

JURISDICTION : EQUAL OPPORTUNITY TRIBUNAL OF
WESTERN AUSTRALIA

LOCATION : PERTH

CORAM : Deputy President: MS P KEELEY
Deputy Member: MR J McKIERNAN
Deputy Member: MS M FADJIAR

HEARD : 1 & 2 SEPTEMBER 2004

DELIVERED : 25 NOVEMBER 2004

FILE NO/S : ET/2002-000034

BETWEEN : CLEM JONES
Complainant

and

DEPARTMENT OF HOUSING & WORKS
Respondent

Catchwords:

Equal Opportunity – Direct discrimination on the ground of race in the area of accommodation

Legislation:

Equal Opportunity Act 1984 Sections 47(2)(c) and Section 36(1)(a)

Result:

Application dismissed

Representation:

Counsel:

Applicant : MR A McDONALD, Equal Opportunity Commission
Respondent : MR M JENKIN, State Solicitor's Office

DECISION OF THE TRIBUNAL

1 The complainant, MR. CLEMENT JONES, claims that the respondent, THE DEPARTMENT OF HOUSING & WORKS (for ease of reference referred to as "HOMESWEST", the respondent's current trading name), unlawfully discriminated against him on the ground of his race in the provision of accommodation contrary to Sections 47 (2)(c) and 36(1)(a) or 36(1a)(a) of the *Equal Opportunity Act 1984* (the Act). HOMESWEST denies it has unlawfully discriminated against MR JONES as alleged.

2 The allegation by MR JONES is that he was subjected to a detriment in relation to accommodation occupied by him as the result of the discrimination of HOMESWEST.

3 At the hearing MR JONES expanded his claim somewhat and alleged that he suffered a detriment either because of the race of the children under his care (his grandchildren) or because of his race (only the latter having been pleaded) or both, this claiming discrimination pursuant to both Sections 36(1)(a) and 36(1a)(a) of the Act.

4 In his opening submission, MR MACDONALD for MR JONES stated that a visit by MS NOBBS as an agent of HOMEWEST was a manifestation of a discriminatory course of conduct which had a discriminatory character. As a result of this discrimination MR JONES was aggrieved by the visit and was affected by it. He was seeking relief by way of compensation in the nature of general damages.

Evidence of Mr Jones

5 MR JONES gave evidence that he had been a HOMESWEST tenant for about 30 years and most recently had been living at 13 Fitzpatrick Place, Waroona for approximately 8 years. He lived there with his five grandchildren including one SAMUEL NANNUP.

6 In 2000 HOMEWEST had known that he had the five children in his care. As a result of the children living with him he had assistance from the Department of Community Development (then called Family & Children Services and here referred to as "F.A.C.S.").

7 His evidence was that there had never been any incidents of antisocial behaviour during his residence in Fitzpatrick Place and that he had never received any complaints from other residents. He said that his

relationship with the other residents of the street was quite good. He also said that HOMEWEST had not approached him prior to the incident in question about either his conduct or that of the children.

8 At the time of the incident which is the subject of the complaint, MR JONES had lived in the house for approximately three years.

9 Mr JONES gave further evidence that he had had a number of conversations with the accommodation manager for HOMESWEST, RICHARD MELDRUM, on several occasions but that MR MELDRUM had never raised any complaints about MR JONES' accommodation. Similarly he said that he had never been contacted by the police about the conduct of the children within the house. However, he also did give evidence that he had had discussions with SENIOR CONSTABLE JOHN COOK about his grandson, SAMUEL. Apparently SENIOR CONSTABLE COOK had made a generalised comment to MR JONES about Aboriginal children having been seen throwing rocks at each other on two occasions although not in Fitzpatrick Place.

10 There had been another occasion when several children including SAMUEL had kicked a ball which broke a window at 15 Fitzpatrick Place. However MR JONES gave evidence that CONSTABLE COOK had not discussed that incident specifically.

11 Mr JONES said that on 15 November 2000 he walked out of his front door and down his driveway and saw a car parked on the curb with a woman taking photos of his house. MR JONES said he approached her and said "What the fuck are you doing taking photos?". The woman got in the car, said she was from HOMESWEST and drove off. She had not had much of a conversation with MR JONES but had said that she had a right to take the photo and otherwise made no mention of her reason for the visit. He said that no one had contacted him to say that this person was going to visit.

12 He did not see her again until she arrived back with SENIOR CONSTABLE JOHN COOK later that morning.

13 By this stage MS BEATTIE from the Department Of Community Development had arrived for an appointment with MR JONES. She had arrived just as the woman taking photos had driven off. During their meeting (that is MR JONES and MS BEATTIE) the woman returned, walking straight into the house with SENIOR CONSTABLE JOHN COOK who stood outside the door. MR JONES says that MS NOBBS (as she later identified herself) walked in through the door and turned to

where he was sitting down. She said "I came back to finish this business off". MR JONES asked why SENIOR CONSTABLE COOK had been brought by the woman and she said that she felt threatened. MR JONES said that he only swore because he didn't know who she was and the woman said who she was and said "I have come to see you about the allegations." MR JONES responded that he didn't want to speak to her, that he wanted it in writing and she said she didn't have that information on her. MR JONES reiterated he wanted the information in writing at which point MS BEATTIE gave MS NOBBS a page from her notebook and MS NOBBS wrote on that page.

14 MR JONES said that up until that point he was unaware of any antisocial behaviour by his grandchildren, he had not been approached by anybody, he hadn't had a letter and he hadn't been spoken to.

15 The document which MS NOBBS wrote was identified as exhibit 1.

16 That document stated as follows:

"Complaints have been received regarding 13 & 14 Fitzpatrick.

In the main relate to children from both households.

Children are trespassing on private property. Causing damage. Throwing rubbish into peoples backyards. Loud + abusive behaviour to people in the street and neighbours.

Spoken to police ie. JOHN COOK.

Problem is:

Affecting tenancies."

17 MR JONES considered that the note was not sufficiently specific in relation to the allegations and requested MS NOBBS to provide him with more specific information which she said she would obtain from SENIOR CONSTABLE COOK. That information was provided later. It was MR JONES' evidence that he received the specifics of five incidents which had been passed to MS NOBBS from SENIOR CONSTABLE COOK and that MS NOBBS provided him with that information by a letter dated 30 November 2000.

18 That letter in fact refers to five complaints having been received by the police regarding SAMUEL. The letter further states that SENIOR CONSTABLE JOHN COOK has discussed SAM's behaviour in relation

to each incident with MR JONES, reminds him of the obligations of tenants not to commit a nuisance to other households and requests MR JONES to discuss with SAMUEL the impact of his poor behaviour on MR JONES' home. MR JONES understood that he had also received a document which became exhibit 2 (A) which was an email from JOHN COOK to JENNY NOBBS dated 29 November 2000. This sets out the details of the five complaints. MR JONES was somewhat uncertain about when he came into possession of that document but it seems more likely that it was during the discovery process after he had made a complaint to the Commission.

- 19 MR JONES then commented that he thought that because he was Aboriginal HOMEWEST had picked on him and that they actually didn't care whose child it was who was committing antisocial behaviour. He knew that no antisocial behaviour was being committed from his home, that if he was not Aboriginal they would have to have been more specific and would have had to identify the house and the children before interviewing him. He reiterated that he did not know details of what HOMEWEST was investigating, that he had received no complaints from neighbours and no one else had contacted him from HOMESWEST.

Evidence of Samantha Beattie

- 20 SAMANTHA BEATTIE was at the relevant time a field officer with F.A.C.S. who had had dealings with MR JONES as his case manager since 1997. She was his advocate, grief counsellor and general support.
- 21 MS BEATTIE had also had dealings with RICHARD MELDRUM, the accommodation manager for HOMESWEST. She gave evidence of seeing the end of what seemed an argument as she arrived, and a car being driven off. MR JONES told her briefly about the discussion. She then gave evidence of MS NOBBS' return with SENIOR CONSTABLE COOK.
- 22 Given her evidence of where she was sitting, and the plan of the house which was tendered, and the fact that she was not privy to the original discussion between MR JONES and MS NOBBS, her impression of the return of MS NOBBS was given in a different context from that of MR JONES and MS NOBBS.

23 It seems clear from MR JONES' evidence and demeanour at the time
of the incident that on MS NOBBS' return, he knew who she was, where
she was from and broadly why she was there. If she did not introduce
herself, it was because MR JONES already knew who she was.

Evidence of Jennifer Nobbs

24 MS JENNIFER NOBBS gave evidence that she was employed as
Manager of the South West Region of HOMESWEST and that she was
located in Bunbury. She supervised approximately 30 staff.

25 On 30 October 2000 the Department had received a request in a
"Ministerial" to investigate alleged antisocial behaviour at 14 Fitzpatrick
Place (not MR JONES' house). RICHARD MELDRUM was the
accommodation manager responsible for that area and he did so
investigate. MR MELDRUM completed his investigation, he could not
substantiate who was involved and therefore took no further action.

26 Subsequent to seeing MR MELDRUM'S report (dated 1 November
2000) on 10 November 2000, she received a telephone call from the office
of a Member of Parliament, JOHN BRADSHAW, during which she spoke
both to MR BRADSHAW and an officer employed by him. The office
had received complaints which alleged antisocial behaviour by children
from "13 and 14 Fitzpatrick Place and 39 Jason Street".

27 The Department was asked to investigate.

28 MR MELDRUM was on annual leave and therefore MS NOBBS
decided to use the opportunity both to check on certain properties owned
by HOMESWEST as part of a regular check on "stock" and also to
commence the investigation of the allegations.

29 On 15 November 2000, she drove to Waroona and to Fitzpatrick
Place intending to speak to the tenants at 13 and 14 Fitzpatrick Place, to
speak to neighbours as part of her investigation and possibly to the police.
This was the procedure followed by Homeswest in the investigation of
complaints.

30 MS NOBBS evidence was that she spoke to one set of neighbours in
Fitzpatrick Place and that another neighbour was not home.

- 31 She then moved her car to outside 13 Fitzpatrick Place (MR JONES' house) and took a photograph of that property because she saw that there was a broken window and she took a photograph to be better able to report to the maintenance section what part of the home had to be repaired.
- 32 As she took the photo a man (who was MR JONES) came out and approached the car. MS NOBBS' evidence was that this man was very vocal, loud, demanding and aggressive. When he approached her MS NOBBS said that she told him who she was, where she was from, why she was there and that she wanted to talk to him. She said that she wanted to talk about allegations of antisocial behaviour of children in his care. She also said that she gave him some indication of what that antisocial behaviour was.
- 33 The man forcefully told her that she couldn't take the photo and called her a "fucking white cunt". She took that as a personal affront as the man was angry and aggressive. MS NOBBS said that she was concerned about possible violence because of the extremely confrontational affect on the man. He demanded that she leave and she did so. She said she drove two or three houses away, stopped and took notes and then decided to go to the police. It was a normal part of the investigative procedure into complaints to contact the police in order to find out whether they had information about the incidents complained of and also if an officer felt intimidated or threatened to request the police to accompany the officer to interview the tenant.
- 34 MS NOBBS said that she intended to speak to SENIOR CONSTABLE COOK to see if he knew anything of any complaints and to seek his advice and assistance to enable her to go back to 13 Fitzpatrick Place to discuss the matter with MR JONES. She spoke to CONSTABLE COOK who said that there had been complaints and allegations about children from that and other properties but that he could not provide her with details without a formal request.
- 35 The two of them returned to 13 Fitzpatrick Place and approached the doorway. The door was open and she could see MR JONES sitting at a table inside. MR JONES saw her. MS NOBBS said that she knocked and asked if she could come in and MR JONES said yes. When she went into the house she saw an additional person talking to MR JONES. CONSTABLE COOK stayed just inside the door. At that point MR JONES made a sarcastic remark about her returning with SENIOR CONSTABLE COOK and something along the lines that if she had done

the right thing in the first place she wouldn't have needed the police. He reiterated that she shouldn't have come to the property or taken photos and should have told him what it was about. MS NOBBS said that the other person talking to MR JONES did not introduce herself but she said to MR JONES she needed to discuss the situation and he indicated that he wanted the visitor to hear what MS NOBBS had to say. At that point she introduced herself to MS BEATTIE who similarly introduced herself to MS NOBBS.

36 MS NOBBS then said she outlined the allegations at which point MR JONES asked for specific details of times and dates and refused to discuss the allegations until he had that detail. MS NOBBS provided such details as she did have on a piece of paper provided by MS BEATTIE. She said that she thought that it was a reasonable request from MR JONES to seek the additional information. She gave MR JONES her business card, she explained to MR JONES when he enquired that MR MELDRUM was on leave which is why she was there and then she left.

37 She subsequently received some information from CONSTABLE COOK by email which set out specific allegations in relation to SAMUEL NANNUP. She then wrote to MR JONES on 30 November. Although this letter did not indicate that no further action was going to be taken, that was the intention of the letter as the investigation was concluded. As far as Ms NOBBS was concerned there was no substantiation of any specific incidents of antisocial behaviour and she could not take any further action.

38 MS NOBBS said that MR JONES' Aboriginal descent was irrelevant to the action she took and that she would have taken similar action had he not been Aboriginal.

Evidence of Sergeant John Cook

39 At the relevant time, SERGEANT COOK was a senior constable stationed at Waroona. He knew CLEM JONES having had dealings with him over some time regarding complaints of antisocial behaviour by children in his care and other children in the area. In particular he had spoken to MR JONES regarding each of the incidents involving SAM NANNUP referred to in Exhibit 2A at the time that those incidents occurred.

40 SERGEANT COOK did not have a detailed recollection of the visit to MR JONES' home on 15 November, but clearly to him the visit did not involve anything particularly out of the ordinary. He recalled MR JONES

rising from his chair as MS NOBBS reached the door, but he did not recall what words passed between them. SERGEANT COOK recalled MS NOBBS being firm, polite and quite calm and MR JONES being somewhat uncooperative in his general demeanour as he was not convinced his grandchildren were involved, but he appeared quite prepared to talk to MS NOBBS.

Evidence of Robin Wood

41 MR WOOD is State Manager, Rentals, of the respondent. He gave evidence regarding the internal procedures of HOMESWEST in dealing with complaints of antisocial behaviour. MR WOOD referred the Tribunal to practice manuals created by HOMESWEST which set out "best practice" in dealing with different issues including the investigation of complaints of antisocial behaviour by tenants.

42 Part of the "best practice" is that upon receipt of a complaint, the HOMESWEST officer should talk to the complainant.

Homeswest's Obligations

43 The Tribunal asked MR JENKIN to present to it the legislative basis for the investigation of the sort MS NOBBS carried out. He referred the Tribunal to the Residential Tenancies Act and the Submission by the Dept. of Housing and Works to the Inquiry into Provision of Public Housing to Aboriginal People in Western Australia at pp. 23 and 24.

44 Under the terms of the Residential Tenancies Act 1987, a landlord has an obligation to take all reasonable steps to ensure that other tenants of the landlord occupying adjoining premises enjoy quiet enjoyment.

45 The tenancy agreement entered into by MR JONES provided that he would not allow the premises to be used by another person in any way which causes a nuisance to any other person.

46 The complaint received by MS NOBBS was of antisocial behaviour by children from 13 and 14 Fitzpatrick Place and 39 Jason Street.

47 While the Tribunal accepts that it is appropriate for Homeswest to respond to and investigate complaints about tenants who may be creating or permitting a nuisance on their premises there does not appear to be any basis on which any such investigation should be carried out if the

antisocial behaviour or nuisance is occurring elsewhere than on the premises occupied by a tenant.

48. It is regrettable in this instance that MS NOBBS simply accepted the complaint through MR BRADSHAW's office without attempting to talk to the actual complainants as the first part of her investigation. Even if the complainants wished to remain anonymous, it is the Tribunal's view that it was incumbent upon her to try and establish more details regarding the specifics of the complaints. It is noteworthy, for example that the complaints set out in Exhibit 2(A) are all somewhat stale in relation to the actions taken by MS NOBBS in November 2000. The latest incident in that email is referred to as occurring on 12 June 2000. It is therefore likely that whatever triggered the complaints to MR BRADSHAW, it was not the complaints referred to in SENIOR CONSTABLE COOK's email.

49. It does appear however, that in general MS NOBBS followed HOMESWEST procedure in her investigation of the complaint.

Complainant's Onus

50. The complainant has the onus of proving his complaint against HOMESWEST.

51. It is his case that either –

- a. it is clear from the evidence that MR JONES when compared with a non-Aboriginal tenant of HOMESWEST with 5 children in his care about whom a complaint had been made was discriminated against because of his race; or
- b. alternatively that the complaints originally made and to which HOMESWEST responded, were complaints which would not have been made had the children involved not been Aboriginal. That is, a complaint was made just of "Aboriginal children at large - SAM NANNUP was notorious and therefore we should investigate SAM".

52. The difficulty with the second limb of MR. JONES' allegations is that there are no notes still in existence of the conversation between MR BRADSHAW, his officer and MS NOBBS of 10 November 2000 nor has MS NOBBS kept the notes she made on 15 November of the visits she made to neighbours of MR JONES nor of the incident between MR

JONES and her when she took the photo nor of the meeting between MR JONES and her when she returned with SENIOR CONSTABLE COOK.

53 It is a matter of some concern that these notes have not been kept given that the complaint was made by MR JONES relatively quickly after the incidents occurred and it should have been clear to MS NOBBS and HOMESWEST that such documentary evidence was important to the investigation and conclusion of such a complaint. That failure reflects poorly on the professionalism of MS NOBBS and HOMESWEST.

54 Nevertheless, given the undisputed evidence of MS NOBBS as to the procedure to be followed for the investigation of complaints, (supported by MR ROBIN WOOD, State Manager of Rentals at HOMESWEST), it is clear that once MS NOBBS had received a complaint from MR BRADSHAW she was obliged to investigate it.

55 It is the investigation of the complaint from MR BRADSHAW which establishes whether the complaint to the Tribunal is justified or not. It would not be appropriate for MS NOBBS or anyone in her office (for example the Accommodation Manager), to respond to a complaint from MR BRADSHAW's office without first investigating it and having received the complaint, she had to investigate it.

56 If there was discrimination as postulated by MR MACDONALD in the laying of the original complaint, then it arose not from HOMESWEST nor its officers but from the original complainant or the conduit through which the complaint was conveyed to HOMESWEST (MR BRADSHAW'S office).

57 MS NOBBS was quite clear that the complaint that she received on 10 November 2000 referred specifically to 13 and 14 Fitzpatrick Place and 39 Jason Street and this is confirmed by the note she wrote on 15 November 2000 and provided to MR JONES. This was not a general complaint against Aboriginal children but a quite specific complaint against the tenants of 3 particular properties.

58 With respect to the other limb of MR JONES' complaint, that he had been treated differently during the investigation because of his race, there is simply no evidence to support this allegation.

59 While it could be said that MS NOBBS was rude in commencing her investigation by taking a photo of MR JONES' house before trying to contact him, it must be said that MR JONES' response was somewhat extreme and very threatening to MS NOBBS. The Tribunal accepts MS

NOBBS' version of the first meeting between her and MR JONES and accepts that MR JONES was both abusive and threatening but that MS NOBBS tried to provide him with information as to why she was there and what she was doing.

60 MR JONES' response on MS NOBBS' return, on all versions - those of MR JONES, MS BEATTIE, MS NOBBS and SENIOR CONSTABLE COOK make it clear that by the time MS NOBBS returned, MR JONES was quite clear who she was, was in control of the situation in the sense of being clear how he would respond to her and what information he would require from her and that he was pleased to have a witness to that conversation.

61 Given that MS NOBBS had only received relatively vague and general complaints from MR BRADSHAW'S office (albeit about specific tenancies) she was not really in a position to provide any more information than she did.

62 The request by MR JONES for further information shows an awareness of his rights and self assurance in relation to the complaints and the complaint process. MS NOBBS attempted to provide more information by seeking information from SENIOR CONSTABLE COOK. It seems very clear to the Tribunal that this additional information obtained from SENIOR CONSTABLE COOK had nothing to do with the complaint which had been made to MR BRADSHAW'S office. They were old incidents and it would appear were unlikely to be related to what had prompted the complaint on 10 November. However, it was also clear that contrary to his evidence, he had previously been spoken to about SAM NANNUP's antisocial behaviour, and his protestations to the contrary were untrue. MR JONES may have been put out because rather than seeing RICHARD MELDRUM, whom he knew, he was approached by MS NOBBS.

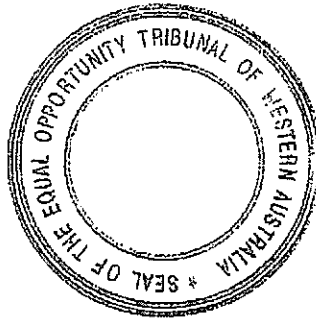
63 The result of her investigation, consisting of the discussion with a neighbour, the discussion with MR JONES and the information obtained from SENIOR CONSTABLE COOK, was that there was no basis on which any further action could be taken. MS NOBBS therefore wrote the letter dated 30 November 2000 to MR JONES.

64 It is therefore the Tribunal's determination that the complainant has failed to prove his case and the complaint is dismissed.

65 It must further be said that there was no evidence presented upon which the Tribunal could reach a conclusion that MR JONES had suffered

any detriment as a result of any action by the respondent, whether as a result of discriminatory action or otherwise.

66 Finally the Tribunal wishes to comment on the role of HOMESWEST in investigating complaints of antisocial behaviour. There does not seem to be any legislative or other basis upon which such investigations can be made unless such behaviour is alleged to be creating a nuisance, in the legal sense, or interfering with the quiet enjoyment of the HOMESWEST tenants. However, HOMESWEST appears to take the view that it has a role in investigating any antisocial behaviour by any of its tenants. Unless some legislative basis does exist for such a view, in the Tribunal's opinion, HOMESWEST has no such role.



A handwritten signature in cursive script, appearing to read "Haley".

