

JURISDICTION : EQUAL OPPORTUNITY TRIBUNAL OF
WESTERN AUSTRALIA

LOCATION : PERTH

CITATION : SIMMONDS v MINORA INVESTMENTS
PTY LTD

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

HEARD : 19 SEPTEMBER 2001

DELIVERED : 17 APRIL 2002

FILE NO/S : ET/2000-00030

BETWEEN : GRAHAM SIMMONDS
Complainant

and

: MINORA INVESTMENTS PTY LTD T/as
LEISURE INN ROCKINGHAM
Respondent

Catchwords:

Equal Opportunity – age discrimination

Legislation:

Equal Opportunity Act 1984, s3, s66V, s66ZF, s66ZM and s123
Liquor Licensing Act 1988, s121

Result:

Application dismissed

Representation:

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

Respondent : Mr D Strom, General Manager of Minora
Investments 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

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

Cases(s) also cited:

Hashish v The Minister for Education of Queensland (1996) EOC 92-806

McCarthy v Metropolitan Passenger Transport Trust (Transperth) (1993)
EOC 92-478

Parsons v Western Australian Fire Brigades Board (1995) EOC 92-735

Smith v Anor v Sandalwood Motel Pty Ltd (1994) EOC 92-577

JUDGMENT OF THE TRIBUNAL:

Introduction

1. The Complainant, Graeme Simmonds, claims that the Respondent, Minora Investments Pty Ltd, trading as Leisure Inn Rockingham, 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 Respondent discriminated against the Complainant in the terms and conditions upon which it would allow entry and provide services to the Complainant 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 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. 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 its Points of Defence the Respondent does not specifically plead a defence under section 66ZM. However, it does assert that it was acting in the best interests of the child and refers specifically to safety issues. If the Respondent establishes that the Respondent has acted in breach of section 66ZF, section 66ZM is the only exculpatory provision available to it.
8. 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. Irrespective of construction, the Respondent bears the onus of establishing that its conduct falls within the parameters of section 66ZM: *section 123 of the Act*.
9. On behalf of the Complainant, reliance was placed on the provisions of the Liquor Licensing Act 1988, 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 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

10. On Saturday 26 February 2000 the Complainant, his wife, Debra Marie Simmonds, and her 7 year old son Ryan went to a restaurant in Fremantle for an anniversary celebration. Following the meal the Complainant suggested that they go across the road to Rosie O'Grady's hotel for a drink. They were refused entry to that hotel and decided to go home. On the way home, the Complainant suggested that they go to the Respondent's hotel to sit in the beer garden and have a drink. On their arrival at the hotel the Complainant entered the beer garden area from the rear car park through a gate abutting a limestone wall. Mrs Simmonds and Ryan sat on the wall while the Complainant went to purchase drinks. According to the Complainant, the time was approximately 10.10 pm.
11. The Complainant stated that when he entered he was stopped by two security guards, one of whom initially told him that he could not enter the premises. Not surprisingly, in view of the time lapse, the Complainant had a little difficulty in recounting in his evidence exactly what was said to him by the security guard. To summarise different portions of his evidence, it seems he was told that, according to the law, he could not enter with a child after 9.00 pm. The Complainant disputed that there was any such law and said that all he wanted was a quiet drink. The security guard then indicated a specific corner of the beer garden, told him he could get drinks for him and his wife and sit in that corner, have their drinks and then leave. In her evidence, Mrs Simmonds confirmed that this was the account of the conversation given to her by her husband shortly after. According to the Complainant, immediately following the conversation he walked over to his wife and said, "[L]ook, this is the story, and we have to leave, or we're leaving, you know".
12. The Complainant stated in his evidence that he was upset and shocked by this. The Tribunal accepts that he was upset. However, in view of the fact that he had shortly before been refused entry to a hotel for exactly the same reason, the Tribunal does not accept that

the Complainant was shocked by the exchange. Further, the Complainant stressed in his evidence that he only wanted one drink before going home. Even on his own account, the security guard was permitting him to do exactly that. It was apparent from his evidence that the Complainant considered himself to be responsible in his drinking habits and entitled to have a quiet drink with his children when he chose. There is no evidence to suggest that the Complainant is other than a responsible person. However, it does not follow that there are no legal constraints on his entitlement to determine whether he can enter licensed premises with a child who is under his care and control.

13. The Complainant further described the lay-out of the hotel and the number of patrons in the beer garden area. The main bar area where the band plays and which has a dance floor is accessed from the beer garden through two doors. There is an outside bar in the beer garden area and it is from that bar that the Complainant intended to purchase his drinks. There are two meals areas, one is outside and the other is opposite the main bar. The Complainant stated that the beer garden "wasn't loaded up with people" and estimated the number at 30-40. However, it is apparent from the evidence of Mrs Simmonds that the reason she and Ryan sat on the limestone wall was because the tables were all full. Indeed, there were other people who were also obliged to sit on the wall because the tables were full.

14. A few days later the Complainant contacted the hotel to discuss the incident. He was again told that restriction of access by children after 9.00 pm was the law. The apology to which the Complainant considered he was entitled, and which he stressed was all that he ever wanted, was not forthcoming. Thereafter, the Complainant contacted the Office of Liquor Licensing and then the Equal Opportunity Commission. It is apparent that the Complainant took the matter sufficiently seriously to pursue a complaint with a number of different entities and did so in a timely fashion. It is specifically pleaded in the Respondent's Points of Defence that in making his claim the Complainant was motivated by greed, a proposition disputed by the Complainant when it was put to him in cross-examination. It was also suggested to the Complainant that he should have been satisfied with the reprimand given to the Respondent by the Office of Liquor Licensing. The Tribunal rejects the proposition that the Complainant was motivated by greed and further rejects any suggestion that any inference adverse to the

Complainant's credibility can be drawn from the fact that he has chosen to pursue his legal rights including all available forms of relief.

15. The Complainant stated that there were no signs at any entry point to the hotel advising patrons that children were not permitted on the premises after 9.00 pm. The Respondent did not dispute the absence of a sign to that effect. It was apparent from the Complainant's evidence that the absence of any signs warning him that he might be refused entry if accompanied by a child was a major aspect of his concern about the whole incident. He said that he didn't want other patrons to be embarrassed in the way that he had been.

16. Mr Strom, the Respondent's General Manager, conducted the Respondent's case and gave evidence on its behalf. He was not present at the hotel on the relevant night and did not call the security guard who spoke with the Complainant. The Tribunal did receive into evidence an Incident Report Sheet which contains the security guard's account of the incident. The document was received over objection by the Complainant's counsel and was received on the basis of the latitude allowed to the Tribunal by virtue of section 120 of the Act. However, as the Tribunal considers the Complainant to be a credible witness and the Complainant was not afforded the opportunity to test the credibility of the security guard, the Tribunal would not be prepared to accept the account in the Incident Report Sheet where it conflicts with evidence given by the Complainant. As it turns out, the two versions are substantially similar. The Incident Report Sheet describes the occurrence as follows:

"A couple and their son went to enter the premises at 9.50 pm and I refused them entry stating that it was against the law for me to let them in with a minor after meals had stopped being served. ...He said that he only wanted one drink then they would go, so I said that if they sat in the corner making sure that their son sat next to them at all times I didn't think it would be a problem. I was worried that they would have a drink and let their son run around and as he only seem 4 or 5 I wouldn't want him being knocked over when people didn't see him. He said that was fine and he would speak to his wife. He then came back and told me that they wouldn't worry about it and thanked me and then left."

17. This account confirms that the Complainant was told that it was against the law for a child to enter the hotel at that time. The Tribunal has not been directed to any legislative enactment which supports that assertion and Mr Strom was unable to identify the source of the security guard's information. Certainly the Liquor Licensing Act contains no such restriction. While that assertion may be a convenient method of avoiding explaining to patrons why entry is being refused, it is an inaccurate statement and the Respondent should ensure that its staff are instructed as to the correct legal position.
18. While it is clear that the Complainant was told that he could not enter with the child at that time, it is also clear that he was not in fact refused entry. The Tribunal finds that the security guard, having been made aware that the Complainant only wanted one drink, allowed him to enter on the condition that he sit in a particular location. The Tribunal is not persuaded that the security guard imposed a further condition that the Complainant leave after his drink; any such reference was simply a reference to the Complainant's stated intention to remain for only one drink. It is apparent from the security guard's own account of the incident that the only basis for imposing that condition was the fact that the Complainant was accompanied by a child. In those circumstances, the Tribunal finds that the Respondent discriminated against the Complainant on the ground of the age in the conditions on which services were provided, contrary to section 66ZF of the Act.
19. It remains then for the Tribunal to determine 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. In assessing the first aspect of establishing an exception under section 66ZM the Tribunal has been hampered by the Respondent's failure to call the security guard to give evidence as to the basis of his decision to impose the condition that he did. The security guard's statement that it was against the law to allow entry to a minor at that time gives rise to the possibility that the decision was

based simply on a misunderstanding of the law and not on any health and safety basis. However, there is evidence from Mr Strom which assists in resolving this issue. Mr Strom stated that the safety and well-being of all patrons was of extreme importance to the Respondent and the Respondent was also aware that it had a legal obligation to ensure the safety of patrons of the hotel. Mr Strom stated that in determining whether children are allowed entry to the premises the Respondent takes into account the attitude and demeanour of the accompanying adult, the number of people in the hotel and the time. The relevance of the time is that after 9.00 pm the entertainment starts and the number of people on the premises increases. According to Mr Strom, it was invariably the case that on a Saturday night at approximately 10.00 pm a band would be playing and that the hotel would be busy from 9.00pm onwards.

21. Notwithstanding those factors, Mr Strom explained that there was no hard and fast policy that entry would not be permitted after a particular time. Mr Strom stated that it very much depended on the circumstances such as whether there was available seating and whether it was one of the less busy nights of the week. The only difficulty with Mr Strom's evidence regarding the flexible policy on entry of children to the hotel is that he does not seem to have passed it on to the security guards. When asked what instructions he had given the security staff he said that he would not have given them any instructions as it was not really an issue. He stated that the incident involving the Complainant was the first occasion on which an adult accompanied by a child had attempted to enter the hotel at that time of night. Mr Strom also indicated that the rarity of the event was such that the Respondent saw no need to have a sign advising patrons that children will be refused entry after a particular time of night.
22. There is an additional piece of evidence which assists in identifying whether the condition was imposed in order to comply with health and safety considerations. There is the reference in the security guard's account to a concern that the child might be knocked over if he were to be allowed to "run around". On balance, the Tribunal is persuaded that the condition was imposed in order to protect the child's safety.
23. The final issue is whether the condition was reasonable in the circumstances. In addressing this issue the Tribunal has the assistance of the evidence of Mr Strom. He described the hotel as a very busy hotel with a number of bars and with entertainment from

Tuesday through to Sunday nights. According to Mr Strom the beer garden is separated from the main bar only by a clear plastic blind partition. On the relevant night at that time of night the entertainment would have commenced and the hotel would have been very busy. As has already been noted, the numbers in the beer garden at the time were such that there was no available seating and patrons were sitting on the limestone wall.

24. Occupiers of premises, such as the Respondent, 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. Where such obligations exist there is the added difficulty of determining whether the parents are, in fact, responsible. A licensee of a hotel owes a duty of care to all patrons, including children with irresponsible parents. If the hotel has no way of knowing which category the parent falls into then, when the prevailing circumstances are such as to create a risk to the health and safety of the child, in order to protect some children it becomes necessary to deny access to all.
25. The reality is that even the most responsible parent cannot protect a child from all dangers. In certain circumstances, hotels can be fraught with danger for vulnerable 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.
26. 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 discrimination under the Act. For that reason alone it would be inappropriate for the hotel to display a sign indicating that children will be refused access after a particular time. To conform with the law, a sign would have to indicate that entry may be refused to adults accompanied by children where it is necessary to do so in order to comply with health and safety considerations. A sign in those terms simply would not allow a parent to determine, in advance, whether entry would be permitted. If a parent wishing to enjoy a social

outing with his or her child suffers embarrassment when turned away from licensed premises late at night when there is no sign advising that children will be refused entry, that is a small price to pay for the protection of children in our community.

Conclusion

27. For the reasons outlined above, 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.