

JURISDICTION : EQUAL OPPORTUNITY TRIBUNAL OF
WESTERN AUSTRALIA

LOCATION : PERTH

CITATION : LUPTON V THE KUNUNURRA ARTS COUNCIL

CORAM : Deputy President: MR G DONALDSON
Deputy Members: MS M FADJIAR and
PROF. C MULVEY

HEARD : 13 SEPTMBER 2002

DELIVERED : 11 OCTOBER 2002

FILE NO. : ET/2001-000040

BETWEEN : BEVERLEY-ANN LUPTON
Complainant

AND

THE KUNUNURRA ARTS COUNCIL
Respondent

Catchwords:

Equal Opportunity - discrimination on the ground of race in the area of the provision of services

Legislation:

Equal Opportunity Act 1984 (WA), ss 46(a), 46(b), 90, 107

Result:

Application dismissed

Representation:

Applicant : Ms N Brown, Legal Officer, Kimberley Community
Legal Service

Respondent : Mr I Harrison, President, Kununurra Arts Council

REASONS FOR DECISION

1. On 18 May 2001 Ms. Lupton lodged a complaint with the Equal Opportunity Commission alleging contravention of the *Equal Opportunity Act 1984* by the Respondent. Ms. Lupton alleges that the Arts Council, through its agent, contravened s.46(a), alternatively (b), of the Act; discriminating against her on the ground of race. Ms. Lupton is an aboriginal person.
2. The complaint was referred to the Tribunal by the Equal Opportunity Commission pursuant to s.90 of the *Equal Opportunity Act 1984* in or about November 2001 and thereafter inquired into pursuant to s.107 of the *Equal Opportunity Act 1984* by way of hearing on 13 September 2002.
3. The respondent is a body incorporated pursuant to the *Associations Incorporation Act 1987*.
4. At the hearing the Respondent was, with the leave of the Tribunal, represented by Mr. Ivar Harrison who is its president or chair.

PADDY'S MARKET

5. During the dry season the Arts Council organizes a market on White Gum Park in Kununurra, known as Paddy's Market. It is held on Saturdays.
6. The Arts Council's organization of the market arises from a rather loose arrangement with the local municipal council. The work to facilitate the market is undertaken by the Arts Council as a public service and with a view to advancing the arts and a spirit of community in Kununurra.

7. The Arts Council does not hold a lease or license over a specified area of the park for the market. It was explained in evidence that the market operates on White Gum Park and that it takes up as much of the park as is required on any given market day. On occasions the whole of White Gum Park would be utilised and on other days less of the park used. It would be expected that patrons of the market might wander all over the park during the course of attending the various stalls and other activities at the market.
8. As part of the market people from the local community set up and operate stalls. Stallholders would pay a relatively nominal sum of \$5.00 to the Arts Council, which the Arts Council used for advertising and to fund entertainment and other activities as part of the market.
9. From time to time the Arts Council would appoint a person as co-ordinator of the market. An advertisement announcing the forthcoming market was usually placed in the local newspaper in the week prior. The advertisement invited people who wanted to run a stall to contact the co-ordinator by telephone. The co-ordinator would then organize the placement of stallholders at the market. It was explained that stall positions were allocated on the basis of "first in best dressed". On the morning of the market the co-ordinator would attend at White Gum Park and peg out the stalls as allocated. In this way all stallholders would know where their stall was positioned for the day.
10. Due to the weather and the time of year that the market is operated there is an obvious advantage in being in a position that is under shade. Presumably for other reasons also some positions were better than others.
11. In 2001 the co-ordinator of Paddy's Market was Jane Harman.

MS. LUPTON AND PADDY'S MARKET

12. Ms. Lupton had operated a stall at Paddy's Market in 2000. At her stall Ms. Lupton sold plants and craft items that she made.
13. From the evidence presented, Ms. Lupton appears to have experienced no difficulties at the market during 2000, and indeed her stall appears to have been most successful. It seems that in 2000 Ms. Harman was not the co-ordinator or at least was not the person with whom Ms. Lupton dealt.
14. The conduct of which complaint is made occurred on 12 May 2001, which was the first Paddy's Market of the year that Ms. Lupton attended.
15. Prior to 12 May 2001 Ms. Lupton was not aware that Ms. Harman had been appointed co-ordinator and that the protocol from the previous year as to telephoning in the week leading up to the market was operating again.

MS. HARMAN AS THE AGENT OR REPRESENTATIVE OF THE RESPONDENT

16. It was accepted by the Arts Council that Ms. Harman was, in her conduct on 12 May 2001, acting on behalf of the Arts Council, within the meaning of s.162(1) of the Act.
17. Accordingly, the acts of Ms. Harman are attributable to the Respondent.

THE EVENTS ON 12 MAY 2001

18. Ms. Lupton was obviously eager to have got going with her stall at Paddy's Market as she had arranged for Mr. John Smart to collect her

and her things at around 6.30 – 7.00 am on 12 May 2001 and help her set up at White Gum Park.

19. Ms. Lupton and Mr. Smart were the first people to arrive at the park. When they arrived Ms. Lupton selected a site for her stall across the park from the area that stalls had been erected in the previous year. Ms. Lupton explained that she selected this site because it was in a shady area. Ms. Lupton's stall was set up by the time that Ms. Harman arrived at the park.
20. When Ms. Harman arrived she parked her car on the opposite side of the park to where Ms. Lupton had erected her stall and proceeded to peg out the positions for the other stalls. Ms. Harman gave evidence that when she arrived she saw that Ms. Lupton had set up her stall across the park. Ms. Harman said nothing to Ms. Lupton at this point and went ahead to peg out the other stalls.
21. By the time that Ms. Harman had finished pegging stallholders were arriving and setting up.
22. When Ms. Harman finished pegging out the stalls she approached Ms. Lupton. The conversation that ensued is the essence of the complaint.
23. Although Mr. Smart was around about the area where the conversation took place, he was quite open in his evidence that he did not hear or see all that took place. No one other than Mr. Smart was in the vicinity of the conversation. Accordingly, the evidence of the conversation before the Tribunal was essentially that of Ms. Lupton and Ms. Harman. As will be seen, however, Mr. Smart's evidence bears some importance.

24. According to Ms. Lupton, when Ms. Harman approached her Ms. Harman immediately commenced abusing her [T12] and yelling “If you people think that you’re with Paddy’s Market you’ve got another thing to think about. You’re not staying here go away.”[T14]. According to Ms. Lupton, Ms. Harman said at the time that this so was because Ms. Lupton had not rung her prior to the market [T14]. Ms. Lupton gave more detail of the conversation as she recalled it, stating that Ms. Harman had said to her that she should move her stall off the park altogether to a place where, “we cant see you or smell you”[T15]. Further that, “We don’t want you here. Can’t you get it through your thick head? Are you thick too?”[T15]. Further that Ms. Harman repeated “We don’t want you here. ... Go away”.
25. Ms. Lupton gave this evidence in respect of the conversation in response to a request by the Tribunal to recount her recollection of the conversation, unprompted as it were by questions from her counsel, Ms. Brown.
26. Quite obviously, on Ms. Lupton’s recollection of the conversation it was most unpleasant, nasty and demeaning. Ms. Lupton’s best recollection was that the conversation took 20-40 minutes.
27. At the hearing before the Tribunal, after this initial evidence of the conversation, Ms. Brown then asked Ms. Lupton:

“Why did you think what was being said to you was an inference about you being an Aboriginal person or an Aboriginal person? --- It wouldn’t have mattered if I was an Aboriginal, Chinese, Malayan, anything, Japanese. The fact that I was made to feel no good because of the colour of my skin. See I don’t understand racial prejudice

because I never had it before, but if that's racial prejudice we want to start doing something about it because that's evil. That's plain rotten.

But what is it about what she said that made you ... ? --- Yes. She said, "We all know you people congregate in one spot" and I looked around and there weren't any countrymen there. "You all congregate in one spot and you cause trouble." [T20]

28. There are a number of things that are significant about this evidence. First, in the unprompted evidence of the conversation given early in her evidence, none of the abusive comments attributed by Ms. Lupton to Ms. Harman carried what might be obviously considered a racial connotation. Indeed, Ms. Lupton appeared initially in her evidence to attribute Ms. Harman's ferocious manner to anger at not being contacted by Ms. Lupton before the market opened.
29. It was only later in her evidence, in response to what was clearly a leading question, that Ms. Lupton attributed any comment to Ms. Harman that could be considered to carry a racial slur; the reference to "you people".
30. As stated, Mr. Smart overheard some of the conversation, though not a lot [T36]. What Mr. Smart did hear is, however, of importance:
- "Did you hear anything that was said between Ms. Harman and Ms. Lupton? --- I heard Ms. Harman say "If you're going to be part of Paddy's Market you have to move over in the circle. If not you're going to move your self from here. You now have to go and get a hawker's licence."*
31. Mr. Smart also recalled hearing an argument between Ms. Lupton and Ms. Harman as to whether Ms. Harman would accept the \$5.00 fee from

Ms. Lupton [T36] and seeing Ms. Lupton wave her arm at Ms. Harman to go away [T38].

32. According to Ms. Harman, when she first approached Ms. Lupton she was met by Ms. Lupton saying, "So you're the dragon who's going to make me move." [T45, T52] On Ms. Harman's version of the conversation it was clearly unpleasant, voluble and ended with considerable hostility. According to Ms. Harman, she was barely able to say anything due to Ms. Lupton's agitation and aggression.
33. According to Ms. Harman this conversation went for about 5 minutes or so, rather than the 20-40 minutes estimated by Ms. Lupton [T54].
34. Ms. Harman emphatically denied making any comment of a racial nature [T55].
35. Ms. Lupton was clear that she was extremely upset and distressed by the conversation with Ms. Harman. Mr. Harrison, who saw Ms. Lupton later in the morning and after the conversation, verified this.
36. After the incident, which took place early in the morning, Ms. Lupton continued to operate her stall until approximately 11.30 am. Ms. Lupton stated in her evidence that she was upset and that she left earlier than she would otherwise have left. The market operated until noon.
37. No other evidence led at the Tribunal directly assists with the difficult task of determining which version of the conversation occurred. Although some evidence was given as to an incident the following week between Ms. Lupton and Mr. Harrison, the evidence relating to this matter does not directly assist the Tribunal in determining the factual matter that lies at the heart of this complaint.

38. It is important to observe, however, that on the following Saturday, 19 May 2001, Ms. Lupton operated her stall at Paddy's Market. Although there was a further incident on that day involving Mr. Harrison, it is not the subject of the complaint that has been made. This is confirmed by the Points of Claim that are before the Tribunal. Inconclusive evidence was led as to what occurred on 19 May 2001.
39. The gravamen of this complaint is the conversation between Ms. Lupton and Ms. Harman on 12 May 2001. The only direct evidence of this is the conflicting evidence of each and the evidence of Mr. Smart. Both of Ms. Lupton and Ms. Harman presented as credible, thoughtful, conscientious people. The Tribunal has no difficulty in accepting that both have presented the version of the event as they fairly recollect it to be. Mr. Smart was clearly a truthful witness called by Ms. Lupton.
40. For the following reasons the Tribunal finds that Ms. Harman's version of the conversation is to be preferred.
41. First, the evidence of racially derogatory comments was not given by Ms. Lupton other than in response to a blatantly leading question. Her earlier evidence in relation to the conversation did not contain any reference to Ms. Lupton's race.
42. Ms. Lupton gave evidence that she was so incensed by her treatment on 12 May 2001 that she wrote down what had happened to her that evening. If this is so, and as Ms. Lupton has been free to consult this memoir since 12 May 2001, her vagueness suggests that her recollection of the conversation is imperfect.
43. Second, Ms. Lupton gave evidence that she is deaf in one ear and that her hearing is, as a result, impaired. This gives rise to a possibility that she

did not clearly hear all that was said to her in her conversation with Ms. Harman on 12 May 2001 or that she misheard Ms. Harman's initial comments, from which mishearing, the conversation degenerated with Ms. Lupton becoming extremely upset.

44. Third, undisputed evidence was put before the Tribunal that a number of Aboriginal people operated stalls at the market in 2000 and 2001. Indeed, evidence was given that other Aboriginal people operated a stall on 12 May 2001. Of course, Ms. Lupton had operated her stall at the Market in 2000. Albeit that a different person co-ordinated the market in 2000, these circumstances are inconsistent with an attitude on the part of the Arts Council that Aboriginal people were unwelcome or discouraged from operating stalls at Paddy's Market.
45. Fourth, during the course of cross examination by Mr. Harrison Ms. Lupton became extremely agitated and aggressive in response to a rather straight forward and inoffensive question asked in a respectful tone. The Tribunal concluded from this that Ms. Lupton is a person prone to exaggerated and overly forceful response when confronted. Her reaction in cross examination was aggressive and unwarranted and is consistent with the description of her behaviour on 12 May 2001 by Ms. Harman.
46. In this respect it needs to be recognized that the manner in which evidence was presented to the Tribunal was a little unusual. The hearing took place with the Tribunal in Perth and the parties, their representatives and other witnesses in Kununurra appearing by video link. The video link facility in Kununurra was housed in a relatively small room and Ms. Lupton, when giving her evidence, was required to sit relatively close to Ms. Harman and Mr. Harrison. None-the-less, the physical

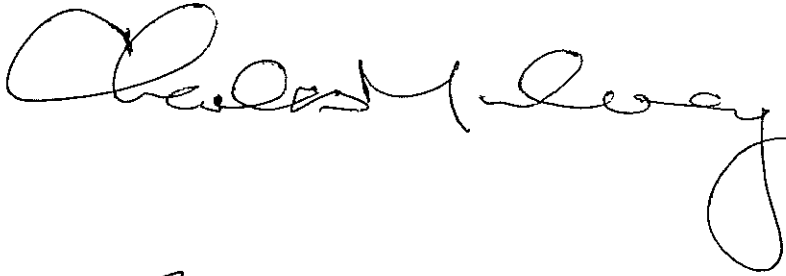
arrangement of the facility did not appear to the Tribunal to give rise to or contribute to Ms. Lupton's outburst.

47. The Tribunal is conscious of the difficulties which Aboriginal people experience in giving evidence in curial settings. This has been the subject of recent research, of which the Tribunal is acutely aware. When this matter came before the Tribunal (comprising the presiding Deputy President) for directions prior to the hearing on 13 September 2002 Ms. Brown who (ably) represented Ms. Lupton was invited to raise with the Tribunal then or at the hearing any cultural or customary concerns that Ms. Lupton may have in respect of the hearing. No concerns were raised.
48. At the hearing, during closing submissions, Ms. Brown was asked whether there was any explanation for Ms. Lupton's outburst. No cultural concern was expressed.
49. The Tribunal is satisfied that Ms. Lupton in giving her evidence was given a fair and not culturally inappropriate opportunity to state her evidence and importantly her recollection of the conversation with Ms. Harman on 12 May 2001.
50. Fifth, Ms. Harman presented as a witness whose recollection of the conversation with Ms. Lupton on 12 May 2001 was clear. It was evident from Ms. Harman's evidence that she too was deeply upset by the events on that day, a response at odds with her having conducted herself in the boorish and offensive manner attributed to her by Ms. Lupton.
51. For these reasons, the Tribunal prefers the version of the conversation of 12 May 2001 given by Ms. Harman in her evidence.

52. To re-iterate a point made earlier in these reasons, in arriving at this conclusion the Tribunal is not concluding that Ms. Lupton has concocted the version of the conversation which she gave in evidence. Rather the Tribunal considers that her recollection of it is likely faulty.
53. It follows inevitably from this that in the events that occurred on 12 May 2001 Ms. Harman, acting on behalf of the Arts Council, did not discriminate against Ms. Lupton on the ground of her race. The Tribunal is satisfied that Ms. Harman, acting on behalf of the Arts Council, in dealing with Ms. Lupton in the manner that she did on 12 May 2001 did not treat her any differently or less favourably than she would have treated any other person, by reason of Ms. Lupton's race.
54. As a result of these findings and conclusions it is unnecessary to examine, let alone conclude, the further question of whether, within the meaning of s.46(a) of the Act, Ms. Lupton was refused a service or denied facilities by the Arts Council.
55. Likewise, the findings and conclusions make it unnecessary to determine whether the Arts Council provided any services to Ms. Lupton or facilities were made available to her, within the meaning of s.46(c) of the Act.
56. For completeness, it is to be noted that at the hearing on 13 September 2001 the Tribunal raised with Ms. Brown whether the complaint included an allegation of contravention of s.49C of the Act; involving racial harassment. The Complainant, in Points of Claim that had been filed, had not raised alleged contravention of this section. In any event, in light of the findings and conclusions made above, the Tribunal would not conclude that anything Ms. Harman did on

12 September 2001 falls within the scope of operation of s.49C of the Act, as defined or provided for in s.49C(2).

57. Accordingly, pursuant to s.127(a) of the Act the complaint is dismissed.

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