17

JUDGEMENT

EQUAL OPPORTUNITY TRIBUNAL OF WESTERN AUSTRALIA

No. 6 of 1990

KATHLEEN MARGARET ALONE
Complainant

- against -

STATE HOUSING COMMISSION ("HOMESWEST")
Respondent

BEFORE: Mr L.W. Roberts-Smith, Q.C. (Deputy President)
Ms P Harris (Member)
Mr K Wyatt (Deputy Member)

Counsel for the Complainant — Ms P Hogan
Counsel for the Respondent — Mr J Allanson

HEARD: 8 and 9 April 1991

REASONS FOR JUDGEMENT

(Delivered: 2 August 1991)

JUDGEMENT

L.W. Roberts-Smith, Q.C. Deputy President, and K. Wyatt, Deputy Member:

Mrs Kathleen Alone is a woman of Aboriginal descent. From approximately October 1984 to April 1987 she was a tenant of the State Housing Commission of W.A. ("Homeswest") in a property owned by Homeswest at 10 Worthing Street, Balga ("the Property"). Mrs Alone lived there with her five children.

On 20 July 1987 she lodged a complaint with the Equal Opportunity Commission ("the Commission") alleging unlawful discrimination by Homeswest against her on the ground of her race in relation to events which occurred over the period and on the termination of her tenancy.

In essence, Mrs Alone's complaints as detailed in the Points of Claim (which were undated but filed with the Tribunal on 19 April 1990) were that in refusing three requests by her for a transfer from the Property, evicting her from it and in taking possession of and disposing of her furniture and other personal possessions, Homeswest unlawfully discriminated against her on the ground of race (paras 15 and 16 of the Points of Claim).

Included in the particulars of these claims was a reference to the defective sewerage system at the Property (para 15 (vii)) in which it was asserted that:

> " *The sewerage system at the Property was defective and sewerage often blocked the pipes and came up through the sinks, the toilet and ran down the drive of the Property, despite repeated requests by the Complainant to the Respondent to fix the problem the Respondent merely unblocked the pipes each time they became blocked".*

This matter had initially been raised at Page 1 of Mrs Alone's letter of complaint to the Commissioner for Equal Opportunity dated 16 July 1987.

The specific particular was not addressed in the Respondent's Points of Defence dated 8 May 1990. At the hearing Mr Allanson (who appeared as Counsel for the Respondent) said this was because it was regarded by the Respondent simply as an irrelevant particular not as an alleged breach of the Equal Opportunity Act 1984 ("the Act") in itself.

However, in opening the case for the Complainant Ms Hogan expressly put it that the Respondent's alleged failure to properly repair the sewerage system during Mrs Alone's tenancy itself constituted unlawful discrimination in the provision of services contrary to Section 46(1)(c) of the Act.

After Ms Hogan had completed her opening address Mr Allanson protested pointing out that failure to properly repair the sewerage system had not previously been claimed nor pleaded as an act of unlawful discrimination in itself. Nonetheless he expressly stated that he was not making any application for an adjournment nor otherwise at that stage although he reserved his right to do so subsequently if that became necessary.

Mindful that the Tribunal is not a jurisdiction of pleadings in any real sense and that the Act requires that the Tribunal act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms (Section 120(b)) we allowed Ms Hogan to proceed on the case as she had opened it. In the event, Mr Allanson made no formal objection nor application in this regard.

The complaint as put to the Tribunal for determination therefore alleged three instances of unlawful discrimination against Mrs Alone on the ground of her race namely -

(1) In the provision of services by failing to properly repair the sewerage system (Section 46(1)(c));

(2) In the area of accommodation by refusing the Complainant's request for a transfer to another Property (Section 47(2)(c)); and

(3) Also in the area of accommodation, by the eviction of the Complainant and the disposal of her personal goods (Section 47(2)(b)).

In the Points of Claim the eviction and the disposal of goods were identified as two separate breaches of the Act. We think that to be the correct approach, despite the way in which it was put by Counsel for the Complainant on the hearing. The only conduct covered by Section 47(2)(b) is eviction. The alleged disposal of property is quite a distinct and separate circumstance and would not come within the scope of that sub-section, although it may arguably come within Section 47(2)(c) as being a *"detriment in relation to accommodation"*.

Discrimination on the ground of race is proscribed in Part III of the Act -

S.36 (1) For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this sub-section referred to as the "aggrieved person") on the ground of race if, on the ground of-

(a) the race of the aggrieved person;

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

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

the discriminator -

(d) 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; or

(e) segregates the aggrieved person from persons of a different race..."

Racial discrimination in the provision of goods and services is covered by Section 46 -

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-

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

(b) in the terms or conditions on which the first- mentioned person provides the other person with those goods or services or makes those facilities available to the other person";

or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

Section 47 deals with discrimination on the ground of race in the area of accommodation. Sub-section 2 of that section provides that -

(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's race-

(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..."

(2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's race-

> *(a) by denying the other person access, or limiting the other person's access, to any benefit associated with accommodation occupied by the other person;*
>
> *(b) by evicting the other person from accommodation occupied by the other person; or*
>
> *(c) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person."*

The Complainant does not have to establish that race was the only (nor even the major) ground for the decisions or conduct of which she complains because Section 5 of the Act specifically provides that -

> *"A reference in Part II, III, IV or IVa to the doing of an act by reason of a particular matter includes a reference to the doing of an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act."*

Homeswest is a body corporate pursuant to the provisions of the Housing Act 1980. The liability of a body corporate may be established under Section 162(1) of the Act which is in the following terms -

> *"(1) Where, for the purposes of this Act, it is necessary to establish that a body corporate has done an act on a particular ground, it is sufficient to establish that a person who acted on behalf of the body corporate in the matter so acted on that ground."*

In these proceedings the Complainant bears the onus of proof. She must establish her case on the balance of probabilities. (O'Callaghan v Loder (1984) EOC 92-204).

There has been in these proceedings a deal of evidence relating to Mrs Alone's domestic standards, allegations of anti-social behaviour, complaints of racial prejudice against neighbours and the like on one hand and Homeswest policies for dealing with transfer

applications, evictions and the disposal of tenants property on the other. In this case such matters are relevant only to the extent they bear upon the only question which this Tribunal has to determine, namely, whether we are satisfied on the balance of probabilities that the Respondent unlawfully discriminated against the Complainant on the ground of her race.

For a complaint of racial discrimination to be made out the Act requires proof that less favourable treatment was accorded the Complainant "on the ground of" her race. Here therefore, Mrs Alone must show the fact of her Aboriginality had a proximate bearing on the relevant decision, act or omission and had a causally operative effect on such *(see Director General of Education v Breen (1984) EOC 192-015 per Street C.J. and Clarkson v the Governor of the Metropolitan Prison and Anor (1986) EOC 92-153).*

Furthermore, the act or omission which constitutes discrimination must be shown to be advertent and done with knowledge of the relevant characteristic, that is in this case the Complainant's Aboriginality - *see Jamal v The Secretary, Department of Health and Anor (1988) EOC 92-234.* However as Samuels J.A said there (speaking of discrimination on the ground of physical impairment under the New South Wales legislation):

> " *This does not mean that the actor must be influenced by affirmative animus to use Marshall J.'s phrase in Alexander Governor of Tennesee et al v Choate et al 469 US 287 (1985) or that proof of discrimination in Part IVA requires an element of malice in the ordinary legal sense of the intention to do something unlawful. Discrimination is the label which the Act attaches to certain kinds of conduct which may be motivated by want of compassion or lack of understanding or by ignorance or apathy or by brutality, hostility or prejudice. The Act does not concern itself with motive nor does it make discrimination under Part IVA depend upon proof of some deliberate intent*

to injure the prospects or deny the aspirations of the physically handicapped."

In the present case, it is common ground that the Respondent, through its servants and agents, was aware that Mrs Alone was Aboriginal. The issue therefore, is whether the particular act or omission complained of was advertent, discriminatory and (if so) founded at least in part on Mrs Alone's race.

Against this outline of the legal principles to be applied we turn now to the evidence and the facts.

Mrs Alone gave evidence and called one witness, Ms Irene Stainton, a former employee of Homeswest.

The only witness for the Respondent was Mr Graham Jones, who during the relevant period had been Assistant Manager for Homeswest at Mirrabooka.

Much of the evidence was either agreed or at least not contested. It is therefore possible to set out the basic course of events as we find that to be whilst reserving for the moment our comments and findings on those aspects which were disputed.

Having been a Homeswest tenant previously at Balga Avenue, Balga for some eight years, Mrs Alone signed a tenancy agreement with Homeswest in respect of the Property on 3 October 1984 and occupied it at about that date.

The Property comprised a four bedroom house and land. The house was not new. It had been the subject of at least one prior Aboriginal tenancy. It appears little had been done to establish the grounds and garden. The Complainant lived there with her five children.

They were the only Aboriginal family living in the immediate area. Most (if not all) of the other residents in the area owned their own homes. A number were war service homes.

From the very beginning Mrs Alone experienced severe problems with the sewerage and drainage system. The Respondent's "Maintenance History Report" in respect of the Property (at Tab 6 of the Commissioner's report, Exhibit 1) shows two soakwells having to be pumped out on 10 October 1984. It also shows there were 15 separate instances of plumbing work on the Property's sewerage or drainage system between October 1984 and January 1987, most being to clear blockages.

Mrs Alone testified that the toilets and baths and kitchen sinks were all blocked up from the very first day she moved in. She complained and a contractor came out the next day and unblocked the pipes. That was probably on 10 October 1984.

The effects of the sewerage system blockages were appalling. As Mrs Alone described the situation -

> " *... If you used the toilet you couldn't press the button because it overflowed everywhere and if you had a bath you couldn't empty it - like just pull the plug out and empty it and the kitchen sink were all blocking up.*

> *... Towards the end it got so bad that ... it was just - all ran down the driveway; came up through the kitchen sink; in the bathroom and you know everything just stunk (sic) cause it was all the stuff from the toilet and that, just running all through and down the driveway and coming up even through the kitchen sink."*

Mrs Alone complained about the sewerage problem repeatedly throughout the period. She made those complaints mainly to Ray Blackwood an Aboriginal Housing Board Officer attached to Homeswest. He was apparently the departmental officer responsible for her tenancy.

Each time a complaint was made Homeswest arranged for a contractor to attend and unblock the drains, either the same or the following day.

Late in the tenancy Homeswest representatives and a maintenance contractor inspected the Property and the latter expressed the opinion that repeated unblocking of the system was no good; what was required was a new system.

That was not installed during Mrs Alone's tenancy.

Subsequent to repossession of the Property by Homeswest on 20 March 1987, maintenance work was done on it prior to its occupation by new (non Aboriginal) tenants. That work included a complete overhaul of the sewerage system.

When asked what her belief was as to why nothing was done to rectify the (underlying) problem with the drains while she was at the Property the Complainant responded:

" *Because I'm a Noongah and of Aboriginal descent ... because they were never really interested in anything like - in anything I had to say to them or try to have done, it was of no interest to them."*

This was denied by Mr Jones. He agreed there had been a complaint about the sewerage system on the Property by the previous tenant (on 1 November 1982). He said that at the time of Mrs Alone's tenancy Homeswest did not have a plumbing technical adviser and relied on advice from individual private contractors sent out to particular jobs. According to his recollection Homeswest did not then have the computerised system now in operation. Maintenance records were held separately from the tenant's file and maintenance complaints could be directed to different people. All of this meant there would not necessarily be any appreciation by Homeswest that there had been repeated complaints indicating a major ongoing problem. He was not able to be more specific about this aspect but the effect of his evidence was that there was simply no realisation by Homeswest of the need to replace the sewerage system until the end of the tenancy and the work was undertaken then because of the opportunity presented by the premises being vacant pending new tenants.

At an early stage in her tenancy Mrs Alone complained to Mr Blackwood (and possibly other Homeswest officers) that she and her children were being subjected to racial harassment by neighbours and other local residents. She told him that her daughter had been struck with a brick which had been thrown at her by people living across the park. She said that every time her children went out on the park to play the white people who owned big Alsatian dogs nearby would let them out and *"get them"* onto the children so that they had to climb trees to get away. People were abusing her daughter's dog; they used to throw things at it and tease the dog, they would pull up on her front lawn in the

middle of the night and throw bottles at the dog. When the dog had pups somebody shot them all with a pellet gun and killed them whilst the family was out. People would swear at her and her family using racist epithets. Things got so bad her daughter would not go to school and her children would not walk to the delicatessen or anywhere on their own - she had to take them.

There was no evidence before this Tribunal about these matters other than Mrs Alone's testimony. Although that was unchallenged, we are in no position to make any particular findings about her claims of racial harassment by the neighbours and we do not do so. It is sufficient for the purposes of this inquiry that we find (as we do) that she did make those complaints, she did so genuinely, Homeswest (through its officers) was aware of them and they were the expressed and main reason for her seeking a transfer to other accommodation in June 1986.

Homeswest took the view that it was in no position to do anything about Mrs Alone's claims of racial harassment. As Mr Jones saw it, (T. 147) it was really a question of what the landlord's responsibility is in these matters. Homeswest had no authority to intervene in disputes between neighbours, other than perhaps to refer the tenant to other agencies. Specifically in this case he conceded there was no investigation by Homeswest into Mrs Alone's complaints of racial harassment (T. 150) - although neighbours' complaints against her were actively investigated and recorded on file.

Homeswest does seem to have been a particularly intrusive and indeed patronising and judgemental landlord in relation to its own tenants. Officers were apt - and indeed were

required - to make subjective assessments of tenants and tenancies as a matter of record for Homeswest files. According to Mr Jones this practice was founded on an interpretation of the landlord's rights and the tenant's obligations under the Tenancy Agreement, a copy of which was provided to the Tribunal and appears at Tab 6 of Exhibit 1 (the Commissioner's report).

The relevant terms appear to be Clause 2 which required *(inter alia)* -

> " *(d) to keep the said premises and the fixtures and fittings therein and thereon and the sanitary and water apparatus thereof in good repair and condition as at present ... and to keep the same in a clean and sanitary condition, free from dirt and vermin*
> ...
> *(h) to keep the residential unit land ... clear of all refuse and weeds and to make and maintain a garden or gardens, plant fruit or ornamental trees or hedges or shrubs so that the premises present a neat and tidy appearance ..."*

And the *"Rules"* which were *"to be observed for the general comfort and convenience of the tenants of (Homeswest)"* which stipulated the tenant should not, nor allow any visitor etc to -

> " *(a) Create any act, nuisance (sic) or make or permit any objectionable disturbing or irritating noises or interfere in any way with neighbouring tenants or those having business with them*
> ...
> *(e) Use the said premises or permit them to be used for any purpose of an illegal or immoral nature, nor to create any nuisance, annoyance, inconvenience or disturbance to (Homeswest) or tenants in the neighbourhood, or permit persons of a character objected to by any officer, servant or agent of (Homeswest) to resort thereto".*

In its policy directive in relation to applications for transfer, Homeswest also directed attention to the tenant's domestic and garden standards and in its file documentation for approval of transfer applications comment was called for under a heading *"Social Behaviour"*. Likewise when Homeswest policy stated that transfer applications were subject to *"satisfactory tenancy history"* that was taken to include issues of social behaviour as well as rental history and domestic standards.

As wide even as these terms and descriptions were they were applied extremely broadly in practice, extending well beyond what might ordinarily be regarded as any legitimate interests a landlord may have in the personal lives and behaviour of its tenants.

There was a further disturbing feature of Homeswest administration at that time. The evidence was that a different coloured form was used to record details of Aboriginal tenants. The form also differed from that used in respect of other tenants in that the one in respect of Aboriginal tenants contained a space to record details under a heading "welfare inspection", which did not appear on the other form. We understand these forms were abolished some time after these events.

Thus in January 1986, reports on file in respect of Mrs Alone's tenancy referred to beds not being made, floors being dirty, the bathroom and laundry being *"grubby"* (which may not have been particularly surprising given that the maintenance history confirms that sewerage blockages were still occurring about that time) with later references ranging from notations that *"the rooms were neat and tidy; all beds made and floors swept"* to

"anti-social behaviour" or that the domestic standard was *"average"* or *"below average"*.

Mrs Alone made a formal application for a transfer to other accommodation on 18 June 1986 (Exhibit 2). Under the heading *"Reasons for requiring a transfer"* she wrote *"racial prejudice"*. The application was presented to Ms Irene Stainton who at the same time completed a Tenancy Inspection Report. Under the headings *"Social Behaviour"* and *"Hardship"* Ms Stainton made the following notes -

> " *There have been numerous anti-social type problems with this tenant, standards have always been below average and there are rental arrears.*
>
> *Tenant advised that she is requesting a transfer mostly because she feels her neighbours are racially prejudiced. She claims that her daughter is continually subjected to abusive language and name calling by other neighbours. One set of neighbours it is alleged allow their German Shepherd dogs out into the local park when her daughter is playing there. Mrs Alone also states her daughter refuses to attend school.*
>
> *Mrs Alone feels that she would like a fresh start and perhaps move away from her family.*
>
> *Recommendation : Suitably housed"*

The application was considered by what was described in evidence as the Tenancy Committee on 8 July 1986.

The meeting was chaired by Mr Shane Edmunds, the Senior Housing Officer (Tenancy), Ms Stainton was also present. She said it was either the first or one of the first such meetings she had attended. She made it clear to the Tribunal that certainly at that stage she was not assertive in her role and deferred to Mr Edmunds. It was not clear whether or not the Committee consisted only of the two of them. It is possible there were other

people present. Nonetheless we are satisfied on the evidence that the decision of that Committee (at least in relation to Mrs Alone's application) was effectively the decision of Mr Edmunds.

According to the Tenancy Committee Summary Sheet (Exhibit 7) the Committee noted the four bedroom property had been occupied by Mrs Alone, her three boys (aged 17, 14 and 13) and her two girls (16 and 11) since October 1984, she had requested the transfer *"because of anti-social complaints"* (which was not correct) and that standards were average/below average. The Complainant's account was $386.55 in arrears.

The Committee decision was noted (in Mr Edmunds' handwriting) -

> " *Declined out of hand. Client is to demonstrate satisfactory tenancy - anti-social and arrears. Failure to do so only jeopardises her current tenancy.*
>
> *Decline letter to be in warning form."*

On 15 July 1986 Homeswest wrote to Mrs Alone (Exhibit 3) advising her of the outcome in the following patronising terms -

> " *Dear Mrs Alone,*
>
> *I refer to your recent application for transfer.*
>
> *After careful consideration of your circumstances it has been decided that you are suitably housed in your present accommodation at this time. Your request is therefore declined.*
>
> *Please note that your rental account is currently $396.55 in arrears. While there has been a distinct improvement in both your social behaviour and your standards, you are reminded of your obligation to maintain your account free of arrears. Failure to do so could jeopardise your tenancy.*

Yours faithfully,

(Signed) on behalf of the Regional Housing Manager
15 July 1986".

Although Mrs Alone was then paying off arrears which as at 6 June 1986 stood at $396.55 they were not in respect of the Property. An amount of $486.63 had been debited to the Complainant's Homeswest account on 28 April 1986 in respect of her previous tenancy. Apart from weekly rent of $31.20, the only amount she had to pay in respect of the Property was $70.32 for repairs which were held not to be fair wear and tear. She was in fact paying $82.40 per fortnight, $20.00 of which was in respect of the arrears. Payments were made by warranty which was a method whereby the tenant's income cheque (in this case her Supporting Parent's Benefit) was paid direct to Homeswest which deducted the rent and any other authorised amount and paid the balance to the tenant. Mrs Alone's rental and arrears payments had been made regularly as at the date of the Committee decision and the arrears had by then been reduced to $345.35.

So far as Mrs Alone's *"social behaviour"* and *"standards"* were concerned the Committee relied essentially on what was on the Homeswest file. Ms Stainton's first contact with the Complainant had probably been 15 May 1986 and the officer responsible for the tenancy (Ray Blackwood) was not present at the meeting.

It was evident that Mrs Alone did not reside at the Property for a period in November 1985. She denied that. Without detailing the evidence here it is sufficient to say that the Tribunal accepts that Mrs Alone probably slept elsewhere for some period about that time whilst maintaining her tenancy of the Property.

A file note dated November 1985 recorded a visit by a Homeswest officer to check if the tenant had re-occupied the Property. The officer observed that the place looked a *"mess"* through the windows, the external area was severely overgrown and *"the appearance from the street is disgraceful"*.

In December 1985, the file was noted that the tenant had re-occupied and was home when the officer visited it added *"internal reasonably tidy, grounds very dry but tidy, suggest call regularly"*. That the grounds appeared very dry in December is perhaps not surprising.

On 14 January 1986, an Aboriginal Housing Board representative noted that the bedrooms were untidy, the beds were not made and the floors were dirty, the lounge was *"very untidy"*, the kitchen had dirty floors and the bathroom and laundry were grubby. The tenant had made some attempt to clear the yard at the back. There was no indication whether or not the condition of the kitchen, bathroom and laundry was attributable wholly or in part, to the ongoing sewerage problem.

In the Points of Claim the Complainant asserted that she subsequently made two further requests for a transfer (paras 9 and 11), that was denied by the Respondent (paras 6 and 7 of the Points of Defence).

Mrs Alone testified that a few months after her first application she made a second. She said she filled in the form (which she got from the Homeswest office at Mirrabooka) and handed it in. She was not sure if she gave it to Ray Blackwood or just took it in. She

made this second request because nothing had changed; nothing had improved and there was an additional reason, she said -

> " *... and also at that time my sister had left her de facto husband and at night he used to sit across the park and watch the house because he thought that I knew where she was ...*"

She said she was never officially informed of the result of the second application although Ray Blackwood just came and told her it had been refused. The only reason he gave was that she had to clear her arrears and that *"They didn't really think that (she) needed to be moved"*.

Mr Jones' evidence on this was that on a file note dated 14 November 1986, Ray Blackwood wrote *"Tenant again approached me on a transfer"* (Exhibit 8) and recorded the following recommendation -

> " *Given the problems associated with this tenancy over the past two years I feel her request for a transfer be considered for the following reasons -*
>
> *(1) Neighbours should be given another view of an Aboriginal family (careful allocation upon vacation);*
>
> *(2) With the continual stream of visitors and related problems a "special" should be considered;*
>
> *(3) (sic) Tenant's daughter has been subjected to some rough treatment from neighbours and Mrs Alone states that her 11 year old does not wish to attend school due to alleged harassment;*
>
> *(4) Homeswest will regain the 4BR at the expense of a 3BR and if a special is earmarked for this tenant, future anti-social complaints will be expected to be reduced".*

According to the file the Regional Manager noted the request and sought more detail.

Later in November Mr Blackwood provided further detail on family size and in December a rent history was done.

The Regional Manager then asked for an updated report but noted that in view of the family size he considered the family should remain in 4 bedroom accommodation for the time being.

The file then indicates that Ray Blackwood called on the Complainant twice in December to advise her of this but she was not there. Mr Jones said that although there was no formal application for a transfer and therefore no *"decision"* to be made he would have expected Mr Blackwood to advise the tenant of the Regional Manager's view. On Mrs Alone's own evidence Mr Blackwood did give her that information at some stage.

These events having occurred over four years ago it is hardly surprising that witnesses might now have difficulty in recalling them accurately especially without reference to documentary material.

It may be that Mrs Alone handed in some sort of note which she regarded as an application (although there is now apparently no record of that). Be that as it may, it is clear that her desire for a transfer was discussed with Mr Blackwood who in turn discussed it with the Regional Manager. We are satisfied Homeswest gave some consideration to it and formed a view there should be no change and that was not regarded as a formal *"decision"* in any formal sense - although Mrs Alone obviously regarded it as a definite refusal.

The next major development occurred in late December 1986.

One of Mrs Alone's daughters had a dog which used to accompany the daughter wherever she went. Mrs Alone testified that not long after they moved into the Property people began abusing the dog, throwing things at it and teasing it. On occasion it was shot at with an air rifle and came home with slugs in its skin. She said the dog was originally not vicious but became so after being subjected to this treatment.

So it happened that probably about September 1986 the dog bit a 13 year old boy who was riding his bicycle in the area. A complaint was made to the police. Court action was taken and the dog was destroyed. There were allegations that the dog had also attacked and bitten other people. That dog however, had produced pups probably towards the end of 1985. According to Mrs Alone only two of those had survived, the others having been shot to death with an air rifle one day whilst she and her family were out.

At the end of December 1986 there was a spate of written complaints to the then Premier the Hon. Brian Burke (who was also the local member) from neighbouring residents. They appear to have been prompted by a dog attack on a 71 year old resident on 21 December 1986 but encompassed a range of concerns about the Property. The dog which made this attack was identified as the offspring of the one which had been destroyed. It was claimed that the lady attacked had to have more than 26 sutures in her leg.

Over the period 23 December 1986 to 19 February 1987 there were at least ten written complaints made (9 to the Hon. Premier and one to another Minister) and referred to

Homeswest regarding Mrs Alone's tenancy.

Their timing and the content and terminology leave no doubt that they were part of a deliberate co-ordinated campaign to have Mrs Alone and her family removed from the Property. That fact in itself though says nothing about the validity of the complaints themselves. It is unnecessary (nor would it be possible on the evidence before the Tribunal) to come to any conclusion on the substance or otherwise of those complaints. Their only relevance for the purposes of these proceedings is that they were in fact made and they were referred to the Respondent for comment and action in the period 23 December 1986 to 29 February 1987.

The letters were not confined to recent events. They complained of alleged problems over several years including attacks by various dogs from the Property, that the house was *"an eyesore"*, of abandoned cars on the premises, of visitors to the house setting fire to plants in the nearby park, being drunk, swearing at and abusing residents, of excessive noise, of people from the premises knocking on residents doors asking for money and other things and more complaints in a similar vein.

It appears the letters referred to Homeswest by late January 1987 resulted in an investigation by Shane Edmunds and Ray Blackwood. The former interviewed at least some of the neighbours. The latter called on Mrs Alone and spoke to her on 20 January 1987 (T. 106).

According to a file note by Ray Blackwood she told him that she had been away from the

house for some weeks at that stage. He put a number of the neighbours' allegations to her as to the alleged attack on an elderly lady by her dog. He noted the Complainant said (Folio 504) that she and her brother Mervyn Brown felt that the dog responsible for the recent attack belonged to a neighbour two houses down; they said their dog was still a pup and was not savage. Blackwood noted that the dog was placid as he interviewed Mrs Alone and inspected the backyard.

On the complaint of unruly visitors, Blackwood's note was that Mrs Alone had stated that she did have quite a few visitors and they did have a couple of beers occasionally. She denied that they caused problems for the neighbours. He asked her about *"skinheads and other non-Aboriginal youths"* causing problems for the neighbourhood. Mrs Alone said her son had shaved his head but was not a skinhead and some of his friends around the same age (14-15 years) did call around. She denied that they caused trouble for the neighbours.

On the file Mr Blackwood noted his conclusion (at Folio 505) that the *"Tenancy is cause for concern, the ... family do associate with the rougher element of society and with the continual stream of visitors would be more suited to a special buy in. Undoubtedly these visitors are associated with other Homeswest tenants and these current problems may surface at another location, but it is definitely at an unsuitable level here."*

The outcome of the investigation was that Shane Edmunds drafted a letter for Mr Jones to sign. He forwarded that letter to Mr Jones with a handwritten memo dated 21 January 1987 (Exhibit 9) recommending that final notice be sent to Mrs Alone, that the *"soft*

option" of a special buy in should not be entertained and that the Aboriginal Housing Board should be requested to amplify the Homeswest concern to Mrs Alone in writing.

Mr Jones at that stage had an awareness of the matter and was prepared to act on the assessment of his staff and what was on the file. He endorsed his agreement with the recommendations and signed the letter. It was sent Certified Mail to the Property address. It was in the following terms -

" *Dear Mrs Alone,*

I refer to several recent complaints of anti-social behaviour and overcrowding at your rented Homeswest property at the above address.

Unfortunately, the complaints of anti-social behaviour particularly against your visitors have been found to be justified. Such actions by yourself and visitors for whom you are responsible is in direct breach of your Tenancy Agreement I refer particularly to the Rules 1(1)(a) and (b).

This is a FINAL NOTICE. Should one further complaint of anti-social behaviour or overcrowding at this tenancy be proved to be justified then your tenancy with Homeswest will be terminated on a NON WITHDRAWAL basis and costly eviction action will commence.

Your tenancy is now seriously in jeopardy and should the action as outlined above become necessary no further housing from Homeswest will be made available.

Yours faithfully

G. Jones
Acting Regional Manager"

Mrs Alone denied ever having received this letter.

There is a possibility that she did not, although we are satisfied it was sent.

She had told Ray Blackwood on 20 January 1987 that she had not been sleeping at the

Property for some weeks then. That was because she was afraid of her sister's *de facto* husband who she says had been watching the house and who was known to be violent and dangerous.

On 21 January 1987, Mrs Alone visited Mr Robert Isaacs, Chairman of the Aboriginal Housing Board to talk to him about the problems she was having at the Property. She explained the situation as she saw it and told him things were getting worse. She again asked to be relocated. It is this request that has been described as her third request for a transfer (See eg paragraph 11 of the Points of Claim). According to Mrs Alone, Mr Isaacs told her he would make arrangements for her to be re-housed in a special buy-in Property.

There is an endorsement on the bottom of Exhibit 9 by Mr Isaacs about this visit. He noted the discussion of the complaints *"and anti-social behaviour by neighbours in the street"* and that he had warned Mrs Alone of the seriousness of the complaints and that her tenancy was in jeopardy, he wrote that her request for a transfer to a special buy in property was pending and that he would need to speak to Mr Joyce (who was acquiring properties at that time) and further noted that *"Mrs Alone assured me she would try to control visitors and bring her tenancy standard up to Homeswest requirements"*. Mr Isaacs then wrote to Mr Jones in similar terms to his file note on 22 January 1987.

Even though Mr Jones had rejected the idea of a special buy in for Mrs Alone on 21 January, following receipt of Mr Isaac's letter he reconsidered that possibility and on 23 January he wrote an instruction to Mr Blackwood (Exhibit 10) to advise Mrs Alone that

Homeswest would guarantee her a special tenancy subject to the following conditions, namely,

1. The tenancy be left clean at vacation and any subsequent debts be cleared in accordance with the existing policy prior to rehousing; and

2. That Mrs Alone not be permitted to overcrowd any Homeswest rental accommodation until rehousing.

He further requested the Regional Manager to include Mrs Alone on the waiting list for a special tenancy.

The proposition was subsequently put to Mrs Alone by Mr Blackwood in Ms Stainton's presence. Mrs Alone said she would vacate the Property if she could be given a written guarantee that she would retain a listing for a *"special"*. The proposition was typed in letter form and handed to her on 11 March 1987. She asked for time to consider it. She was concerned (amongst other things) about where she would live in the meantime. She appreciated she was not being offered a transfer, but rather a commitment that special housing would be provided to her in the future.

On 19 March 1987, Mr Jones visited the Property.

The evidence was not entirely clear about why he (as the Assistant Regional Manager) did that but having regard to the series of written complaints forwarded to Homeswest from the Premier's electorate office and the circumstances generally the Tribunal is satisfied he did so because the tenancy had come to be seen as a major political embarrassment to the Mirrabooka office of Homeswest and it was thought necessary to resolve it by direct

management intervention. He was given - or assumed - that task.

It is common ground that Mrs Alone was not then residing at the Property and had not been probably since about late January 1987. The Property was then unsecured in that the back door lock was broken so that the door could not be locked and one of the rear windows had been smashed. Mrs Alone told the Tribunal that she had complained about both of these to Homeswest and had asked that they be fixed.

She decided to stop sleeping at the Property mainly because of her fear of her sister's *de facto* husband. She and her children slept at the house of another sister (who was also a Homeswest tenant) and her family.

Mr Blackwood was aware that Mrs Alone was not sleeping at the Property. He knew that she attended Leederville Technical College and where she was staying.

Mrs Alone testified that she would visit the Property usually twice daily, once in the morning and once in the afternoon to check it and to sort and collect clothing for her and the children to wear.

The Complainant was under the impression that her tenancy was not affected by the fact that she was sleeping elsewhere so long as she kept Homeswest informed of the situation, visited the Property regularly and maintained her rental payments. Homeswest did not share that view. Mr Jones understood the Tenancy Agreement to require the tenant to be *"residing in full time occupation"*. That was probably legally correct (as Clause 2(a) of

the Tenancy Agreement required the tenant *"to reside together with (her) family at all times during the tenancy ... in the said premises")*. However, we accept that Mrs Alone was never told that she was placing her tenancy in jeopardy by not residing there.

Mr Jones' visit to the Property on 19 March was the first time he had been there. He arrived in the later afternoon or evening. He knew that Mrs Alone and her family had not stayed there for some time. He saw that the Property was not secure and for those reasons and because of how the premises appeared to him he concluded they had been abandoned. He posted a Notice of Abandonment on the front door. That notice read simply -

> " *This property is abandoned.*
>
> *Any person found trespassing will be prosecuted."*

Mr Jones obviously must have taken that notice with him when he went to the Property that evening.

Mrs Alone denied having seen that notice that day, although she said she was there that day at the usual time, which was about 3.30 or 3.40 p.m.

Mr Jones returned to the Property early in the morning of 20 March. He said there was obviously no change in the condition of the Property from the night before. He regarded this as an unusual abandonment situation because the Property was unsecured. He testified that he had a suspicion the place may have been used by squatters and a concern for what was likely to happen to the Property if it was left unsecured.

Having formed this view he returned to his office, made arrangements to take a contractor out to secure the Property and returned with the contractor.

He made a list of items found in the house (which is at Tab 4 of Exhibit 1) and took a series of photographs (Exhibits A1 - A9). These photos were in fact selective - they did not include a photo of every room, for example - and the Tribunal is satisfied that Mr Jones' purpose in taking them was to record those things which he regarded as wrong with the property. Some features so shown did not necessarily reflect on the tenant, for instance the extensive mildew shown on the bathroom ceiling (Exhibit A6) was no doubt due to the inadequate ventilation of which Mrs Alone had specifically complained to Ms Stainton and to overcome which she had requested installation of an exhaust fan (which was refused). Likewise the obvious staining on the bathroom floor (Exhibit A7) was most probably due to the problem of overflowing sewerage drains. We note too that although there was at least some furniture in the house, none of that appears in the photographs.

One of the major areas of conflict in this case concerns just what furniture and other items of the Complainant's personal property were in the house on 19 and 20 March 1987 and the condition of it. Mr Jones' list showed significantly less property than Mrs Alone testified was there; what he says was there (with the exception only of a table) was unserviceable, by which he meant *"not being useful for further use"* (T. 118).

After listing the property in the house Mr Jones had the premises secured.

He made no attempt to contact Mrs Alone, either about the tenancy or about the property

on the premises. What he did do was arrange for a contractor to take the items of furniture and other property to the rubbish dump. It was in fact disposed of in that way.

Mrs Alone arrived at the Property about 3.40 p.m. on 20 March. That was when she first saw the notice on the front door. Some of her goods were outside the house. She mentioned a few wardrobes in the driveway. She said she went to a telephone box and telephoned Mr Jones. He told her that he had exercised his right as landlord and reclaimed the property. As she said, there really wasn't much she could do about that but she wanted to know what had happened to her personal property. He told her that everything had been taken to the tip - it was rubbish. She tried to find out who the contractors were and where the items had been taken but he refused to tell her. Mr Jones said he had no recollection of this conversation. We are satisfied it did in fact occur.

Mrs Alone later arranged for her brother to remove the furniture from the driveway in his trailer, but when he went to get it that furniture had gone.

The evidence does establish that the contractor made two trips to the dump and it is likely that the second trip occurred after Mrs Alone had been to the Property and before her brother-in-law got there.

Mrs Alone has never since seen any of the personal goods and furniture that she had left in the house.

Following termination of Mrs Alone's tenancy, maintenance work was done on the

Property (including renovation of the sewerage system) and it was subsequently re-allocated to non-Aboriginal tenants.

Against this broad background of the course of events we turn now to the particular matters the subject of the complaint.

The Sewerage System

There is absolutely no doubt that the sewerage and plumbing system was a constant problem and in need of a complete overhaul from the beginning of Mrs Alone's tenancy.

The conditions created by the blockages and overflowing drains were unpleasant in the extreme. The problem was a continuing one and must inevitably have been a source of the greatest distress, concern and frustration to the Complainant.

The question for this Tribunal is whether the Respondent's failure to overhaul the system constituted discrimination against the Complainant on the ground of her race - that is whether she was afforded less favourable treatment than a non-Aboriginal in similar circumstances would have been accorded - because of her Aboriginality. The fact that she was Aboriginal must be shown to have had a proximate bearing on the Respondent's failing to properly repair the sewerage system and to have had a causally operative affect on that failure (Director General of Education v Breen Supra).

The evidence as to the eventual proper renovation of the system after Mrs Alone's

tenancy was equivocal. That did not establish whether the decision to rectify it properly was made before or after the Property was reallocated. It is impossible to come to any conclusion on this evidence as to whether the fact that the new tenants were not Aboriginal had any bearing on that action.

There is no evidence that Homeswest failed to respond to Mrs Alone's complaints about blockages. Indeed, the evidence is to the contrary. The essence of the complaint here is that the real problem was not identified and resolved until after termination of her tenancy.

Certainly, the sewerage problem experienced by the Complainant was of a nature and magnitude which is not tolerable by modern standards and which Homeswest could (and would) not expect to be generally acceptable amongst its tenants. However, there was no advertent act or omission by Homeswest as to this and we are furthermore not satisfied on the evidence looked at as a whole that the Complainant was afforded less favourable treatment than a non-Aboriginal tenant would have been in similar circumstances. That is to say we are not satisfied that Homeswest discriminated against Mrs Alone in relation to the sewerage problem. Likewise, we are not satisfied to the requisite degree that the fact that Mrs Alone was Aboriginal had any causally operative affect on the Respondent's failure to properly repair the system.

It follows that the complaint has not been made out in this regard.

Refusal to Transfer

The particular decision challenged here was that made by the Mirrabooka Tenancy Committee on 8 July 1986. We have already observed that decision was effectively made by Mr Edmunds.

The reasons he noted on the summary sheet for refusing the transfer appear to have been the need for the Complainant to demonstrate a satisfactory tenancy regarding alleged anti-social behaviour and arrears. However, the reason given in the Homeswest letter to Mrs Alone dated 15 July 1986 (Exhibit 3) was that she was *"suitably housed in (her) present accommodation"*. The letter went on to note that her rental account was then in arrears.

Mr Jones' view of this decision was that it was consistent with Homeswest policy and consistent with the way in which other applications for transfer would have been dealt with at the time.

Whilst Ms Stainton agreed with this, she did point out that circumstances could be taken into account. Having regard to the evidence as a whole (particularly that of Mr Jones later when dealing with his approach to policy requirements for dealing with abandoned property) the Tribunal is satisfied that Homeswest policy was capable of being flexibly applied and that Mrs Alone's transfer could have been justifiably approved had the Committee considered that approval otherwise appropriate.

Homeswest policy in July 1986 was that to be listed for transfer, a tenant must demonstrate a need to be relocated *"on an emergent basis"*, the Tribunal was told *"emergent"* simply meant *"priority"*. Reasons which may justify relocation were

(according to the policy)

(A) Acute overcrowding arising from natural family increases - includes adoption of children by re-marriage;

(B) Compassionate grounds where the circumstances are extreme;

(C) Extreme ill-health where medical evidence is conclusive that the transfer is essential to prevent further deterioration;

(D) Where an accommodation gain will accrue to the Commission if the transfer is effected;

(E) Where a tenant has been transferred in employment for reasons beyond his control and without prior notice and resides an unreasonable distance from his place of employment ...

(the emphasis above is that given in the policy document).

In addition the tenant's *"domestic and garden standards"* must be maintained at a level acceptable to Homeswest and if the tenant had a poor rent payment history when his/her turn is reached the application was to be deferred for three months; if the account is then being satisfactorily maintained an offer of transfer accommodation could be made.

There are some notable features of the evidence as to the refusal on 8 July 1986 and the reasons advanced for it.

(1) According to Mr Jones the phrase *"suitably housed"* was a standard form reason given in all letters refusing transfers about that time. Whatever actual reasons the Committee may have had, they were not stated in the letter to the tenant.

(2) Notwithstanding the arrears were not in respect of the Complainant's then property, nor that payments were being regularly maintained and had apparently been since October 1984, the transfer application was refused *"out of hand"* rather than

deferred for three months in accordance with the Homeswest policy.

(3) Mrs Alone's express reason for the application *("racial prejudice")* was obviously not accorded much, if any, weight.

(4) There was a degree of inconsistency between the letter dated 15 July 1986 and the notation of the decision on the Tenancy Committee Summary Sheet. The latter indicated the Complainant's tenancy was unsatisfactory in respect of anti-social (behaviour) and arrears. The former made no mention of either of those factors being a reason for the refusal of the application and indeed expressly observed that *"... there has been a distinct improvement in both your social behaviour and your standards"*.

As at July 1986 the Homeswest file did contain a record of complaints about what was referred to throughout as *"anti-social behaviour"* and concerns regarding the condition of the Property.

The file indicated that Mrs Alone was not in occupancy of the Property at November 1985. On calling to check if she had re-occupied a Homeswest officer noted the Property was in a mess, the garden was overgrown and the appearance from the street was *"disgraceful"*. By December 1985 the house was re-occupied. Internally the house was reasonably tidy and the grounds were dry but tidy. From then to June 1986 reports ranged from observations on whether or not beds were made to the presence of rubbish and up to 5 motor vehicle wrecks on the Property at various times. What was described as a *"standards letter"* was sent on 7 April 1986 (T. 182) and a Final Notice on 5 May 1986 (T.182). Despite all this by 18 June 1986 Ms Stainton had noted domestic standards as being *"average"* and the general internal appearance of the house was neat and tidy. Two motor vehicles had been removed and on that very day Mrs Alone had signed an authority for Homeswest to remove the other three at her expense.

Over the same period there had been complaints by neighbours.

On 31 January 1986, there was a Parliamentary enquiry (that is *"a plēase explain"* directed to Homeswest from a Member of Parliament) in relation to a complaint by a neighbour of *"anti-social"* behaviour by people at the Property.

The last recent complaint before June 1986 was received in March of that year. An elderly neighbour had complained of rubbish being thrown into her yard, cars *"continuously coming and going anytime day and night"*, exceptional noise from motor vehicles, dogs from the Property fighting, drunkenness, bad language and verbal abuse. This particular complaint was investigated by a Mrs Peary of Homeswest whose investigation included interviewing neighbours and contact with the Department for Community Welfare and the Police. The file also notes that she spoke to Mrs Alone about these matters. Mrs Peary presented a report dated 19 March 1986, as a result of which what was described a *"warning letter"* was issued to Mrs Alone in the following terms -

> " *Recently families living nearby to you and your family have found it necessary to approach Homeswest regarding noisy and inconsiderate behaviour by people who are either visiting you or are living at your address. As you are aware, this is not the first Homeswest tenancy which you and your family have occupied and your neighbours have had to seek assistance from Homeswest because of similar sorts of disturbances. I can only advise you that if further complaints are received by Homeswest and proven to be justified, eviction action will be instigated. Therefore to avoid this occurring I cannot impress on you too strongly the need for you to ensure that other families living nearby are not disturbed by people either visiting you or living at your address.* " (T.206)

There was a further Parliamentary enquiry as the result of another complaint in April 1986 and another in May 1986. This last again complaining of drunken fights by people on the Property.

This then was the material on the Homeswest file when the decision refusing the transfer was made.

Of course the file also showed that Mrs Alone had herself been complaining (usually to Ray Blackwood) about racial harassment by the neighbours. That was the reason she gave for wanting the transfer.

Her attitude was that the Homeswest officers on the one hand had always simply accepted the neighbours complaints against her but never did anything about her complaints of racial attacks, abuse and other forms of harassment. She said she was never given a chance to answer neighbours' complaints and never understood why she personally was classified as *"anti-social"*.

Mr Jones did not really disagree with this, but explained it in effect by pointing out that although Homeswest had a degree of control and authority over its tenants under the Tenancy Agreement it had none over other residents of the neighbourhood. He saw (and in this respect was surely reflecting the Homeswest view) Mrs Alone's complaint of racial harassment as something other agencies should deal with (T.147; 150). Homeswest did not have the expertise to deal with social problems (T.112-3).

No doubt as a consequence of this view Mrs Alone's complaints were not investigated. No consideration was given to the possibility that the complaints made by the neighbours against Mrs Alone may have been racially motivated, even in part, although what she had said about what was occurring should have impressed upon Homeswest a need to carefully evaluate any complaints against that possibility. Furthermore, a transfer application was not considered on the basis of any assessment of the need for Mrs Alone and her family to escape from the racial harassment she was claiming.

In any event, the situation was on either account quite intolerable. It was manifestly evident that there were acute tensions both ways, between Mrs Alone and her family on the one hand and other residents in the neighbourhood, on the other. It was also likely that at least some of the complaints against the Alone family, were racist.

It did not seem to occur to Mr Jones (as it appears not to have occurred to Mr Edmunds) that the only action which was open to Homeswest was precisely that which Mrs Alone was asking for, namely to transfer her out of that Property and out of that neighbourhood - coincidentally that was also the solution being sought by the other residents!

The Complainant herself appreciated this; as she said: "*I didn't expect them to do anything about my neighbours - they could have moved me*" (T.52).

In considering whether the Homeswest decision to refuse the transfer was discriminatory or not it is necessary to compare the treatment of Mrs Alone and her family with that of a

non-Aboriginal family in similar circumstances. (S.36(1)(d)).

In this context that would have to mean a non-Aboriginal family in a neighbourhood of residents with a different racial background seeking a transfer on the ground of claimed racial prejudice. Would that "nominal family" have been treated in the same way as Mrs Alone and her family.

The onus is, as we have observed, on the Complainant, to make out her case and to succeed in this Tribunal in the context of this case it must be racial prejudice or nothing. Thus, whatever views we may have in respect of the transfer application or the other matters complained of, as to whether Mrs Alone was accorded natural justice, or whether the Respondent had a legal right to proceed as it did or whether the decision or action was "right" or "wrong" are all irrelevant unless and except to the extent they may indicate whether or not Mrs Alone's race was a pertinent factor.

Mrs Alone did give evidence as to her personal experiences and knowledge of relevant matters. She also called Ms Stainton, although the latter had been a Homeswest employee, is still a public servant and clearly did not necessarily advance every aspect of the claim.

Neither Mr Edmunds nor Mr Blackwood was called. There was evidence that Mr Edmunds was in private employment in Queensland. In this instance we accept that as a reasonable explanation for him not being called. On the other hand, it appeared Mr Blackwood was available and could have been called. Whilst we acknowledge the force

of Mr Allanson's comment that either party could have called him, we consider that having regard to his then position and role in these events, Mrs Alone's testimony and the respective factual claims of the parties his testimony could have been expected to have supported the Respondent's case on issues upon which there were evidentiary conflicts (for example, on the extent to which Mrs Alone was advised of complaints by neighbours, or on the nature and quality of her furniture, etc), there was at least an evidentiary onus on the Respondent to call him.

In a situation such as this, a failure to call a particular witness may assist the Tribunal of fact to draw an inference or reach a conclusion against the party whose failure that is perceived to be. The proposition was expressed this way in Jones v Dunkel (1959) 101 C.L.R. 298 (H.C.):

> " *Any inference favourable to the plaintiff for which there was ground in evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation for his absence".*

(relied upon in ex.p. Harrison (1979) 36 FLR 322). It was put even more succinctly by Lord Mansfield in Blatch v Archer (1774) 98 E.R. 969, 970 when he said:

> " *All evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted".*

Nonetheless, such pronouncements do not detract from the fundamental principles that the onus is on the Complainant and that inferences can be drawn (whether more easily or not) only where they are properly open on the evidence adduced. We mentioned above the

legal requirement that the onus is on the Complainant to establish her claim on the balance of probabilities. What this means was explained by Dixon J. in Briginshaw v Briginshaw (1938) 60 C.L.R. 336 at 354, when he said that in civil cases: –

> " *The truth is that, when the law requires proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality...* "

and

> " *..it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences.* "

The Full High Court has also approved and applied this explanation in Rejfek v McElroy (1965) 112 C.L.R. 517.

In similar vein, the Supreme Court of Massachusetts has described the civil onus of proof in these terms:

> " *The burden of proof that is on the plaintiff in this case does not require him to establish beyond all doubt, or beyond a reasonable doubt, that the insured died from accidental injury within the policy. He must prove that by a preponderance of the evidence. It has been held not enough that mathematically the chances somewhat favour a proposition to be proved; for example, the fact that coloured automobiles made in the current year outnumber black ones would not warrant a finding that an undescribed automobile of the current year is coloured and not black, nor would the fact that only a minority of men die of cancer warrant a finding that a*

particular man did not die of cancer ...

The weight or ponderance of evidence is its power to convince the tribunal which has the determination of the fact, of the actual truth of the proposition to be proved. After the evidence has been weighed, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there."

(Sargent v Massachusetts Accident Co 307 Mass. 246,250.

In the present case, applying these principles, we are not satisfied on the evidence led before us that it is more probable than not that a "nominal family" in the circumstances referred to would have been treated any differently than was the Alone family, nor that Mrs Alone's race was an advertent consideration in the decision to refuse a transfer.

Repossession of the Property

Despite the professed adherence to policy in relation to the application for a transfer there were some notable departures from policy in respect of the repossession. The first such major departure was use of the Notice of Abandonment. The relevant policy was set out in Housing Circular No. 383 dated 17 May 1985. It stipulated that where a property was abandoned a Notice to Quit was to be issued and attached to the front door. Possession could be taken one week later. The Tribunal noted that the policy demanded that every effort should be made to contact the tenant by checking with neighbours, searching the personal file for family addresses and so on. A furniture disposal register was to be maintained showing such details as the name of the ex tenant who reported abandonment, where items were disposed to, etc.

The notice Mr Jones put on the front door of the Property in the evening of 19 March 1987 was not a Notice to Quit; likewise he agreed his action in taking possession the very next morning was not in accordance with policy. Mr Jones' justification of this was that *"the policy ... was like a lot of Homeswest policies a guideline in what action to take in a situation where its a normal ... if you like a regular occurrence, this particular situation was unusual; it had some parts to it which I had not struck before and I exercised some flexibility as a consequence ..." (T.164).* When it came to specifics however, the only *"unusual"* feature he was able to satisfactorily identify was that the Property was unsecured. Obviously other abandoned properties look abandoned and some of them would contain only items which appear to have been left as rubbish.

Again, although it is true to say that even with installation of a new door lock a Property is still *"... only a broken window away from being used"* (T.165), that must have been a general consideration in relation to most abandoned Homeswest properties to which the policy applied.

The property list compiled by Mr Jones likewise did not comply with the requirements of Homeswest policy. The policy was formulated for the protection of Homeswest and its officers. It acknowledged a possible problem that on occasion after the disposal of unsanitary or damaged goods deemed to be of no value for resale nor donation to a welfare organisation, a claim may be received by Homeswest for a range of *"as new"* goods and appliances. It was essentially for that reason that if the owners or relatives have not made arrangements for the removal of goods an inventory and detailed description of the items and of their condition was to be taken and verified by a second

Homeswest officer where possible. The policy expressly noted that the comment on the condition such as *"u/s"* or *"no value"* did not constitute a sufficient description.

Mr Jones' list (Folio 527) did not contain a detailed description of the items nor of their condition. Almost all the items were noted simply as *"u/s"*

Perhaps the most striking evidentiary conflict in the whole case had to do with the goods on the property and their condition as at 20 March 1987.

Mrs Alone tendered a list of items on the Property as at that date with a total claim value of $7.500.00 (Exhibit 5). She claims that Mr Jones' list was "nowhere near" complete; items not mentioned included beds in all the bedrooms, wardrobes, dressing tables and a chest of drawers.

Mrs Alone was adamant that apart from the house being dusty, untidy and having clothing in heaps on the floor (because she had been sorting the clothing out) and although the house probably did look abandoned, all her furniture was still there when she called on 19 March 1987. Put simply, the Complainant's evidence was that the house was generally in good condition although dusty and untidy and it contained a substantial amount of furniture and other personal items. Mr Jones' evidence was that the place was dirty, full of rubbish, cockroach infested, obviously abandoned and what small amount of furniture and other items were there were worthless and unusable.

Mrs Alone gave her evidence with considerable feeling and, we think, honesty. But these

events did occur some four years ago, they were most distressing for her, and she would naturally have thought a lot about them since. It is normal for any person when reflecting on past events to build up a picture in one's mind and to speak from that rather than necessarily an actual recollection. We think Mrs Alone has in her mind a picture of her house as she had left it, that she did visit it from time to time, but probably not every day and that it is quite likely she had not been there on 19 March 1987. In the circumstances described in evidence it is quite likely that unknown to her the house had been occupied by squatters and/or ransacked, so it may be that many of the items in the Property had been removed before 20 March 1987 and what remained (or some of it) may well have been damaged. The photos taken by Mr Jones (limited though they were), the fact that the house was unsecured and the lengthy period during which the Complainant had not been living there all tend to support his evidence on this aspect.

It is necessary to consider the condition of the Property and of the goods in it, not only in relation to Mr Jones' decision to dump the latter but also in relation to the way in which he effected the repossession, because they were amongst the factors operating on his mind.

As to the repossession then, the question once again is whether that amounted to discrimination against Mrs Alone; Was she treated less favourably than a non-Aboriginal would have been in similar circumstances?

One might speculate greatly about that, but as we have said it is not for this Tribunal to speculate; it is a matter of what inferences can properly be drawn from the facts as we

find them to be. It is important in undertaking this exercise to consider the evidence in its entirety. It is unusual in cases coming before this Tribunal for there to be direct evidence of, for example, racial discrimination. Of its very nature that is ordinarily something which is manifested indirectly and proved (where it exists) by evidence normally called circumstantial. The decision of the High Court in Chamberlain v The Queen (1984) 153 CLR 521, 536; 51 ALR 225, 237, establishes that a Tribunal of fact should decide whether to accept the evidence of a particular fact not by considering the evidence directly relating to that fact in isolation but in the light of the whole of the evidence and can draw an inference from a combination of facts, none of which viewed alone would support that inference. (See also the Marriage of Michiels 14 FAM LR 587 at 591). Nor is it necessary for a fact itself to be proved to the requisite degree before it may be used as a basis for an inference adverse to a party (See Shepherd v The Queen 97 ALR 161 (High Court), in which Dawson J. observed that *"... the probity of the force of a mass of evidence may be cumulative making it pointless to consider the degree of probability of each item of evidence separately"* (at Page 165) and as McHugh J. observed (at Page 175) *"the cogency of the inference of guilt is derived from the cumulative weight of circumstances not of the quality of proof of each circumstance"*. It is important to appreciate, however, that discrimination cannot be inferred when more probable and innocent explanations are open on the evidence (Fenwick v Beveridge Building Products Pty. Ltd. (1985) 62 ALR 275; Erbs v Overseas Corporation Pty. Ltd. (1986) EOC 92-181; Department of Health v Arumugam (1988) VR 319.

The way in which the repossession was carried out (and the Complainant's goods disposed of) was quite unacceptable. It contrasted starkly with Homeswest's own policy.

The conclusion that Mr Jones deliberately decided not to contact Mrs Alone is inescapable. He had decided to sort this problem out once and for all and was not at all concerned about her nor her family. But was her Aboriginality a factor here or would he have acted the same way towards a non-Aboriginal family in similar circumstances? The evidence suggests he probably would have. To put it more correctly we do not think the Complainant has shown on the evidence that it is more likely than not that Mr Jones would not have acted the same way towards a non-Aboriginal family which he regarded as presenting the same problems.

This ground likewise is accordingly not made out.

Disposal of Goods

Mr Jones' single-minded determination to get rid of this problem as quickly as possible was manifest again here.

Even accepting that there may have been some damage to items such as cupboards, we are satisfied that was not so extreme as to make them totally unusable. Mrs Alone made no observation to that effect when she saw items of her furniture in the driveway on 20 March 1987. We are satisfied further that Mr Jones classified items as unserviceable without any proper investigation and when they could simply have been washed (clothes and kitchen utensils for example). At least one item (the kitchen table) was sent to the dump when on Mr Jones' own evidence it need not have been.

It is apparent that in assessing the utility of household items, Mr Jones was applying a very different standard to that applied by Mrs Alone.

This distinction was adverted to by Ms Stainton, who in her evidence drew attention to the fact that such assessments depend on what terms of reference one is using. As she said (T.83) *"If you're using the normal everyday middleclass Australian white type reference, its going to be different to what's acceptable by Aboriginal standards"*. She described Mrs Alone's furniture as acceptable by Aboriginal standards. She was speaking of the situation in about June 1986. Mrs Alone's evidence was that she had been able to gradually get better furniture over the period of the tenancy and so if anything it was likely to have improved in the meantime.

Overall, we are not satisfied all the property listed by Mrs Alone was in fact on the premises on 20 March 1987 and Homeswest cannot therefore be held responsible for the loss of what was not then there. On the other hand we are satisfied that the property which was there was not unserviceable nor of no use to Mrs Alone. The way in which Mr Jones dealt with and disposed of that was not only contrary to Homeswest policy but demonstrated a complete insensitivity towards and a lack of concern for the tenant. However sad a reflection this may be on him, we think the evidence does tend to show he would have behaved the same way had he been dealing with a *"troublesome"* white tenant with a similar history. Accordingly, this ground also fails.

Ms Patricia Harris (Member): Although I agreed generally with the reasons and ultimately come to the same conclusions as the Deputy-President and Mr Wyatt, I arrive at those conclusions in a somewhat different way.

In considering whether or not the Homeswest decision to refuse the transfer was discriminatory, the Act requires that a comparison is made between the treatment of Mrs Alone and her family with that of a non-Aboriginal family in similar circumstances (S.36(1)(d)). Given that a non-Aboriginal family is most unlikely to find itself in the circumstances confronting Mrs Alone and her family (that is, of being in a minority of one in a neighbourhood of residents from a different and more influential race), this section of the Act presented considerable problems of interpretation. In requiring that a comparison is made between the Complainant and a person of a different race in similar circumstances, allowance is not made for the possibility that the circumstances facing the complainant may themselves be substantially associated with his or her race.

Rather, therefore, than entertain the hypothetical and somewhat illusory comparison between Mrs Alone and a non-Aboriginal tenant in the same circumstances, I asked myself whether, on the balance of probabilities, a non-Aboriginal family's claims of racial harassment would have been treated similarly to those of Mrs Alone. This line of inquiry had the added advantage that a comparison could be made between Homeswest's actual reaction to the claims of the non-Aboriginal neighbours with its reaction to those of Mrs Alone.

The point of this comparison was to ascertain, in the first instance whether or not Homeswest's reaction to Mrs Alone's complaint, and more particularly their summary dismissal of her application for a transfer, was less favourable than their reaction to the complaints of the neighbours making substantially similar complaints in similar circumstances of neighbourhood tension. If, on the basis of the evidence available, Homeswest's reaction did indeed emerge as less favourable, it would then be necessary to determine whether this less favourable treatment was at least partly on the grounds of her

race. I turn first to the comparison between Homeswest's reaction to the claims of Mrs Alone and those of her non-Aboriginal neighbours.

In each case, allegations of harassment were made, and in each case it is clear that Homeswest had a measure of responsibility, even if the practical implications of such responsibilities were different. In more general terms, if neighbours complain about tenants, it was apparent from the evidence that Homeswest undertakes to protect them through the investigation of complaints, and through warning and even evicting the disruptive tenant. Should tenants be at risk from their (non-Homeswest) neighbours, the parallel obligations of Homeswest to its tenants may reasonably be supposed to include support, information, and even the consideration of transfer should the situation be severe enough to merit it.

While there are no clear rules about the reaction in each case, the general point is that Homeswest has a measure of responsibility to both its tenants and to the neighbouring non-tenants. Questions can therefore be asked as to whether or not these varying responsibilities were equally discharged in the case of Mrs Alone and her neighbours.

In making the comparison between Homeswest's reaction to the allegations of Mrs Alone and those of her neighbours (who were, it appears, neither Aboriginal nor Homeswest tenants), I acknowledge (a) the gravity of Mrs Alone's complaints, involving the harassment of her daughter and the daughter's consequent unwillingness to attend school, (b) the equally grave nature of the neighbours' allegations, and (c) Mr Jones' contention that it was not Homeswest's task to control the behaviour of people who were not its tenants.

While I accept Mr Jones' argument that Homeswest is not responsible for the behaviour of those who are not its tenants, and therefore that no investigation should have been undertaken purely for the purpose of remedying the alleged actions of the neighbours, the question of whether Mrs Alone's complaints and those of the non-Aboriginal families were treated with equal seriousness still remains.

The evidence suggested that neighbours' complaints were indeed taken seriously. They were investigated by Homeswest's officers, recorded on Mrs Alone's file, and were sufficient to place her tenancy in jeopardy. The reaction to Mrs Alone's complaints, were, as she pointed out in evidence, very different. The summary nature of the dismissal of her application for a transfer, the lack of any recorded discussion as to whether the complaints justified a transfer or not, both suggest that the complaints were not given equal weight.

Furthermore, in trying to explain why the request for a transfer was refused, despite the fact that it would have suited the neighbours as well as Mrs Alone, I reached the conclusion that Mrs Alone was in fact seen by Homeswest as the precipitant of the conflict. Neither housekeeping standards nor rental arrears appeared sufficient in themselves to justify the summary refusal of a transfer when neighbourhood tensions had become so intolerable on both sides. It therefore seems highly probable that Homeswest had decided that the Alone family was *responsible for,* rather than *part of,* the conflict; that matters would therefore improve if they and their visitors changed their behaviour; that to approve a transfer would be to reward anti-social behaviour. Such a reading makes sense of an otherwise somewhat incomprehensible decision and is consistent with the references to 'anti-social' behaviour on Mrs Alone's file, particularly when used as part explanation for the refusal of a transfer, and to the description of a 'special' as a

'soft option'.

Mrs Alone's complaints were thus not only treated less seriously than were those of her neighbours, they were also given a distinctly less favourable interpretation. This occurred even though Homeswest, by virtue of its own policy of not investigating the behaviour of non-tenants, had no firm basis on which to weigh the contending accounts. In reaching this conclusion, I am not making any judgements about the relationships between Mrs Alone and her neighbours or about the onus of responsibility for the conflict. The issue is simply to compare the reaction of Homeswest to the two sets of complaints given the options and information available to its officers.

In attaching very different weight to the respective complaints of Mrs Alone and her neighbours, Homeswest treated Mrs Alone less favourably than it treated the substantially similar complaints of the non-Aboriginal families. More specifically, equivalent treatment would have demanded serious consideration of the application for a transfer, a far reach from the dismissal 'out of hand' which the application in fact received. However, the question of whether this less favourable treatment was actually based on Mrs Alone's race still remains. Did Homeswest treat Mrs Alone's allegations less seriously at least partly *because* she was Aboriginal?

In attempting to resolve this question, I start with an awareness that the situation was one in which questions of race were implicated from the start - both Mrs Alone and many of her neighbours referred to race and a high visibility was attached to the Alone's Aboriginal tenancy in Balga Avenue. In such circumstances, the risk that partisan or stereotypical judgements will be brought to bear by those appealed to is always present, particularly when, as in this case, no sustained attempt is made to evaluate the contending

accounts. Furthermore, evidence of the attitudes and practices of Homeswest, as recorded on Mrs Alone's file, suggest that she was in fact viewed and treated in stereotypical terms - I refer in particular to the tone of the letter declining the request for transfer (15/7/86) and to the different coloured form used to record details about Aboriginal tenants with its requirement for a welfare inspection. Finally, Mrs Alone's own strong conviction that she was treated less favourably because of her Aboriginality, combined with her credibility as a witness, is of importance. It might have been difficult for her to record the cumulative signs which led her to this conclusion, but I have no difficulty in accepting her evidence that she did reach that conclusion.

It is questionable, however, whether these factors, taken cumulatively and considered as a whole, provide sufficient evidence to permit a conclusion that Homeswest's behaviour was discriminatory within the meaning of the Act. A critical issue here is the fact that the onus of proof lies with the complainant. In this context, even the cumulative nature of the picture drawn so far (including the nature of the situation and its inherent risk of generating partisan judgement; the unfavourable nature of the judgements that were made without adequate inquiry; the nature of the comments on Mrs Alone's file, and Mrs Alone's own convictions and credibility) do not ultimately seem sufficient to me to establish the legal case against the respondent.

In relation to the repossession of property I note the argument that Mr Jones would most probably have acted the same way towards a non-Aboriginal family in similar circumstances; and thus it has not been shown that it was not the circumstances of the case, rather than Mrs Alone's race, that caused Mr Jones to act so hastily and in contravention of Homeswest's own guidelines.

Accordingly to this view Mr Jones would have acted the same way towards a non-Aboriginal family whom he regarded as presenting the same problems - namely a history of trouble in relation to the tenancy and a record of neighbourhood conflict.–In my view, the difficulty with this interpretation is that it stops short of investigating what Mr Jones' interpretation of these 'same problems' appeared to be. In other words, it is not sufficient to argue that Mr Jones would have acted similarly towards a non-Aboriginal family whom he regarded as presenting the same difficulties without asking whether or not his interpretation of the situation was racially grounded. This means that while it might correctly be argued that Mr Jones would have acted in the same way towards a non-Aboriginal family whom he believed to cause similar neighbourhood conflict as he attributed to the Alone family, the case against Mr Jones would stand if it could be shown that his perception of that conflict, and his assessment of the Alone family's responsibility for it, was itself racially biased.

In asking whether or not this was so, a number of points emerge as significant. First, the evidence showed that the problems in question (most particularly the history of the tenancy and the complaints surrounding it), themselves involved questions of racial tension and conflict. As a consequence, any person involved in passing judgement and/or taking action was inevitably caught up in questions of race. This was the situation in which Mr Jones found himself when he decided to take action. Importantly, there had been no thorough attempt to provide Mrs Alone with an opportunity to defend herself against the neighbours' complaints, so Mr Jones' assessment and subsequent actions were based on the inadequate evidence at his disposal. His actions indicated not only his sense of urgency, but also his belief that the liability for trouble lay with Mrs Alone. (This can be inferred from the probability that normal procedures would have been observed had Mr Jones believed Mrs Alone to be largely innocent of the complaints levelled against

her).

In sum, then, in a situation evidently involving racial tension on both sides, Mrs Alone was seen by Mr Jones to be a sufficient liability to warrant his taking unusual action, and this perception held despite the lack of opportunity for Mrs Alone to respond to the allegations against her. The critical question which then emerges is whether this unfavourable assessment was related to Mrs Alone's race. The prima facie case suggests to me that it was; on the basis of inadequate information, Mr Jones, a non-Aboriginal, made an assessment and on its basis acted against Mrs Alone's interests and in favour of the non-Aboriginal neighbours. In this way, Mrs Alone's Aboriginal voice was 'less favourably' heard (that is, carried considerably less weight) than those of the non-Aboriginal complainants who spurred Mr Jones to action. Given the existence of this prima facie case, the lack of alternative explanations is of some importance and, in their absence, the possibility that race was a factor remains.

When the matter is taken further the likelihood persists. If it is asked *why* the non-Aboriginal voices carried more weight with Mr Jones than the interests of Mrs Alone, the fact that the neighbours' claims were far more numerous, vastly more influential, far better able to engage political pressure, emerge as key issues. Such things are not independent of race, and while I believe that Mr Jones would have been more influenced by indirect considerations such as these than by any direct animus towards Aboriginal people, the possibility that neither his perceptions nor his actions were racially neutral remains.

It is, however, again necessary to ask whether these factors, considerable as they may be are sufficient to establish the case against the respondent given the fact that the burden of

proof lies with the complainant. Ultimately, my conclusion is negative on this ground of the complaint too. The factors described above, while they certainly support Mrs Alone's complaint in the sense of lending plausibility to it, remain speculative: they **suggest the *likelihood*** that Mr Jones was influenced by questions relating to race but do not demonstrate, even on the balance of probabilities, that he *was* in fact so influenced.

Finally, in relation to the question of repossession, I note the argument that Mr Jones might have treated a non-Aboriginal family with an equal lack of concern had he been dealing with a 'troublesome' white tenant with a similar history. In considering this issue, I again believe that the operative question lies one step further back, and that it is therefore necessary to consider the grounds on which Mrs Alone was considered 'troublesome' by Mr Jones together with the evidence used by him to reconstruct the history of the tenancy.

My reasoning here follows the same path as that taken in relation to the repossession of property. I thus think it probable that Mr Jones' hasty disposal of Mrs Alone's goods was caused by his perception that she was the cause of considerable tension and conflict; that, given the lack of any sustained attempt to establish Mrs Alone's point of view, this assessment was likely to be related to Mrs Alone's race; and that the voice of the non-Aboriginal neighbours would have carried more weight because of factors associated with their majority racial status. However, in this instance also I remain unconvinced that these factors were sufficient to demonstrate that Mr Jones did in fact act on the basis of Mrs Alone's race. Without the support of additional evidence they simply remain plausible reasons for believing that he might have done so.

In this matter one further consideration is relevant. Ms Stainton's evidence concerning

the quality of Mrs Alone's furniture, and her suggestion that Aboriginal and 'middle class white Australian' points of reference were different, indicate the possibility that Mr Jones' evaluation could have been influenced by his race. I accept Ms Stainton's general proposition and therefore come to the view that in allowing a vital decision concerning the disposal of property to be so summarily taken without the presence and advice of an officer of her own race, Mr Jones greatly increased the risk that his determinations would reflect cultural bias. There was, however, no additional evidence that it was racial difference rather than, say socio-economic difference and/or the hast to be rid of the situation, that motivated Mr Jones. I therefore conclude that this line of inquiry does not establish the Complainant's case.

For all of the reasons provided above I conclude that the Complainant's case is not substantiated on the basis of the available evidence.

Deputy President: The formal finding of the Tribunal is that for the reasons already expressed the complaint is not substantiated in any of the particulars relied upon and is accordingly dismissed.

There will be no order as to costs.

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