

JURISDICTION : EQUAL OPPORTUNITY TRIBUNAL OF
WESTERN AUSTRALIA

LOCATION : PERTH

CITATION : COLLARD V WOOLWORTHS

CORAM : Deputy President: B DHARMANANDA
Deputy Members: T ACKLAND and Z PAL

HEARD : 17 AUGUST 2001

DELIVERED : 17 OCTOBER 2002

FILE NO/S : ET/2001-000007

BETWEEN : CHRISNA COLLARD
Complainant

AND

WOOLWORTHS (WA) PTY LTD
Respondent

Catchwords:

Equal Opportunity - alleged discrimination on ground of race in provision of goods and services

Legislation:

ss 5, 36, 46, 161, *Equal Opportunity Act 1984* (WA)

Result:

Application dismissed

Representation:

Counsel:

Complainant : Ms H Versey
Respondent : Mr G Bull

Solicitors:

Complainant : Legal Officer, Equal Opportunity Commission
Respondent : Chamber of Commerce and Industry

Case(s) referred to in judgment:

Fenwick v Beveridge Building Products Pty Ltd (1985) 62 ALR 275
KLK Investments Pty Ltd v Riley (No 1) (1993) EOC 92-525

Case(s) also cited:

Bear v Norwood Private Nursing Home (1984) EOC 92-019
Chief General Manager, Dept of Health v Arumugam (1987) EOC 92-195
Evans v Lee (1996) EOC 92-822
Hall & A & A v Sheiban Pty Ltd (1988) 20 FCR 217
Hopper v Mount Isa Mines Ltd (1997) EOC 92-879, Queensland Anti
Discrimination Tribunal No H25/95
Judge v South Hurstville RSL Club Ltd (1984) EOC 92-113
Waters v The Public Transport Corporation (1991) 113 CLR 349

JUDGMENT OF THE TRIBUNAL:

Introduction

- 1 At the heart of this matter is a factual dispute about whether the complainant, Chrisna Collard, was the victim of discrimination on the ground of race in the afternoon of Saturday, 26 August 2000, when the complainant was in the Big W discount store in the Mandurah Shopping Centre (**Mandurah Big W**). The complainant asserts that, in her dealings that afternoon with Ms Lavinia Reilly, a health and beauty advisor at Mandurah Big W, she was discriminated against on the ground of race. This is essentially because she asserts (i) security was called; (ii) Ms Reilly watched the complainant as she tried on cosmetics; and (iii) she was told by Ms Reilly that the complainant had already spent 15 minutes using certain make up testers and that the testers were there for potential customers only.
- 2 The respondent, Woolworths (WA) Pty Ltd, the then employer of Ms Reilly, denies that it discriminated against the complainant on racial grounds. Specifically, the respondent contends that the evidence paints a different picture namely that (i) security was called as part of the respondent's normal procedures, without regard to the complainant's race; (ii) even if Ms Reilly watched the complainant, this was not because of the complainant's race; and (iii) Ms Reilly did not tell the complainant the testers were for potential customers only but, instead, informed the complainant that she should not be opening the new lipsticks and should use the testers provided. Also, the respondent contends that an issue arose between the complainant and Ms Reilly because the complainant called Ms Reilly a "*f***ing racist*", which resulted in the duty store manager, Mr Simon Featherstone, being called to calm the situation.
- 3 Unless otherwise indicated, a reference to a section is a reference to a section of the *Equal Opportunity Act 1984* (WA). The complainant relies on s 46 which provides that 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 race, materially, in the terms or conditions on which those goods or services or facilities are provided or made available or in the manner in which those goods or services or facilities are provided or made available.
- 4 Section 36(1) provides that discrimination occurs if, on the ground of race

or a characteristic that appertains or is generally imputed to persons of that race, the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person of a different race. The complainant also asserts that the respondent is vicariously liable for Ms Reilly's conduct by reason of s 161(1), and that s 161(2) does not assist because the respondent did not adduce sufficient evidence to establish that it took all reasonable steps to prevent Ms Reilly from doing what she allegedly did.

- 5 The onus was on the complainant to prove, on the balance of probabilities, that the *Equal Opportunity Act 1984* (WA) was contravened: **Fenwick v Beverage Building Products Pty Ltd** (1985) 62 ALR 275; **KLK Investments Pty Ltd v Riley (No 1)** (1993) EOC 92-525 at 79,666. In the end, for the reasons, which follow, the Tribunal has concluded that the complainant did not discharge the onus upon her to show that she was discriminated against on the ground of race. It is necessary to turn to the evidence to explain the conclusions the Tribunal has formed, having heard the evidence, listened carefully to the different versions of events presented to the Tribunal and formed judgments about the different witnesses' credibility.

The evidence

- 6 For the complainant, evidence was given by the complainant; Ms Adrienne Viti, the complainant's younger sister; and Mr Errol D'Rozario. For the respondent, evidence was given by Ms Reilly, Mr Featherstone, Ms Kerry Wells, a switchboard and fitting room attendant who works at Mandurah Big W. In material respects, there was a conflict in the testimony provided by the complainant's witnesses, when compared to the testimony provided by the respondent's witnesses. What follows is a statement of the Tribunal's findings of fact. What follows is also an explanation of the Tribunal reasons for preferring the evidence of one witness over another.
- 7 The complainant and Ms Viti gave evidence that on the afternoon of Saturday, 26 August 2000, they, together with some of their relatives, visited their parents in Mandurah. Because no one was home, they went "down to the shop" and, in fact, went to Mandurah Big W and went directly to the cosmetics section. The complainant was accompanied by her sister (Ms Viti), two nieces of hers, a cousin of hers, and her son,

Joseph. The cosmetics section is somewhat closed off from other sections at Mandurah Big W. Ms Viti also gave evidence to the effect that all of them went directly to the cosmetics section when they arrived at Mandurah Big W.

Issues as to what the complainant & Ms Reilly did

- 8 The complainant tried on foundation at the cosmetics section and Ms Viti remained with the complainant but her other niece was separated from them. The complainant said that she tried on all the foundations, the different colours and the different brands.
- 9 The complainant said that she did not notice Ms Reilly until after security was called but then noticed that Ms Reilly was watching them. The complainant's evidence was that Ms Reilly was tidying things up and watching them throughout after security was called. Ms Viti also gave evidence to the effect that they were being watched by Ms Reilly; that *"she was just, like, hovering around all us, watching and pretending to, like, fix stuff up"*.
- 10 The complainant said that Ms Reilly did not speak to them until just after they had finished trying on all the foundations. The complainant said that Ms Reilly then asked whether the complainant wanted any help in picking a foundation. To this, the complainant said no because she wanted to find a foundation which suited by herself, without getting someone else's opinion. The complainant's evidence was that Ms Reilly then said: *"Well, you've been here for over 15 minutes and you've been trying on all the testers. Testers are there for potential customers only and if you're not going to buy them you're wasting them for everybody else to use"*. In response, the complainant gave evidence that she was stunned, enquired of Ms Reilly as to how *"the hell"* she knew whether the complainant was going to buy anything and told Ms Reilly that, just because the complainant was black did not mean she did not have money to spend. On the complainant's evidence, Ms Reilly's was offended and asked whether the complainant wanted to speak to the manager. The complainant denied calling Ms Reilly a *"f***ing racist"*, at this point but said she may have called Ms Reilly a racist when she was speaking to Mr Featherstone.
- 11 Ms Viti also gave evidence to the effect that Ms Reilly told the complainant that the testers were there for potential customers. Ms Viti

also denied that the complainant called Ms Reilly a “f***ing racist”.

- 12 Importantly, unlike the complainant, Ms Viti gave evidence to the effect that Ms Reilly asked the complainant and Ms Viti not to open the new products and said that the testers were there to be used by them. The complainant gave no evidence to this effect. But, Ms Viti gave evidence to the effect that they had not opened any of the products for sale. While the complainant said that she was looking for foundation, Ms Viti said that they were looking for eye shadows and lipstick. Ms Viti also gave evidence to the effect that they said the new products had already been opened. Ms Viti said that they were in the cosmetics section for about 20 minutes.
- 13 On the complainant’s evidence, she did not want to see the manager at this point because she was offended at what she felt Ms Reilly thought of her - someone who did not have money to spend by reason of the colour of her skin. The complainant did not give any evidence to the effect that Ms Reilly actually *said* anything by reference to which it was explicit or it could unequivocally be inferred that Ms Reilly thought these things. It appeared as if this was what the complainant felt or inferred because of the way she apparently behaved; because of Ms Reilly’s “*body language*” - she was apparently not friendly. The complainant gave evidence to the effect that Ms Reilly was not friendly and stood back and watched them. The complainant said that she thought Ms Reilly had formed an opinion that the complainant and her relatives were going to steal things because of the colour of their skin. Under cross examination, the complainant accepted that she *assumed* that Ms Reilly thought she was a thief. Ms Viti also gave evidence that that was her assumption. Under cross examination, the complainant accepted the point that Ms Reilly had told her she did not have any difficulty with Aboriginal customers and approached the complainant and offered to assist. Ms Viti also gave evidence to the effect that Ms Reilly said that she had Aboriginal friends and that she was not a racist. Under cross examination, the complainant accepted that Ms Reilly was offended by the complainant’s comments to Ms Reilly when the complainant said “*Well, what the hell would you know, whether I’ve got money or otherwise*”.
- 14 On the complainant’s evidence, she changed her mind about speaking to the manager before she left Mandurah Big W because she felt she did not have to put up with this, and went back to Ms Reilly and asked to speak to the manager. Ms Reilly then called Mr Featherstone and apparently

explained, on the phone, that the complainant and Ms Viti had been trying on all of the make up, having been there for at least 15 minutes.

- 15 Mr Featherstone then arrived and asked the complainant and Ms Reilly what had happened. The complainant could not remember what Ms Reilly said to Mr Featherstone. She recalls, though, that she told Mr Featherstone that Ms Reilly had discriminated against them because of their race; that Ms Reilly had been watching them and had come up to them and told them that *“if we weren’t going to buy anything we were just wasting the products for everybody else”*. Mr Featherstone said that he was sure Ms Reilly did not mean to discriminate against them. The complainant was not satisfied with the manner in which Mr Featherstone dealt with the matter. The complainant gave evidence to the effect that Mr Featherstone said *“the only reason security was called was that we walked in as a group”*.
- 16 Under cross examination, the complainant at first said that she had not faced discrimination prior to the incident at Mandurah Big W and had had no previous difficulty with discriminatory behaviour. Then, under cross examination, it was pointed out that the complainant had referred to *“many occasions”* when she had written formally complaining about the incident at Mandurah Big W. To this, the complainant said that there was *“actually only another one”* occasion when she had **obviously** been treated that way. Under cross examination, the complainant accepted that, in her job at the Education Department, she had asked to be transferred from one area to another because she had felt uncomfortable working with another person because the other person had made a racial remark. When it was put to the complainant that her transfer request was triggered by her concerns at discrimination and that she had not volunteered this evidence as part of the many previous occasions of discrimination against her, the complainant sought to explain her evidence by asserting that she thought the question was directed to discrimination whilst shopping.
- 17 The Tribunal formed the clear view that the complainant was somewhat argumentative and was willing to give evidence that suited her case, rather than giving evidence that reflected her recollection of the incident at Mandurah Big W. The complainant was argumentative about many issues including about whether she had felt she had been discriminated against previously; about the number of customers present at the cosmetics section (discussed below); about when security should have

been called (when she and her relatives walked into Mandurah Big W or when they went to the cosmetics section). Under cross examination, the complainant said that she wanted to punish the respondent for what had happened.

- 18 All of the above matters relating to the manner in which Ms Reilly behaved were the subject of contest by the respondent's witnesses. The basis of the respondent's defence was that, as a matter of fact, Ms Reilly did not behave in any discriminatory manner. It was argued that the complainant assumed that there was discriminatory conduct, without foundation. Judging these matters and doing its best in making judgments on credibility, the Tribunal preferred the evidence of Ms Reilly over the evidence of the complainant and Ms Viti, to the extent of any relevant inconsistency between their evidence. Ms Reilly's evidence appeared more credible, on a balance of probabilities. The Tribunal formed this view because, in part, the complainant's evidence stretched credibility. On the other hand, the impression the Tribunal formed was that Ms Reilly tried to give evidence of what she recalled, rather than trying to give evidence that supported the respondent's position. Therefore, it is best to refer to Ms Reilly's evidence.
- 19 Ms Reilly no longer works for the respondent but on Saturday, 26 August 2000 she was a part time employee of the respondent. Ms Reilly was assisting a number of customers on that Saturday afternoon. On the basis of Ms Reilly's evidence, the Tribunal finds that Ms Reilly served a few customers during the time the complainant and her relatives were at the cosmetics section. Ms Reilly gave the following evidence, which the Tribunal accepted, on a balance of probabilities:

"And did you at any stage follow [the complainant] or her relatives around the store? - - - No, no.

So after having greeted them when was the next occasion you spoke to them? - - - I had served a few people in between that. [The complainant] - - I was actually behind the counter because I had just actually served somebody and [the complainant] had come up to the last make-up house and she was just looking at the colours there and I asked her if she needed some assistance and - - because some of the testers aren't explanatory. You can't actually tell if they are testers or stock. [The complainant] said, no, she didn't need any help and she was playing with the actual stock and I said to her they were for potential customers, "Here's our testers."

Right? - - - Yes, and I showed her - - directed her to the tester and pointed it out to her.

*Yes? - - - And she seemed awfully upset and she called me a [f***ing racist], and I was dumbfounded. I didn't know what to think. That wasn't necessary as far as I was concerned. She seemed really upset and she was saying other things and sort of directing it to - - there was another girl with her, not - - a little - - sort of, a few steps behind her and I asked her would she like to speak to a manager and she said, "No" at first and I thought, "I'll just call him anyway", so I went to the phone and I called switchboard to page the manager down..."*

- 20 That is to say, on a balance of probabilities, the Tribunal finds as a fact that Ms Reilly did not behave in a racial discriminatory manner. The Tribunal finds that Ms Reilly greeted the complainant and her relatives; served some customers; and told the complainant that the *new stock* was for potential customers, pointing her to the testers. The Tribunal finds that the complainant took exception to this and called Ms Reilly a racist. This, the Tribunal finds, was the cause of the incident.
- 21 Ms Reilly denied being rude to the complainant, and the Tribunal also accepts this evidence. Ms Reilly denied that she kept a watchful eye on the complainant and her relatives throughout the time they were in the cosmetics section. Ms Reilly explained that she was serving other customers. The Tribunal accepts this as inherently more credible, on a balance of probabilities. Ms Reilly explained that she did not have time to tidy up because she was busy with other customers and, again, the Tribunal accepts this evidence. Ms Reilly explained and the Tribunal accepts that she did not watch people intently because she thought it was rude. Ms Reilly also denied saying to the complainant that she had been at the cosmetics section for 15 minutes. The Tribunal also accepts this evidence.
- 22 Under cross examination, Ms Reilly said that the complainant was trying on more than foundation and had opened a new lipstick. The Tribunal accepts this evidence and, therefore, rejects the complainant's version. The Tribunal finds that Ms Reilly was faced with a confrontational and hostile customer. The Tribunal does not accept that Ms Reilly behaved in a racially discriminatory manner.

The number of customers issue

- 23 The complainant said, in examination in chief, that there were some 4 or 5 customers in the cosmetics section when she and her relatives went to the cosmetics section. At no stage did the cosmetics section get busier on the complainant's evidence. There was some contest in the evidence about exactly how many customers were present at the cosmetics section.
- 24 The complainant gave evidence that Mandurah Big W was generally not busy that Saturday afternoon. Under cross examination the complainant accepted that there were "*no more than 10 customers*" in the cosmetics section and said that she was embarrassed because other people overheard what had been said. Under cross examination, the complainant said that there could have been 10 customers in the cosmetics section. Ms Viti gave evidence that there were about 4 or 5 customers at the cosmetics section when the complainant and her relatives went to the cosmetics section. This means that, on this evidence, together with the complainant and her relatives, there were about 10 or 11 potential customers in the cosmetics section at that time.
- 25 Ms Viti also gave evidence to the effect that customers were coming in and out of the cosmetics section - probably 2 or 3 people were walking in and out. Ms Reilly gave evidence to the effect that there were about 12 people in the cosmetics section at the relevant time. Ms Reilly said, and the Tribunal finds as a fact, that the cosmetics section was a very small section. She said that it would be over crowded if there were between 10 and 15 customers in the section. She said, and the Tribunal finds as a fact, that it would be difficult to assist this many people.
- 26 On a balance of probabilities, on the basis of the above evidence, the Tribunal finds that the cosmetics section was busy on Saturday, 26 August 2000 and probably had between 10 and 12 customers in the cosmetics section, when Ms Reilly called security. The Tribunal preferred Ms Reilly and Ms Viti's evidence, over the evidence of the complainant.

The calling of security issue

- 27 The complainant gave evidence to the effect that a few minutes after she and her relatives arrived at Mandurah Big W, security was called to the

“*jewellery section*” and that the jewellery section was part of the cosmetics section. The complainant said she *felt* security had been called because she and her relatives had entered the cosmetics section; she *felt* it could not have been for anyone else because “*nobody else had entered the store, entered that area*”. After security was called, the complainant’s cousin, her son and one of her nieces left the store.

- 28 Under cross examination, the complainant reiterated that security was called to the “*jewellery section*”. Ms Viti also gave evidence to the effect that security was called to the “*jewellery section*”.
- 29 The complainant’s witnesses’ evidence on these matters was contested by the respondent’s witnesses’ evidence.
- 30 When the cosmetics section is overcrowded or busy, Ms Reilly said, and the Tribunal finds as a fact, that she would call the switchboard and get security to come to the cosmetics section. The Tribunal finds as a fact that security is called to assist and to “*monitor everything*”. The Tribunal also finds as a fact that Ms Reilly was instructed to call security when the cosmetics section was busy and it was busy on that Saturday afternoon. Ms Reilly gave evidence to the effect that she called security more than once on many days and the Tribunal accepts this evidence. Ms Reilly gave evidence, which the Tribunal accepts, that she called “*security*” that day because the cosmetics section was busy and she needed assistance.
- 31 Mr Featherstone appeared to the Tribunal as a very reliable and honest witness. The Tribunal unreservedly accepts his evidence. Mr Featherstone gave evidence to the following effect:
- the Mandurah Big W store had a problem with groups of youths and people coming into the store and “*running amok*”;
 - for the protection of staff and customers, Mandurah Big W had a policy, that “*security*” would be called if a large group of customers were present in the store;
 - “*security*” was called to put people on notice that there was security in the store - it was aimed as a deterrent;
 - when “*security*” was called for this purpose, the announcement which would be heard throughout the store was that security should go to “*section A, B, C, D or E or F*” and these sections had

no relevance to any particular area or section of Mandurah Big W and were referred to in the announcement as a deterrent or warning that security was present or had been called;

- “*security*” announcements were made by the reception area and were made either at the request of a shop assistant or randomly, again, acting as a deterrent;
- Saturday afternoons at Mandurah Big W are one of the stores busiest trading periods;
- if there was a real security incident, “*security*” would not be called to “*section A, B, C, D or E or F*” and, instead, there would be an announcement requesting “*Mrs Cunningham*” to go to a specified section, for example, the cosmetics or jewellery section - the reference to Mrs Cunningham was a code alerting security and others that there was a real security issue;
- in fact, on Saturday, 26 August 2000, Mandurah Big W did not have any security officers on duty;
- on Saturday, 26 August 2000, Ms Reilly phoned Mr Featherstone and explained that there was a problem in the cosmetics section because the complainant and her family were asserting that they had been discriminated against and she asked Mr Featherstone to come and speak to the complainant;
- the complainant told Mr Featherstone that she had been discriminated against because security had been called and Mr Featherstone said that the respondent does not make security calls for discriminatory reasons and explained that security was called as a form of deterrence.

32 Importantly, under cross examination, Mr Featherstone gave the following evidence which the Tribunal accepts:

“Do you recall the complainant telling you that Miss Reilly had told her that[the complainant] had been there for some 15 minutes and that the testers that she was using were there only for potential customers. Do you recall that? - - - No. My conversation when I was called there had nothing to do with the cosmetics at all. It was purely on that there was an issue with the calls being put over the system and that they were thought to be of a racial nature.”

[The complainant's] evidence is that she also mentioned to you her concerns that the shop assistant had told her that the testers were only there for potential customers. You don't recall that being mentioned? - - - No, I don't recall that, ma'am, no. I do recall - -

Do you think it's possible it could have been said to you and you didn't remember it when you came to make your statement? Look, anything is possible but to the best of my knowledge I cannot recall that, no."

- 33 Ms Wells gave evidence that confirmed that "security" was called as a deterrent to "section A" and so forth and a call was made to "Mrs Cunningham" if there was a real security problem. She confirmed that "security" was not allowed to be called to a particular section, by reference to the section's name, for example, to the "cosmetics section" or the "jewellery section". The Tribunal found Ms Wells to be an honest and reliable witness.
- 34 It follows that the Tribunal does not accept the complainant's and Ms Viti's evidence to the effect that security was called to the "jewellery section". The Tribunal finds that Ms Reilly called "security" because the cosmetics section was busy that afternoon. She was simply following her instructions that "security" should be called in this event.

Conclusions

- 35 By reason of the above findings of fact, the Tribunal considers that the complainant was not treated less favourably by Ms Reilly nor by the respondent, because of her race or a characteristic that appertains or is generally imputed to persons of her race. For all of the above reasons, the complainant's application must be dismissed.

B. S. Harman