JURISDICTION	:	EQUAL OPPORTUNITY TRIBUNAL OF WESTERN AUSTRALIA
LOCATION	:	PERTH
CITATION	:	NEWLAND v DEPARTMENT OF HOUSING
CORAM	:	MRS N JOHNSON QC, PRESIDENT DR C GILLGREN and MS L MCGRATH, MEMBERS
HEARD	:	31 JULY 2001
DELIVERED	:	17 OCTOBER 2002
FILE NO/S	:	ET/2001-000036
BETWEEN	:	ALBERT NEWLAND Complainant AND DEPARTMENT OF HOUSING Respondent

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Catchwords:

Equal Opportunity - Discrimination on the grounds of marital status in the area of accommodation.

Legislation:

Equal Opportunity Act 1984 (WA)

Representation:

Counsel:

Complainant:	Ms P Giles
Respondent:	Mr J O'Sullivan, Crown Solicitor's Office

Case(s) referred to in determination:

Result:

Application dismissed

REASONS FOR DECISION

1. The Complainant, Albert Newland, claims that the Respondent, the Department of Housing, unlawfully discriminated against him on the ground of marital status in the area of accommodation, contrary to s 21(1) of the *Equal Opportunity Act 1984* ("**the Act**"). The claim is specifically pleaded as one of direct discrimination, as defined in s 9(1) of the Act, rather than one of indirect discrimination under s 9(2) of the Act. By way of relief, the Complainant seeks damages and the publication of a written apology. The Respondent denies that it has unlawfully discriminated against the Complainant as alleged.

The Evidence

2. The evidence presented to the Tribunal consisted of an Agreed Statement of Facts and a statement of the Complainant read into the transcript by counsel for the Complainant with the consent of the Respondent. A copy of the Respondent's statement of policy entitled "Eligibility Relating to Applicants with a Debt to Homeswest" ("**the Policy**") was also received into evidence.

3. The agreed facts are relatively brief and can be conveniently set out in full:

> *"1. The Applicant is a person of Aboriginal descent and is over 70 years of age.*
>
> *2. The Respondent is a Government department responsible for the provision of public housing in the State of Western Australia.*

3. *The Applicant has been and is in a de facto relationship with Ms Lorraine Barnard and is the de facto spouse of Ms Barnard.*

4. *The Applicant and Ms Barnard were the tenants of a Department of Housing property from 12 October 1981 to 30 January 1992. At the time the tenancy came to an end Ms Barnard owed a tenancy debt of $4,539.04 (the debt) to the Respondent.*

5. *An appeal by Ms Barnard against the debt was not pursued. The debt remains outstanding.*

6. *In February 2000 the Applicant lodged an "Application for Rental Housing" form with the Respondent dated 16 February 2000. The application listed Ms Barnard as a household member who would live in the accommodation, if the application were granted.*

7. *On 7 March 2000 the Respondent made a decision to refuse the Applicant's application because a member of the household listed in the application, Ms Barnard, owed a debt to the Respondent. That decision was automatically reviewed within the Department of Housing and on 15 March 2000, after that review, the original decision was upheld.*

8. *On 28 March 2000, the Applicant was sent a letter setting out the reasons for the rejection of the application; that Ms Barnard owed a debt to the Respondent.*

9. *On 24 May 2000 a letter was sent by the Respondent to Ms Barnard inviting her to make contact with the Respondent about her debt. No response to that letter was received from Ms Barnard. In November 2000 the Respondent contacted Ms Barnard by telephone. The Respondent requested Ms Barnard complete a debt moratorium application and a direct deduction scheme form. Neither the application nor the form was returned.*

10. *The Respondent has a written policy that persons who owe money to the Respondent are not re-housed. Where a person who owes money to the Respondent is listed on an application as a person who will live in the accommodation the policy applies. The policy expressly provides that there*

remains a discretion to grant applications relating to debtors. Each application is treated on its merits taking into account the policy referred to herein.

11. The Applicant remains aggrieved by the decision to refuse his application."

4. It was further agreed by both parties that the Tribunal was entitled to accept as a fact that the Complainant and Ms Barnard were re-housed by the Respondent on 31 July 2001 and continue to reside in Homeswest accommodation. Therefore, the period during which the Complainant was affected by the Respondent's allegedly discriminatory conduct was from 7 March 2000 to 31 July 2001.

5. The relevant portion of the Policy is set out in the preamble and is to the following effect:

"Many tenants who make application for further public rental housing assistance have debt from a previous Homeswest assistance. The previous assistance will be from either a previous tenancy, a Housing Assistance Loan (HAL) or a combination of both. It is an unsatisfactory business practice to re-house persons who owe money and Homeswest requires applicants to repay the debt before further assistance is given. Discretion is available for applicants with extenuating circumstances....

It must be appreciated that if some tenants do not pay their debt to Homeswest, there is less money for public housing generally and other applicants will have to wait longer to be assisted.

It is also an unsatisfactory business practice to lend money for a HAL, to persons who have not fully repaid the previous loan.

This policy is applicable to applicants for public rental housing, who include a partner or other people to be housed on their application, who have a debt to Homeswest from a previous assistance, regardless of whether that person/s intend to sign the tenancy agreement."

Legal Principles

6. In considering and construing the legislative framework it is important for the Tribunal to remain mindful that the Act is beneficial legislation and must be construed so as to promote its object or purpose: *section 18 Interpretation Act 1984; West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 631; *IW v City of Perth* (1997) 146 ALR 697 at 702; *Waters v Public Transport Corporation of Victoria* (1991) 103 ALR 513 at 520 per Mason CJ and Gaudron J and at 546-7 per Dawson and Toohey JJ. The objects of the Act include the elimination of discrimination against persons on the ground of marital status in the area of accommodation: *section 3(a) of the Act.*

7. Part II of the Act prohibits discrimination on the ground of sex, marital status or pregnancy. Division 3 of Part II addresses, inter alia, discrimination in relation to accommodation. Section 21(1) of the Act is in the following terms:

> *"It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's sex, marital status or pregnancy –*
>
> *(a) by refusing the other person's application for accommodation;*
>
> *(b) in the terms or conditions on which accommodation is offered to the other person; or*
>
> *(c) by deferring the other person's application for accommodation or according to the other person a lower order of precedence in any list of applicant's for that accommodation."*

8. Discrimination on the ground of marital status is relevantly defined in s 9(1) of the Act as follows:

"For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of the marital status of the aggrieved person if, on the ground of–

(a) the marital status of the aggrieved person;

(b) a characteristic that appertains generally to persons of the marital status of the aggrieved person; or

(c) a characteristic that is generally imputed to persons of the marital status of the aggrieved person,

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different marital status."

9. In s 4 of the Act the term "marital status" is relevantly defined as meaning "the status or condition of being....the de-facto spouse of another". The term "de facto spouse" is further defined as meaning, in relation to a person, "a person of the opposite sex to the first-mentioned person, who lives with the first-mentioned person as a husband or wife of that person on a bona fide domestic basis, although not legally married to that person."

10. 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) 168 CLR 165 at 176-7 per Gaudron and Deanne JJ (**"Banovic"**); *Waters and Ors v Public Transport*

Corporation (1991) 103 ALR 513 at 520 per Mason CJ and Gaudron JJ, Deane J agreeing; *Birmingham City Council v Equal Opportunities Commission* [1989] AC 1155 at 1194 per Lord Goff; *Waterhouse v Bell* (1991) 25 NSWLR 99 at 107 per Clarke JA. 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.

11. In light of a submission made on behalf of the Complainant, which is addressed later in these reasons, it is important to emphasise the distinction between direct discrimination under s 9(1) of the Act and indirect discrimination under s 9(2) of the Act. In order to find that a claim based on indirect discrimination is substantiated, the Tribunal must be satisfied, not only that the Respondent required the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons not of the same marital status as the aggrieved person would be able to comply, but must also be satisfied that such a requirement was not reasonable in all the circumstances. Because of the way in which the claim has been pleaded, the Respondent has not attempted to adduce evidence directed to the issues of proportional compliance or reasonableness.

12. Direct discrimination on the ground of marital status has been the subject of two rulings of the NSW Court of Appeal in relation to s 39(1) of the NSW Anti-Discrimination Act ("**the NSW Act**") which is relevantly identical to s 9(1) of the Act. In *Boehringer Ingelheim P/L and Reddrop* [1984] 2 NSWLR 13 ("***Reddrop***") the Court of Appeal held that an employer's decision not to employ a married female on the ground of the possibility that she might

disclose, whether by inadvertence or otherwise, confidential information of the employer to her competitor-employed husband did not amount to discrimination. In *Waterhouse v Bell* (1991) 25 NSWLR 99 ("**Waterhouse**") the Court of Appeal held that the decision of the Australian Jockey Club not to award a married female applicant a trainer's licence on the ground that she was married to a person who had been warned off racecourses did amount to discrimination.

13. It was submitted on behalf of the Complainant that while the decision in *Reddrop* was not overturned in *Waterhouse*, such was the essential effect of the latter decision. The Tribunal is unable to accept that submission. It is true that the cases resulted in different outcomes, notwithstanding that in both cases the impugned decision was based entirely on a circumstance pertaining to the aggrieved persons' spouse. However, it does not follow that the two decisions are therefore inconsistent.

14. The decision in *Reddrop* was carefully considered by the Court of Appeal in *Waterhouse*. Indeed the appeal proceeded on the basis that the decision in *Reddrop* was correct and the argument focused on the question which was agitated in the tribunal whether *Reddrop* bound the members of the Tribunal to reject the plaintiff's complaint: per Clarke JA at 105. In the result, the decision in Reddrop was distinguished, not overturned. Clarke JA referred to "the significant point of distinction between the cases" in the following terms (at 115):

> *"The decision in Boehringer Ingelheim Pty Ltd v Reddrop should be seen therefore as one in which the decision was grounded upon a characteristic which was particular to Mrs*

Reddrop (and was not generally imputed to married women), that is, that she had a close relationship with an employee of a competitor.

On the other hand no matter what influence is brought to bear by a husband on an incorruptible wife he will not succeed in corrupting her. He will only be able to achieve that if she has a particular characteristic, that is, that she is corruptible".

15. Having thus properly characterized the basis of the decision in *Reddrop*, thereby distinguishing the circumstances from those of *Waterhouse*, Clarke JA concluded (at 117):

"In my opinion, the Tribunal has misconceived the decision in Boehringer Ingelheim Pty Ltd v Reddrop and has failed to appreciate the fundamental importance in this case of identifying the perceived characteristic of the plaintiff on which the decision was grounded and the need to ascertain whether that characteristic was ascribed to her personally or because it was generally imputed to married women."

16. For these reasons, the Tribunal considers that there is no conflict between the decisions and no rejection in *Waterhouse* of the principles earlier stated by the NSW Court of Appeal in *Reddrop.*

17. The principles and consequential findings in *Reddrop* (as stated by Mahoney JA and Priestly JA, with whom Moffitt P agreed) can be distilled into the following propositions:

(1) Section 39(1) of the NSW Act [s 9(1) of the WA Act] operates as an extension of the grounds on which discrimination is proscribed. It extends it so as to include not merely marital status, as defined by s 4(1), but also the two characteristics specified in ss 39(1)(b) and (1)(c): per Mahoney JA at 18;

(2) Paragraph (a) proscribes discrimination based on the fact of marital status and does not proscribe discrimination based upon the identity or situation of one's spouse: per Mahoney JA at 21, per Priestly JA at 24-5;

(3) Paragraphs (b) and (c) are directed to ensuring that in the decision to which the statute refers, each person is to be treated as an individual and without reference to stereotyping assumptions: Mahoney JA at 21; Priestly JA at 29;

(4) Paragraphs (a) and (b) do not require that characteristics which a complainant in fact has be ignored, merely because they are characteristics that in fact appertain generally to, or are generally imputed to, persons of the relevant marital status: Mahoney JA at 21; Priestly JA at 31.

(5) The characteristic which paragraph (b) is talking about is a characteristic that appertains generally to persons of one of the marital statuses listed in the definition in s 4 additional to the characteristic of having that particular marital status: Priestly JA at 29;

(6) As to paragraph (b), while it is a characteristic of a married person that such a person has a spouse, such was not the ground of the company's decision but rather the particular characteristic that spouse had: per Mahoney JA at 21, Priestly JA at 29;

(7) If the fact of marriage or co-habitation results, as a matter of fact, in a position of real difficulty, it is not discriminatory to take that into account: per Mahoney JA at 22.

18. The decision in *Waterhouse* is consistent with these statements of principle and can best be summarized in the following terms: A finding that the complainant was believed to be susceptible to the corrupting influence of her husband would be outside s 39(1)(c) if the finding was that this characteristic was personal to the complainant and not generally imputed to all married women but if it was a finding that the complainant in common with all married women generally was susceptible to the corrupting influence of her husband then the complaint was proscribed by s 39(1)(c): per Clarke JA, with whom Kirby P and Hope A-AJ agreed, at 110.

19. The Court of Appeal considered that in determining whether there has been a breach of the discrimination legislation, inquiry must be directed to the ground of the allegedly discriminatory decision, policy or action. As Clarke JA observed (at 108):

> *"The words used in the statute direct attention to the ground. It may be that where a policy decision affecting a large number of people is involved....the identification of the ground may involve an inquiry that is not identical with that which is appropriate where the complaint is that one person has been the victim of discrimination (such as the present case). In the latter case the relevant question directs attention at the particular characteristic of the complainant which, in fact, led to the decision or action of which complaint is made. It may be that even in this instance it may be wrong to generalize. Notwithstanding, I am of the firm opinion that upon the facts of this case the Court is required to inquire whether the decision was grounded on particular characteristics of the plaintiff, and, if so, whether those characteristics fell, relevantly, within*

s 39(1)(c). In this context I believe that the search is for the factors, or reasons, which led the first defendant to act as it did."

20. Expressed in that way, it is clear that the Court of Appeal drew a distinction between identifying the actual basis of the allegedly discriminatory conduct, in order to determine whether conduct so based is inconsistent with the terms of the discrimination legislation, as opposed to determining whether there existed an intention to discriminate, which is irrelevant in determining whether discrimination has indeed occurred: see *James v Eastleigh Borough Council* [1990] 2 AC 751 at 763-4 and *Birmingham City Council v Equal Opportunities Commission* [1989]AC 1155 at 1194 as considered by Clarke JA in *Waterhouse* at 107-8. It is also clear that the Court is not suggesting that such inquiry is necessary in all cases and is mindful of the dangers of confusing the exercise with one of determining intention or motive.

21. It can be seen that the principles laid down by the Court of Appeal in *Reddrop* and *Woodhouse* provide considerable assistance in determining the scope of s 9 (1) of the Act. However, counsel for the Complainant correctly pointed out that the factual circumstances of the NSW cases differed significantly from those of the instant case and that neither of the NSW cases dealt with discrimination in relation to accommodation. The latter point of distinction is, in the Tribunal's view, of little import. However, the differing circumstances require an application of the principles, rather than the adoption of any particular outcome, of decided cases.

Analysis of the Legal Issues

22. On the Complainant's case, the Respondent's conduct falls within the expanded definition of marital status discrimination in s 9(1)(b) and (c) and is therefore in breach of s 21(1) of the Act. Discrimination under s 9(1)(a) was not argued and, applying the principle in *Reddrop,* in the Tribunal's view is not open on the facts.

23. One submission put on behalf of the Complainant was that, in applying the Policy, the Respondent was effectively attributing to persons in de facto relationships with debtors to the Respondent, the characteristic of being less likely to be good tenants because of that relationship. This submission can be disposed of without difficulty. Firstly, there is no evidence before this Tribunal that the policy or its application was based on such a view. The only reference in the policy to the rationale is the comment that it is "an unsatisfactory business practice to re-house persons who owe money [to Homeswest]". In the absence of additional or explanatory evidence that statement is more consistent with the view that re-housing debtors would have the undesirable consequence of operating as a disincentive to the re-payment of debts.

24. Secondly, it was expressly stated by the Respondent, and not disputed by the Complainant's counsel, that the application of the policy was the only impediment to housing the Complainant; the Complainant's application would have been approved if Ms Barnard had not been listed as an intended resident. In those circumstances it cannot be said that the Respondent was treating

the Complainant as if he were in some way tainted by his relationship with Ms Bernard and had thereby acquired the characteristic of being a less than ideal tenant. Indeed, counsel for the Complainant quite properly resiled from the submission, conceding that it was overstated.

25. The primary submission on behalf of the Complainant was that, in effect, the decision made by the Respondent was a decision only to house the Complainant if he was not in a de facto relationship with Ms Barnard. Hence the Respondent is said to have discriminated against the Complainant on the basis of a characteristic that appertains generally or is generally imputed to persons of the marital status of the aggrieved person; that is, that de facto couples wish to live together.

26. This submission is based on the premise that the defining characteristic, the very essence, of a de facto relationship is that the parties live together. It is further based on what is said to be a number of consequences to the application of the Policy to a person in a de facto relationship which can be summarized as follows:

    (a) It creates a powerful incentive to non-tenants of the Respondent to repay alleged debts of their de facto partners in order to be housed, or for them to prevail upon the partner to pay the debt or make arrangements for it to be paid;

    (b) Applicants whose de facto partners allegedly owe money to the Respondent will be deterred from applying for assistance, thereby relieving the Respondent of the responsibility of housing them.

(c) In order for the Respondent to re-house an applicant who is unable or unwilling to pay or arrange for payment of the debt, the applicant will have to separate from his or her de facto partner.

27. It is clear from the definition of de facto spouse in s 4 of the Act that it is necessary to establish co-habitation before a person can properly be described as a de facto spouse for the purposes of the Act. It is also fair to say that the three matters set out in the preceding paragraph are all potential effects of the application of the Policy. However, acceptance of those propositions does not necessarily result in a conclusion that discrimination has occurred.

28. In substance, the Respondent's argument was that the only relevant ground for the Respondent's decision was the fact that Ms Barnard, who owed a tenancy debt, was to be housed should the Complainant's application be approved. The Policy, which was designed to prevent or perhaps reduce such an "unsatisfactory business practice", was applied to all applicants, irrespective of marital status. The fact that an impartial application of the Policy could result in a less favourable outcome to people in certain relationships does not constitute discrimination as defined in s 9(1) of the Act.

29. In reply, it was submitted on behalf of the Complainant that it was necessary to consider the terms of both s 9(1) and s 21(1) of the Act, in particular s 21(1)(b) which, relevantly, makes it unlawful to discriminate against another person on the grounds of marital status in the terms or conditions on which accommodation is offered to the other person. The decision of the High Court in *Banovic* was

referred to the Tribunal as an authority on the proper interpretation of the term "condition", in the absence of any specific authority which interprets the phrase "terms and conditions" in s 21(1)(b) and (c) of the Act.

30. The Tribunal was referred to the observations of Dawson J (at 185):

> *"Section 24(3), which defines indirect discrimination, has a much wider application and covers discrimination which is revealed by the different impact upon the sexes of a requirement or condition. The starting point with s 24(3) must be the identification of the requirement or condition. Upon principle and having regard to the objects of the Act, it is clear that the words "requirement or condition" should be construed broadly so as to cover any form of qualification or prerequisite demanded by an employer of his employees: Clarke v Eley (IMI) Kynoch Ltd [[1983] ICR 165 at pp170-171]. Nevertheless, it is necessary in each particular instance to formulate the actual requirement or condition with some precision.*
>
> *It is not, I think, enough in the present case simply to see the requirement or condition for continued employment as being contained within the principle of "last on, first off". That principle was applied within defined limits and it is necessary to incorporate them in the requirement. Thus, it was accepted upon both sides in this Court that the requirement was that, for an ironworker to remain in employment once retrenchment had begun in November 1982, he or she must have commenced employment before 6 January 1981.*
>
> *The requirement having been identified, s 24(3) then demands that a comparison be made between the compliance rates for each sex, in order to determine whether "a substantially higher proportion of persons of the opposite sex to the sex of the [complainant] comply or are able to comply"...."*

31. Applying Dawson J's analysis of the proper construction of the expression "requirement or condition" in a provision which defines

indirect discrimination, the Complainant submits that, in determining whether there has been a breach of s 21(1)(b), the ground upon which the impugned decision is based may include the effect of the decision. As the obvious and natural result of the application of the policy is that the applicant will be housed only if the debt is paid or he separates from Ms Barnard, one of the grounds of the decision is based on a characteristic that appertains generally or is generally imputed to de facto couples, the desire to cohabit, and hence is discriminatory.

32. In construing the expression "term or condition" in s 21(1)(b) of the Act, the Tribunal accepts the applicability of the following general propositions stated by Dawson J in *Banovic* (185):

    (a) The words "requirement or condition" should be construed broadly so as to cover any form of qualification or prerequisite.

    (b) It is necessary in each particular instance to formulate the actual requirement or condition with some precision.

33. However, the Tribunal is unable to accept the submission that the wording of s 21(1), construed in accordance with the principles in *Banovic*, allows the Tribunal to interpret s 9(1) as encompassing the effect of the impugned decision rather than the actual ground of the decision. The consequence of such a construction would be that s 9(1) would have the same effect as s 9(2) without the constraint of reasonableness contained in sub-section (2)(b). In the circumstances of this case, the effect is to have the benefits of an

indirect discrimination claim without pleading it and without the qualifications imposed by the legislature.

34. The Tribunal considers that the preferred construction of s 21(1) is as submitted by Respondent; sub-paragraphs (a) to (c) simply describe the variety of means by which the discriminatory conduct can occur, thereby precluding a party from circumventing the effect of the Act by imposing discriminatory conditions rather than actually refusing to provide the various services or opportunities covered by the Act.

35. There is another reason why the Tribunal considers that the Complainant's submission on this issue must fail. The basis of the submission is that the Respondent has discriminated "in the terms or conditions on which accommodation is offered". However, the evidence before the Tribunal was that the Complainant's application was refused. The fact that the explanation offered for such refusal may alert an applicant to factors which, if overcome, would enhance the prospects of approval of a further application, does not, in the Tribunal's view, transform a refusal into a conditional approval.

36. There may be cases in which identifying the circumstances which would have led to access to services or opportunities being approved rather than denied might assist in identifying what is, in fact, the actual ground of the impugned decision. However, in the Tribunal's view, it is not a legitimate exercise to use this approach to change the character of the decision actually made.

37. It remains then for the Tribunal to consider whether the refusal of the Complainant's application for housing on the ground

established by the evidence constitutes discrimination under s 9(1) of the Act. Applying the approach of Clarke JA in *Waterhouse* (at 108), the task of this Tribunal is to inquire whether the Respondent's decision was grounded on particular characteristics of the Complainant and, if so, whether those characteristics fall within s 9(1)(b) or (c). That inquiry may take into account the factors, or reasons, which led the Respondent to act as it did.

38. The Tribunal considers that the evidence supports the conclusion that the only "characteristic" of the Complainant upon which the Respondent's decision to refuse accommodation was grounded was that he proposed to reside with a person who owed a debt to the Respondent. In the Tribunal's view, such a characteristic falls outside the operation of s 9(1)(b) and (c) of the Act. A consideration of the factors or reason behind the Respondent's policy does not alter that conclusion. There is no evidence before this Tribunal which would entitle it to conclude that the purpose of the policy was to cause or encourage de facto couples to live separately.

39. That said, the Tribunal is concerned that even an even-handed application of the policy may have a disproportionate impact on married and de-facto couples. The Tribunal encourages the Respondent to give consideration to alternative means of achieving the aims of encouraging repayment of debts without the undesirable effect of a disproportionate impact.

Conclusion

40. For these reasons the Tribunal considers that the Complainant has failed to establish that the Respondent discriminated against him on the ground of marital status in the provision of accommodation contrary to s 21(1) of the Act and the complaint is dismissed.