

“(1) Nothing in Division 2 or 3 renders unlawful discrimination by a.....person against another person on the ground of the person’s age in the terms and condition on which.....

(e) goods, services or facilities are provided or made available,

as the case requires, if those terms and conditions are imposed in order to comply with health and safety considerations which are reasonable in the circumstances.

(2) *In determining for the purposes of subsection (1) what health and safety considerations are reasonable in all the circumstances, regard shall be had to all relevant circumstances of the particular case, including the effect of the discrimination in question on the person against whom that discrimination takes place.*”

7. In the instant case the Complainant was denied access to the services sought by virtue of being denied entry to the premises. It was argued on behalf of the Complainant that as services were refused rather than provided subject to terms and conditions, the Respondent's conduct falls outside the ambit of section 66ZM. Counsel for the Complainant was unable to identify any authority in support of that construction of section 66ZM. By way of general background the Tribunal's attention was drawn to the cases of *King v Franquin Pty Ltd (T/A The Racquet Club) & Anor* (1995) EOC 92-665 and *Lockyer v Cymour Pty Ltd T/A Rosie O'Grady's Northbridge*, Unreported No37 of 1997, delivered 10 February 1998. While these cases involved refusal of entry to licensed premises, neither dealt with the application of a provision in similar terms to section 66ZM.
8. One factor in favour of the Complainant's contention is that elsewhere in the Act, specifically in section 66ZF, the expressions “*refusing to provide.....goods or services*” and “*the terms or conditions on which the person provides....the goods or services*” both appear, indicating, on one view, that the latter expression was not intended to include the former. Against the contention is the obvious anomaly which would result. For example, a licensee would be lawfully entitled to allow entry on conditions designed to protect the health and safety of a child but would not be permitted to afford a child the ultimate protection of refusing them entry when circumstances are such that the health and safety of the child simply could not be protected. Such a construction would put a licensee in an untenable position; either to allow entry and act in breach of its common law and statutory duty of care as an occupier or refuse entry and act in breach of the discrimination laws.
9. The Act is beneficial legislation and must be construed so as to promote its object or purpose: section 18, *Interpretation Act 1984*. The objects of the Act include the elimination of discrimination against persons on the ground of age in the area of the provision of goods and services and to promote recognition and acceptance within the community of the equality of all persons regardless of their ages: section 3 (a) and (d) of the Act. Having regard to those

objects, statutory exceptions or exemptions contained within the Act and which render some forms of discrimination lawful in some circumstances are not to be given a wider construction than the words of the relevant provisions necessitate. However, neither are they to be given an unduly narrow construction that would create unjustifiable inconsistencies which would bring the law of discrimination into disrepute.

10. Section 66ZM of the Act was inserted by *Equal Opportunity Act Amendment Act No 74 of 1992*. Prior to the 1992 Amendment Act it was lawful to discriminate on the basis of age. The Second Reading Speech of the Equal Opportunity Amendment Bill of 1992 provides limited assistance in construing the operation of section 66ZM and makes no specific reference to the section. However, it clearly states that the exceptions are designed to mitigate against absurdities that may otherwise result from the implementation of laws prohibiting age discrimination and that the exceptions were designed to cover situations where the continuation of age discrimination is both practical and reasonable. Elsewhere in the Second Reading Speech, although in relation to consequential amendments to other legislation, there is specific reference to the protection of minors and “*societal expectations for the protection of persons of certain age groups*”: *Parliamentary Debates (Hansard)*, 1 December 1992 at 7656.

11. Taking all these factors into consideration, the Tribunal considers that refusal of entry to premises, and hence access to services, to a person accompanied by a child falls within the scope of section 66ZM and hence is not unlawful where such action is taken in order to comply with health and safety considerations which are reasonable in the circumstances.

12. In its Points of Defence the Respondent does not specifically plead a defence under section 66ZM. However, the Respondent does not deny that the Complainant was refused entry because of the age of an accompanying person and further pleads an intention “*to continue to maintain its duty of care to the safety and welfare of minors visiting our establishment*”. On that basis, section 66ZM is the only defence open to the Respondent. However, it is apparent from the Points of Defence and the submissions made on behalf of the Respondent, and also from the evidence of Mr Brockwell, a director of the Respondent, that while the Respondent is aware of its duty of care at common law it is unfamiliar with the extent to which its actions are limited by the operation of the Act. Since the

Act was passed in 1984 it has been unlawful to discriminate against a person in relation to the provision of goods and services. Since that time, various amendments to the Act have operated to broaden the grounds upon which it is unlawful to so discriminate. It is of concern to this Tribunal that any entity involved in the provision of goods and services would be unfamiliar with its obligations under the Act.

13. The Tribunal is similarly concerned that the Respondent does not appreciate the importance of calling as witnesses those persons who are able to give direct evidence of relevant matters. Mr Brockwell stated that he did not see the need and sought to have the tribunal rely on a hearsay account of events. Section 120 of the Act relevantly provides that the Tribunal –

- (a) *Shall not be bound by the rules of evidence and may inform itself on any matter it thinks fit;*
- (b) *Shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.*

While the Tribunal has the power to receive hearsay evidence it is under no obligation so to do. Further, the weight attached to hearsay evidence will rarely be the same as that given to direct evidence. The consequence is that a case which is strong when supported by direct evidence may be substantially weakened by calling hearsay evidence only. Accordingly, it is in the interests of all parties to a claim to make their best endeavours to call as witnesses the actual participants in the events and not simply to rely on section 120 of the Act as a basis for adducing hearsay evidence of those events.

14. In the course of submissions reference was made to the provisions of the Liquor Licensing Act, particularly in the context of whether there is any statutory authority for a refusal of access to services which under section 66ZS of the Act would render any discriminatory conduct lawful. There is no provision of the *Liquor Licensing Act 1988* which would have made it necessary for the Respondent to refuse entry to the Complainant when accompanied by a child. However, neither is there anything in the Act which confers on a child or any other person an unfettered and enforceable right to be on licensed premises. Section 108 of the Liquor Licensing Act simply makes it an offence to refuse, without

reasonable cause, to receive a person on licensed premises or to sell liquor to any person. That section clearly envisages that there will be circumstances in which it is entirely appropriate to refuse entry and service to patrons. The Liquor Licensing Act addresses circumstances in which a licensee or other person commits an offence by allowing juveniles on the premises or by serving them liquor. Although section 121 of the Liquor Licensing Act sets out circumstances in which it is no longer an offence to allow juveniles to enter and remain on licensed premises, the section does not convey or create a right for a juvenile who is accompanied by an adult to enter and remain on the premises. Ultimately, the Tribunal considers that the provisions of the Liquor Licensing Act do not assist in the resolution of this claim.

The Evidence

15. On Saturday 26 February 2000 the Complainant and his wife, Debra Marie Simmonds, went to a restaurant in Fremantle for an anniversary meal. They were accompanied by Mrs Simmond's son, Ryan, who was born on 27 December 1992 and was 7 years old at the time. Following the meal, the Complainant suggested to his wife that they go across the road to the Respondent's premises ("the hotel") for a drink. According to the Complainant and his wife, it was their intention to have a drink in the beer garden of the hotel and remain for approximately half an hour.
16. An understanding of the layout of the hotel is necessary to the resolution of this matter, especially in relation to the Respondent's submission that the decision to refuse entry was reasonably based in the circumstances and therefore lawful. The hotel has a restaurant area, a beer garden area, a main bar area and rooms off to the side of the main bar area where people can go for a quiet drink. There is a dance floor in the main bar area and, as the Complainant conceded, "*any person in their right mind wouldn't take their child into that area*". The beer garden has its own bar so that patrons drinking in the beer garden need not enter the main bar area. However, there are no toilet facilities in the beer garden and patrons would have to go into the main area of the hotel to use the toilets. The complainant stated that there was no sign at the hotel indicating that children could not enter after a particular time.
17. As the Complainant, his wife and Ryan approached the entrance to the hotel's beer garden through the back laneway, the Complainant was stopped by a security guard. In view of a comment made by

the security guard and also because of factors relevant to health and safety, the timing of this incident is of significance. According to the Complainant, the time was approximately 9.05 pm, although he later qualified that estimation by stating that he left the restaurant at 9.05 pm. Mrs Simmonds said it was approximately 9 pm when they paid for their meal and left the restaurant to go across the road to the hotel. In a letter written to the Office of Liquor and Gaming on 28 February 2000, a mere two days after the event, the Complainant stated that he had arrived at the hotel at 9.20 pm. According to Mr Brockwell, the records held by the security contractor show that the incident occurred after 9.30 pm. However, Mr Brockwell did not produce those records and his evidence as to the time of the incident was hearsay in that the information was related to him by the head of the security company who had in turn obtained the information from the security guard involved. In those circumstances, the Tribunal is not prepared to rely on the Respondent's evidence on this issue. However, the conflict between the oral evidence of the Complainant and the documentary evidence causes concern as to the accuracy of his recollection at the time of the hearing. The Tribunal considers that the better recollection is to be found in the letter written closer to the event and finds that the incident took place no earlier than 9.20 pm.

18. According to the Complainant, he was advised by the security guard that he could not enter with a child because it was after 9.00 pm and the band was playing. The Complainant attempted to explain that he had been to the hotel many times with his children to have meals. The guard then asked if the Complainant was staying at the hotel and was told that he wasn't. The Complainant initially stated in his evidence that the guard explained to him that if he was staying at the hotel he could *"come in and sit down and have a drink"*. Mrs Simmonds recounted the conversation in this way: *"[h]e said something like "Why can't we come in?" or "Why are we being refused?" I think the doorman said, "It's too busy," or, you know, "Only if you are staying here can you come in with children."*

19. It is apparent from the content of the conversation with the security guard, as recounted by the Complainant and his wife, that the Complainant was refused entry because of Ryan's age. Indeed, the Respondent did not dispute that to be the case. Accordingly, the Tribunal finds that the Complainant was treated less favourably on the ground of the age of an associate in relation to the provision of

goods and services, contrary to section 66ZF of the Act. The critical issue then becomes whether the discrimination was unlawful. For the discrimination to be rendered lawful by section 66ZM the Respondent must establish that:

- (a) *The terms and conditions imposed were in fact imposed in order to comply with health and safety considerations and not for some other purpose, and*
- (b) *The terms and conditions imposed were reasonable in the circumstances.*

20. The Respondent disputed the Complainant's account of the conversation with the security guard, in particular, the reasons given for refusing entry when accompanied by a child. The Respondent declined to call the security guard involved in this matter. As Mr Brockwell was not at the hotel on the night of the incident his evidence as to the content of the conversation is entirely hearsay. According to Mr Brockwell he was informed that the security guard had made it clear to the Complainant that the hotel was extremely busy and they were unable to allow the Complainant to enter with the child because they "*couldn't guarantee that there were areas within the hotel that could ensure the safety and welfare of the child*". Although Mr Brockwell did not specifically refer to these issues when giving his evidence, it is apparent from his cross-examination of the Complainant that it is also suggested that inadequate seating was a further reason given.

21. It was put to the Complainant in cross-examination that, given the number of patrons in the hotel, it would have been impossible to ensure the child's welfare on that particular night. The Complainant said that, to the contrary, he was told that if he was staying there he could enter with his child, sit down and have a drink. It was disputed on behalf of the Respondent that the invitation to enter if the Complainant was a resident did not extend to drinking in the public areas with the child. The Complainant was questioned by the Tribunal and asked to recount exactly what the security guard said to him on this issue. The Complainant said that he was told: "*If you're staying here you can come in*". That account is consistent with the version given by Mrs Simmonds.

22. It must be kept in mind that the security guard was refusing the Complainant entry into the beer garden. It would be inappropriate for him to do so if the Complainant were staying there and was

simply accessing the hotel through the beer garden. The Tribunal considers that the statement made by the security guard cannot be understood to include an invitation to drink in the public areas with the child if the Complainant were staying at the hotel.

23. Whilst the recollections of the Complainant and his wife as to the detail of the incident may not be entirely accurate due to the time lapse between the incident and giving evidence, the Tribunal considers them to be credible witnesses. In those circumstances, the Tribunal is not prepared to accept the Respondent's hearsay account of the incident over that of the Complainant and his wife. The Tribunal finds that the explanation offered to the Complainant for refusing him entry because he was accompanied by a child was the time of night, the fact that a band was playing and that the hotel was busy. In the absence of any direct evidence from the security guard, the Tribunal is not prepared to find that the Complainant was advised that the Respondent considered it was unable to ensure the safety and/or welfare of the child.

24. Mr Brockwell was able to give some direct evidence of the policy and practice of the hotel in relation to refusing entry to persons accompanied by a child and also as to some of the factual circumstances giving rise to concerns regarding the health and safety of children on the premises. Mr Brockwell is involved in the management of the hotel in both an administrative and operational capacity including being on the premises from time to time. Mr Brockwell stated that, although the Liquor Licensing Act permits children to enter and remain on licensed premises when accompanied by a responsible adult, the hotel uses its discretion to exclude children when it believes the circumstances are such that it would not be able to discharge its duty of care to the child if the child were to enter or remain on the premises. Security personnel are made aware of the hotel's policy on this issue and given the discretion to implement that policy. Mr Brockwell identified a number of factors relevant to the exercise of the discretion. He referred to lateness of the hour, adequacy of seating, boisterous and loud environment, colourful language and smoke filled environment. With the exception of colourful language, the Tribunal accepts that these factors can properly be described as health and safety considerations. Exposure to colourful language falls more within the category of a welfare consideration with is not expressly covered by section 66ZM.

25. According to Mr Brockwell, the relevance of the lateness of the hour is the fact that the entertainment starts at 9.00 pm after which the hotel rapidly reaches its maximum numbers. Any security guard dealing with someone who wished to gain entry would know how many people were on the premises because each guard has ear phones with which they can communicate with other security staff, in particular the staff at the front and back door who use number counters to record the number of persons who enter the hotel. The number of people present impacts on the availability of seating. Mr Brockwell stated that seating is an important factor because it locates the child in a set and strategic position. According to Mr Brockwell, given the number of people standing in a hotel at the time and given the height of a child it would take only 10-15 seconds for that child to be lost within the hotel environment. Mr Brockwell observed that the circumstances that exist within the hotel make it manifestly easier to monitor the behaviour of the parent and the child during times which are less busy.
26. Mr Brockwell confirmed that the hotel is very busy on a Saturday night and that on the particular night there were two functions being held. Because they was refused entry neither the Complainant nor Mrs Simmonds are in a position to refute the proposition that the hotel was extremely busy on that night nor are they able to say whether there was any available seating in the beer garden.
27. The Tribunal accepts the evidence of Mr Brockwell as to the hotel's policy, the basis of that policy and the delegation of the discretion to the security guards. It further accepts Mr Brockwell's direct evidence that Saturday night is a very busy night for the hotel, that on the night in question there were two functions being held and that the entertainment starts at 9.00 pm after which the hotel rapidly reaches its maximum numbers.
28. As indicated above, the Tribunal must be satisfied to the requisite standard that the decision to refuse entry was, in fact, imposed in order to comply with health and safety consideration and, further, that the decision was reasonably based. Because the Respondent has chosen not to call the security guard to give evidence the first issue becomes more difficult to resolve than the latter. In the absence of direct evidence as to the motivation of the security guard the Tribunal must determine whether an inference can be drawn from the surrounding circumstances that the security guard was acting out of health and safety considerations.

an approach does not assist in determining whether it was lawful for the Respondent to refuse the Complainant entry to the hotel and constituted no more than an attempt to impose personal views as the yardstick by which responsible parenting should be judged. There is no evidence before this Tribunal from which it could be concluded that the Complainant or his wife are other than responsible parents.

33. The Complainant and his wife were clearly of the view that there should be no limitations on their entitlement, as responsible parents; to bring a child with them on to hotel premises at any time and that the decision as to whether it was safe for the child should have been left to them. There would be merit in that proposition if parents were the only persons who owe a legal duty of care to the child. Occupiers of premises have a statutory and common law duty of care to persons entering upon the premises. Licensees of premises also have specific obligations under the Liquor Licensing Act. Those obligations are not diminished by virtue of the fact that the child is accompanied by a responsible adult. In any event, it is unrealistic to suggest that hotel staff are in any position to make a determination as to whether accompanying parents are responsible.
34. Even the Complainant conceded that it would not be appropriate to take a child into a hotel where there was no safe and quiet area to sit down. However, he considered that the parent should be so advised "*in the correct manner*". The security guard may well have failed to give a detailed explanation of the hotel's policy and the reasons for applying it with respect to the Complainant. However, that is not a matter for this Tribunal. Mrs Simmonds conceded that hotels have a responsibility in relation to the welfare of people on the premises including children accompanied by adults but saw it as the proprietor's job to oust people who were drinking too much. With respect to Mrs Simmonds, her opinion assumes that any danger will necessarily come from other patrons who are drinking too much.
35. Neither does the Tribunal accept the suggestion that the existence of circumstances which would justify refusing a child entry would inevitably also require refusing entry to adults. There can be no doubt that children are far more vulnerable in such an environment than an adult and as a consequence a greater degree of care may be required of an occupier of licensed premises in order to discharge its duty towards a child known to be on the premises.

36. It is an unfortunate fact that even the most responsible parents cannot protect a child from all dangers. In certain circumstances, hotels can be fraught with danger for children, even those accompanied by responsible and vigilant parents. The Tribunal considers that the person in the best position to determine the potential risk is not a person who has just entered the hotel, it is those involved in the running of the hotel in the course of that evening.

37. That said the imposition of an arbitrary time limit after which children will be refused entry would, in the Tribunal's opinion, be in breach of the Act. If the circumstances which reasonably create concerns about health and safety issues are not present at the relevant time, refusal of entry would constitute unlawful discrimination under the Act.

Conclusion

38. The Tribunal finds that it was reasonable in the circumstances described in the evidence, in order to comply with health and safety considerations, to refuse entry to a person accompanied by a child. Accordingly, the Respondent has established that it falls within the exception created by section 66ZM and the complaint will be dismissed.