

AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

CITATION: JAN MONTESINOS Complainant and DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY Respondent ACTDT 5 (28 NOVEMBER 2006)

DT05/494

Catchwords: Discrimination in employment - strike out application – application to refer complaint to tribunal out of time

Discrimination Act 1991 ss 72, 81(2)(a), 81(2)(c), 81(4)(a), 81(4)(b)
Human Rights Commission Act 2005 ss 115, 116
Legislation Act 2001 s146

Firestone and Legal Aid Office (ACT) [2006] ACTDT 3
State Electricity Commission –v- Rabel & Ors [1997] EOC 92/875

Tribunal: Mr G C Lalor, Deputy President

Date: 28 November 2006

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT05/494

RE: **JAN MONTESINOS**
Complainant

AND: **DEPARTMENT OF JUSTICE
AND COMMUNITY SAFETY**
Respondent

ORDER

Tribunal : Mr G Lalor, Deputy President

Date : 28 November 2006

Order :

THE TRIBUNAL ORDERS that the complaints be referred back to the Discrimination Commissioner to be dealt with according to law.

.....
Deputy President

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT05/494

RE: **JAN MONTESINOS**
Complainant

AND: **DEPARTMENT OF JUSTICE AND
COMMUNITY SAFETY**
Respondent

REASONS

28 November 2006

Mr G C Lalor, Deputy President

The Complaint

1. On 9 March 2006 the complainant lodged a completed Complaint Form with the Australian Capital Territory Human Rights Office. In that she alleged that the following persons had discriminated against her in her employment:
*“James Ryan (Director)
Department of Justice and Community Safety

Howard Jones (Superintendent)
Belconnen Remand Centre, Symonston Temporary Remand

Gordon Collins (Custodial Officer)
Belconnen Remand Centre.”*
2. The expressed reason for the perceived unfavourable treatment by the three named persons was:
“Because I, a subordinate female, did not obey a superior male’s direction.”
3. The allegation was that the unfavourable treatment received in her employment by the complainant was because of her sex. The complaint was particularized as follows:
“I was not rostered to act at higher duties in the absence of the CO3 on leave. It is normal protocol to roster the CO2 (my substantive rank) to this position. This is illustrative of ongoing discriminatory management and the selective application of protocols.”

4. The allegation was of an ongoing discriminatory practice in that on five occasions, June 1999, October 1999, January 2000, 9 March 2004 and 10 March 2004 the complainant was not so rostered in the absence on leave of a Corrections Officer Grade 3.
5. The complainant alleged that Superintendent Howard Jones was ultimately responsible for the rostering of Custodial Officers, the Director had *“enabled this workplace environment. He had suppressed information that cleared me of ‘refusing direction’. This reflected on my ability and capacity as a manager and my credibility with upper management.”* The complaint against Corrections Officer Collins was that he had:
*“... recorded an adverse comment on my workplace assessment (‘refused direction’) that could not be substantiated.
Director James Ryan protected Gordon Collins’ rights and aspirations to the detriment of my rights and aspirations.”*
6. The complainant alleged financial loss, loss of credibility as a manager, loss of health and loss of a career. She sought, among remedies, compensation.
7. The complainant filled a significant volume of documentation in support of her allegation. In that there is evidence of an ongoing, often bitter, dispute between the complainant and the three named persons alleged to have acted in a discriminatory manner towards her.
8. On 24 March 2005 the ACT Human Rights and Discrimination Commissioner (“the Commissioner”) wrote to the complainant noting
“In your complaint, only two of the incidents you refer to occur within the 12 month statutory time limit for lodging a complaint, namely your not being rostered as a CO3 on 9 and 10 March 2004. In your complaint you appear to draw a link between these incidents and a previous incident concerning comments made on your personnel file. From the information you have provided it appears that the incident concerning your personnel file had been resolved with comments being removed from your file in December 2003.”
9. The complainant was invited to submit further evidence of the nexus between these alleged discriminatory practices and why it was alleged that the incidents on 9 and 10 March 2004 were so linked.
10. The Commissioner sought a response to the complainant from the Chief Executive of the departments of Justice and Community Safety (“the Department”). The complainant lodged a further statement and documentation on 5 April 2005. On 8 April the complainant filed further material of substantial volume with the Commissioner.
11. The Department filed a response on 12 April 2005 pending receipt of further statements from its employees. On 22 April the Commissioner received a fuller answer from the Department in which it was noted that many of the issues had previously been agitated either with the Department or through external review. It was noted that there had not in any of those reviews been any complaint that the complainant had been treated unfavourably because of her sex. The Department effectively denied that there had been any

discriminatory treatment of the complainant and set out instances when the complainant had been selected to act on higher duties and set out the process under which such acting appointments were made.

12. The complainant filed on 21 April a response to the Department's reply of 12 April and on 2 May 2005 a further response to the Department's reply of 21 April 2005 received on 22 April. In that she takes issue with the majority of the Department's assertions, with much of her references to conduct she examples as being discriminatory relating to incidents that occurred prior to March 2005. In her filed document the complainant says by way of conclusion

"The fact of my being female has been integral to Departmental management decisions in my general employment, and in responses I have received re the tabling and resolution of issues. My record has been sullied by Director Ryan's direct and indirect management actions. In response to this, he has resorted to assertions instead of plausible alternative explanations. I stand by my record of integrity and ethical conduct."

13. The complainant at that time also filed further documentation in support of her assertions. One such purported document was a statement from Custodial Officer Buck dated 18 April 2004, which reads:

"As I was rostered on Recreation Leave from Saturday 13 March 2004, which was our next rostered shift, Ms Montesinos had been offered the position of acting Custodial Officer Grade 3 for the period of my absence. On Wednesday 10 March 2004 I was instructed by Deputy Superintendent A Johnston to seek a decision (sic) from Ms Montesinos before the end of shift on the acting in Higher Duties. At 18.45 on that day I asked Ms Montesinos for her decision (sic) and she informed me that she was still undecided as she felt that management may be trying to 'set her up' and that she would contact Deputy Superintendent A Johnston the next day and inform him of her decision (sic). It is the usual protocol to offer the position of acting Custodial Officer Grade 3 to a substantive Custodial Officer Grade 2."

14. The complainant filed a statement from Mr Craig Winfield who shared a house with her from February 1997 to September 2002. He was not, apparently, a Custodial Officer. In that, apart from commenting on his observations of staff behaviour resulting from attending "a function with a number of remand centre staff at one officer's house" and playing "in some sporting teams with some officers", he asserted

"Mr Ryan apparently told a female officer, not Ms Shaw, that women don't belong in corrections."

15. The genesis of this statement by Mr Winfield was, it would appear in the absence of other evidence, a statement to him by the complainant. In passing the statement, if made, would not comply with the regulatory requirements for the adequate supervision of female detainees. Such would be totally unacceptable from the Director of Corrective Services. The statement is unsourced and uncorroborated. The circumstances in which it is alleged to have been made are not provided and I reject the statement as having no foundation.

16. The Department on 3 May 2005 advised the Commissioner that *“custom and practice was not strictly adhered to”* in relation to the filling of the CO3 on higher duties following Custodial Officer Buck’s absence on leave in March 2004. It was said, effectively, that there was something sinister in this deviation from custom and practice. The Department, on the other hand, considered it appropriate given previous concerns expressed by the complainant as set out in Mr Buck’s statement of 18 April 2004. She was asked to confirm her willingness to act on higher duties rather than being automatically appointed to so act.
17. The complainant on 6 May 2005 filed a response to the Department’s reply of 3 May 2005. In that the complainant states that her concern in relation to the filling of Custodial Officer Buck’s position was that she had not been rostered to fill it given she was the next senior appropriate officer available. At page 2 of that response the complainant states:
- “a) *This statement implies that ‘concerns expressed by Ms Montesinos’ was the reason for my name not recorded as CO3. This is not so. I approached Mr Buck on 10 March 2004, the shift prior to his leave commencing, and enquired who was to be CO3 as no-one was recorded to act as CO3. I expressed concerns **because** I was not recorded as CO3. Later that day, I was approached to act as CO3 in CO3 Buck’s absence. I then expressed concerns about why my name had not been recorded, the rating of ‘unsuitable’ and previous inconsistent management I had encountered. I introduced these concerns on 10 March 2004, **after** I was approached to act as CO3 for CO3 Buck’s absence. The Department is obfuscating.*
- b) *This statement implies that I had been offered the position of CO3 for CO3 Buck’s absence, had expressed concerns, and my name was not recorded as CO3 because I was being afforded time to consider the position. This statement implies that the protocol of HDAing the CO2 to the CO3 position had been adhered to, that I knew I was to be rostered as CO3, and that I had stalled the process. This statement implies an extended timeframe for consideration. This is not so. On 10 March 2004, the shift prior to CO3 Buck’s leave commencing, I was approached to work for the period of CO3 Buck’s absence, **after** I had enquired as to who would be the CO3. I was given until the end of that shift to make a decision.”*
18. The Commissioner by letter dated 9 May 2005 advised the complainant that as the incident relating to temporarily filling Custodial Officer Buck’s position on an acting basis from 10 March 2004
- “is the only incident you have outlined in your complaint that would come within the time limit covered by the Act, all other incidents being well outside the 12 month time limit, and this issue does not appear to raise issues of discrimination under the Act, I am declining your complaint on the grounds of sex as lacking in substance and earlier incidents as being out of time under subsections 81(1) and 81(2)(a) and (c) of the Act.”*

19. The Commissioner further advised the complainant that
- “Under the Act, where I decline to take further action on a complaint, the complainant has the right to require me to refer the complaint to the Discrimination Tribunal. The Tribunal has been established to conduct public hearings of discrimination complaints and is presided over by a Magistrate. You now have sixty days from the date of decision to decline your complaint in which to exercise your right. This means that to have your complaint sent to the Tribunal for hearing, you will need to write to me by **8 July 2005**, requesting that I refer your complaint. If, by **8 July 2005**, you have not asked me to refer your complaint to the Tribunal, I will dismiss the complaint and take no further action in relation to it. If your complaint is dismissed in this way, you may apply direct to the Tribunal for the complaint to be heard if exceptional circumstances prevented you from requiring the referral of me.”*
20. The Commissioner referred this matter to the Tribunal on 27 October 2005 and provided the documentation it held in this complaint.

The Strike Out Application

21. The Tribunal, through the President, on 3 March 2006 ordered that the respondent file by close of business on 28 April 2006 any application to strike out the complainant's application. This was done on 5 April 2006 and the respondent replied on 21 June 2006. The parties argued that the Tribunal should decide this matter on the papers filed with it and the complainant lodged additional material on 17 October 2006 with the Tribunal stamp clearly wrong in alleging the filing date to be 17 October 1999.

The Law applicable

22. The *Human Rights Commission Act 2005* which became effective from 1 November 2006 amended the provisions of the *Discrimination Act 1991*. The Act contains transitional provisions and one such is Section 115, which provides:

“Undecided applications to discrimination tribunal to strike out complaint

- (1) *This section applies if—*
- (a) *a person applied to the discrimination tribunal under the pre-amendment Discrimination Act, section 89 to strike out a complaint; and*
 - (b) *immediately before commencement day—*
 - (i) *the application had not been withdrawn; and*
 - (ii) *the tribunal had not decided the application.*
- (2) *The application is taken to have been made under the*

Discrimination Act 1991, section 79 (Application to strike out complaint)."

23. Section 116 relates to other applications made to the Tribunal and provides:

"Other undecided applications to discrimination tribunal

- (1) *This section applies if—*
 - (a) *a person applied to the discrimination tribunal under the pre-amendment Discrimination Act; and*
 - (b) *the application was not an application to strike out a complaint or to review a requirement made by the previous discrimination commissioner; and*
 - (c) *immediately before commencement day—*
 - (i) *the application had not been withdrawn; and*
 - (ii) *the tribunal had not decided the application.*
- (2) *The application is taken to be an application that may be heard by the discrimination tribunal.*
- (3) *The complaint to which the application relates is taken to have been made under this Act when the complaint was made."*

24. The law relevant to the Commissioner for considering this complaint is contained in the *Discrimination Act 1991* before the amendments came into effect. Part 8.2 of the Act provides for complaints to be lodged with the Commissioner (Section 72) and the Commissioner must investigate it to decide "*whether the complaint can be dealt with under this Act*" (Section 73(a)) and "*(b) whether the Commissioner may decline the complaint*". (Section 73(b)). If the Commissioner as a result of her investigation declines a complaint, as she did here, on the basis that the complaint was lacking in substance under subsection 81(2)(a) she must give written notice of the decision to the parties no later than 60 days after the lodgment of the complaint.

25. Subsection 81(4) provides that a notice under subsection 81(2)(a) must include a statement to the effect that

- "(a) *if, within 60 days after the date of the notice, the complainant does not require the commissioner to refer the complaint to the tribunal, the commissioner will dismiss the complaint and take no further action in relation to it;*"

Referral to the Tribunal

26. As outlined above the date of the notice to the complainant notifying her that her complaint was dismissed under subsection 81(2)(a) was dated 9 May 2005. The Commissioner advised the complainant that should she not request that the Commissioner refer her complaint to the Tribunal by 8 July 2005 the Commissioner would (under subsection 81(4)(a) of the Act) dismiss the complaint and take no further action in relation to it. The complainant by letter dated 8 July 2005 requested that the Commissioner review her decision.
27. In my view the Commissioner has not complied with the provisions of the Act by referring the matter to the Tribunal. Sixty days from the date of the letter to the complainant was the close of business on 8 July 2005. The complainant's request of the Commissioner was within the statutory period.
28. The request of the Commissioner was to review her decision. That is clear from the applicant's submission of 8 July 2005 where, after responding to the Commissioner's determination of 9 May 2005, in the final paragraph stated:
"I believe you have erred in not considering Director Ryan's letter to the Commissioner for Public Administration in your determination of 9 May 2005. I trust that you can review your determination on this basis."
This request is clearly not a request to refer the matter to the Tribunal.
29. In documents forwarded to the Tribunal a file note from the Commissioner's Office is included indicating that the complainant was contacted on 13 July by telephone and advised that the Commissioner had no legislative power to review her decision to decline the complaint. The complainant indicated that she wished her complaint to be referred to this Tribunal.
30. The applicant further corresponded with the Commissioner on 15 July and said:
"I requested that the Commissioner review her decision because she had not considered Director James Ryan's explanatory letter to the Commissioner for Public Administration in her ruling. Director Ryan's explanation of events and practices to the Commissioner for Public Administration is at odds with the reality of what has occurred to me, and is integral to proof of Director Ryan's discriminatory management. I did not understand that the Discrimination Commissioner could not review her decision, and that the matter must therefore proceed to the Tribunal for consideration. I am writing to confirm that review was the intention of my letter of 8 July 2005, and I request that the matter be referred to the Tribunal so that this may occur."
31. It is clear from the documents that the complainant was under the impression that she was entitled to request the Commissioner to review her decision to decline to take further action relating to her complaints. At no time during the statutory period did she request the matter to be referred to the Tribunal. The Commissioner's advice of 9 May 2005 was clear and unequivocal. The complainant, whilst not legally represented, presents as an intelligent, well-

educated woman who has very competently and cogently presented her case. Her verbal request of 13 July and her written request of 15 July were out of time.

32. There is no power in the Commissioner to extend this time limit. The only power to refer a complaint beyond this time limit is contained in subsection 81(4)(b) of the Discrimination Act 1991 which provides:
“should the complaint be so dismissed, the complainant may apply to the tribunal for the complaint to be heard if exceptional circumstances prevented him or her requiring the referral.”
33. The complainant has made no such application.
34. In my view without having the benefit of the matter being fully argued before me, it would seem that the Commissioner has not complied with subsection 81(4)(a) of the Act and dismissed the complaint when she had not by the close of business on 8 July 2005 been requested to refer the matter to the Tribunal. The provision is mandatory and does not allow any further discretion in the Commissioner. Section 146 of the *Legislation Act 2001* provides:
*“(2) In an Act or statutory instrument, the word **must**, or a similar term, used in relation to a function indicates that the function is required to be exercised.”*
35. I am of the view that the file should be returned to the Commissioner to be dealt with according to law. However, I will not conclude my findings on this point alone.

Reasons for Decision on substantive issue

36. The principles to be applied in determining whether a matter referred to the Tribunal should be struck out are set out in the Tribunal's decision of 25 October 2006 in the matter of Firestone and Legal Aid Office (ACT) [2006] ACTDT 3 when the Deputy President, Mr M H Peedom, said
“10 In determining whether a complaint should be struck out pursuant to section 89 of the Act, the Tribunal ordinarily accepts that it should be assumed that the factual allegations relied on by the complainant are true and such inferences in favour of the complainant as are open should be drawn. If, however, it is clear beyond doubt that the complainant has no arguable case which should be allowed to be resolved at a full hearing, a complaint may be dismissed as lacking in substance (see State Electricity Commission v Rabel & Ors [1997] EOC 92/875.
11. The power to dismiss a claim as without substance is required to be exercised with considerable caution (see Clean Ocean Foundation v Environment Protection Authority (2003) 20 VAR 227 at 230-231. See also Lucy Cooper and ACT Housing (DT03/18 dated 22 June 2004).”

37. The essence of the complaint before me is that the complainant has suffered discrimination because of her sex at the hand of the three persons named in her original complaint on 9 March 2005. It was alleged that this discriminatory conduct culminated in her not being rostered to fill a vacant position as a Custodial Officer Grade 3 whilst the occupant was on leave. Under subsection 81(2)(c) a relevant ground for declining a complaint by the Commissioner is where
- “the complaint relates to an act, or the last in a series of acts, that took place more than 12 months before the lodgment of the complaint;”.*
38. The Commissioner effectively found that the allegation relating to the events of 10 March 2005 did not raise issues of discrimination. She found that the complainant was offered the higher duties from 10 March 2005 and that she declined to take up the offer. In relation to the other complaints the Commissioner found that they did not fall within the ambit of subsection 81(2)(c). The Tribunal has the whole complaint referred to it for decision and not the decision of the Commissioner to review. There is no such time restriction placed on matters to be considered by the Tribunal as there is on the Commissioner under subsection 81(2)(C). I note in passing that that time limit has now by the recent amendments been extended to two years.
39. The evidence before me indicates clearly that as at 10 March 2005 the complainant was invited to take up the available acting position for the duration of Mr Buck’s absence on leave. The complainant did not take up this offer. It has been admitted that regular procedure was not followed in the filling of this position. This irregularity did not amount, in my view, to unfavourable treatment against the complainant. She was offered the appointment but declined it. Her assertion contained in her original complaint that she was not rostered to act in higher duties is technically correct but the ultimate reason for her failure to act in the position was her refusal to be so rostered.
40. From the evidence contained in the documents before the Tribunal it is obvious that the relationship between the complainant and her superiors was not a happy one, at times bordering on acrimonious and bitter. From the evidence it seems that there were a number of female custodial officers employed within the Department. There is no evidence of any complaint that any of them were discriminated against because of their sex and it is clear from the evidence that they acted in higher positions on numerous occasions. The fact is that this complainant was not rostered as of right to act in a position at a higher level before management asked whether she would accept the position. This was brought about because of the lamentable situation that had arisen between the parties.
41. I am of the view that even had this referral to the Tribunal by the Commissioner been in time as provided for in the Act the complaint must be dismissed as it has not been substantiated. There is no evidence available that any Departmental Officer engaged in discriminatory behaviour towards the complainant based on her sex. The complaints made against each of the three named officers relate to incidents that have arisen, in my view, primarily because of personality differences and ineffective management practices. I am confident that the parties would acknowledge as they have in part that each instant could have been handled more effectively which would result in the diminution of the residual acrimony and mistrust.

Management practices that do not amount to discrimination as defined under the Act are not the subject of the Tribunal's jurisdiction.

42. I am satisfied that the application under Section 89 of the Act should be granted on the basis that the Commissioner had no legislative power to refer the matter to the Tribunal. I make this finding notwithstanding it has not been pleaded by the applicant for relief under Section 89 of the Act. I am further satisfied that had this not been so it is "*clear beyond doubt that the complainant has no arguable case which should be allowed to be resolved at a full hearing*" State Electricity Commission v Rabel & Ors (supra) and would be dismissed as lacking in substance.

Order

43. The file be returned to the Commissioner to be dealt with according to law.

I certify that this and the 9 preceding pages are a true copy of the decision and reasons for decision herein of Mr G C Lalor, Deputy President.

S M Welsh
Associate
Dated: 28 November 2006