

AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

CITATION: FIRESTONE AND LEGAL AID OFFICE (ACT) [2006] ACTDT 3 (25 OCTOBER 2006)

DT06/242

Catchwords: Discrimination in the provision of services – application to strike out complaint – causal connection between unfavourable treatment alleged and complainant's attribute – whether complainant victimised – whether proceedings vexatious.

Discrimination Act 1991, ss 68, 73, 89

Clean Ocean Foundation v Environment Protection Authority (2003) 20 VAR 227

Legal Aid Commissioner (ACT) & Ors v Grundy [1999] ACTSC 318

Lucy Cooper and ACT Housing (DT03/18 dated 22 June 2004)

State Electricity Commission v Rabel & Ors [1997] EOC 92/875

Tribunal: Mr M H Peedom, Deputy President

Date: 25 October 2006

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT06/242

RE: **MICHAEL FIRESTONE**
Complainant

AND: **LEGAL AID OFFICE (ACT)**
Respondent

RULING

Tribunal : Mr M H Peedom, Deputy President

Date : 25 October 2006

Ruling :

The application by the respondent pursuant to section 89 of the Discrimination Act 1991 to strike out the complainant's application is dismissed.

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Deputy President

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT06/242

RE: **MICHAEL FIRESTONE**
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REASONS

25 October 2006

Mr M H Peedom, Deputy President

The strike out application

The respondent in this case has made an application pursuant to section 89 of the Discrimination Act 1991 (**“the Discrimination Act”**) to strike out the complainant’s complaint of unlawful discrimination and victimisation on the grounds that the complaints are lacking in substance and misconceived. In particular, the respondent has contended that the complaint of discrimination alleges no facts that establish a causal connection between any treatment of the complainant by the respondent and the attribute which affects the complainant nor does the complaint allege facts that could amount to the imposition of a condition or requirement that had the effect of disadvantaging the complainant that was unreasonable in the circumstances.

2. In relation to the complaint of victimisation, the strike out application contends that the complaint alleges no facts that could constitute treatment of the complainant within the meaning of section 68 of the Discrimination Act.

3. The strike out application also contends that the complaint of discrimination and victimisation should be dismissed on the ground that it is vexatious, being made for an improper purpose.

The complaint

4. The complainant’s complaint was lodged with the Discrimination Commissioner on 1 December 2005. It alleged that the complainant had been treated unfavourably by the respondent because of a disability, which he described as “psychological”. He specified the provision of services as the area in which the unfavourable treatment occurred. He alleged that he had been victimised because he had made a discrimination complaint.

5. The complainant attached to his complaint a list which detailed 15 incidents which were said to be the particulars of his complaint.

6. An investigation of the complaint was undertaken by the Discrimination Commissioner pursuant to section 73 of the Discrimination Act. The documents created

by and provided to the Discrimination Commissioner in the course of her investigation were relied upon by the complainant as containing factual information that supported his complaint. The complainant also relied upon factual information contained in documents lodged by him with the Tribunal pursuant to directions given by the Tribunal on 30 June 2006 and 15 August 2006 and other documents he lodged with the Tribunal otherwise than in accordance with its directions.

7. At the hearing of the strike out application the Tribunal admitted in evidence on behalf of the respondent a written statement of Ms L K Crebbin, a statutory partner of the respondent. Her statement was relied upon in support of the respondent's contention that the complainant's complaint constituted an abuse of the process of the Tribunal.

Reasons for decision

8. The material relied upon by the complainant mainly comprises correspondence between him and the respondent and a brief description of the incidents that he complains involved unfavourable treatment of him because of his disability and the victimisation of him. The absence of any written statement or narrative of events in the material lodged by the complainant with the Tribunal creates difficulty in understanding the complainant's complaint and in identifying the evidence capable of supporting some of the allegations made by him.

9. The complainant informed the Tribunal at the hearing of the strike out application that the Discrimination Commissioner had demonstrated an understanding of his complaint. A letter dated 23 December 2005 to the complainant advising why she had decided to decline to take further action in respect of the complaint contains a summary of some of the complaints made by the complainant. The letter states:

In your complaint, you briefly describe a range of events, which you say occurred between February 2003 and September 2005. Most of the events appear to involve your dissatisfaction with Legal Aid's handling of your legal matters, in particular not being consulted or informed about what was occurring with your cases apparently involving the University. In addition you say "(your) solicitor said that if (you) didn't accept the offer, he would recommend that your grant-of-aid be terminated", and that in March 2003 "various solicitors wrote about (you) in terms which n o-one with mental health problems should have to put up with". You say in March 2004 you took over you [sic] own case and on inspecting the Legal Aid files "came across the emails from March 2003" which I understand contained the 'terms' you object to. You claim in September 2005 "the C.E.O. wouldn't discuss (your) concerns about Legal Aid's treatment of (you), and insisted that (you) re-apply for a grant of aid".

10. In order for the complaint to be substantiated there would need to be some evidence favourable to the complainant's contentions which, taken at their highest in favour of those contentions, would render them seriously arguable: Legal Aid Commissioner

(ACT) & Ors v Grundy [1999] ACTSC 318. 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).

12. Although the letter from the Discrimination Commissioner to the complainant does not appear to contain an exhaustive statement of the matters about which the complainant complains, it is sufficient for the purpose of determining what decision the Tribunal should arrive at in relation to the respondent's application to address the material comprising emails contained on the respondent's files from March 2003 that contained the terms which the complainant objected to. The files containing the emails were apparently provided by the respondent to the complainant for inspection when the complainant ceased using the respondent's services to assist him with the continuation of the conduct of litigation that he was involved in.

13. In an email message from an officer of the respondent to another of its officers the following is said:

I guess a referral to the [Mental Health Tribunal] for fitness to plead could be done, but I note your comments, Don, that you think his mental health problems are controlled and he is simply following his own agenda. I wonder if a referral is just building in delay.

I expect that if a person steadfastly refuses to follow advice then we should terminate aid, but again the issue of his mental health must be taken into account.

The reason counsel was involved etc. was for the wider implication of the meaning of workplace orders. Does this latest round of ridiculous behaviour on the part of the client mean that the argument is no longer practically worth running in this case?

Linda, I am concerned that there appeared to be no professional courtesy extended to Don when he was asking for the matter to be stood down for only an hour. What do you think? I would like to devise a plan to let Ms Fryar know that we are unhappy. It is a pity that the client here is such a dick head – it is not a good vehicle to run important arguments.

14. The email message appears to have been written in a context that includes consideration being given as to whether the complainant should continue to receive the provision of legal assistance by the respondent. It contains a clear acknowledgement of the fact that the complainant has an attribute of the kind claimed by him. It contains a comment that is disparaging of the complainant and liable to lower him in the estimation of the persons to whom the email message was sent and any other person with access to the file. It is arguably open to be inferred from the disparaging description of the complainant that the adverse assessment made by one of the respondent's officers of the complainant's personal characteristics was a matter that might be taken into consideration in determining whether he should continue to be the recipient of legal assistance by the respondent.

15. Although the material before the Tribunal does not clearly explain the nature of the complainant's psychological problem, the correspondence from the respondent to the complainant acknowledges that there are problems associated with the complainant's mental health. The respondent's officer's comment about the complainant is a clear reference to an aspect of his mental capacity.

16. In my opinion, there is arguably a connection between the complainant's claimed attribute and the comment made about him by the respondent's officer. It follows that there is an arguable causal nexus between the complainant's claimed attribute and the treatment of him by the respondent and he should be given the opportunity to have his complaint of discrimination heard in the usual way.

17. As to the respondent's contention that there are no facts alleged by the complainant that could constitute treatment of the complainant within section 68, I note that the conduct necessary to establish a complaint under section 68 is subjecting a person to a detriment on the grounds of the making of a complaint under the Discrimination Act or other grounds specified in subsection (1) of section 68 or the belief by the respondent of the existence of such grounds.

18. The statement of Ms Crebbin provides evidence that, as from 7 November 2004, she had a belief that the complainant had in mind the possibility of making a complaint against the respondent under the Discrimination Act. He alleges that in September 2005 he was met with a refusal by the respondent's officers to discuss his concerns about the respondent's treatment of him. Taken at its highest, the complainant's allegation is capable, in my view, of involving the complainant being subjected to a detriment.

19. The respondent's contention that the proceedings in the Tribunal are vexatious is based upon the claim that the evidence shows that they were instituted not for the purpose of prosecuting them to a conclusion but to use them as a means of obtaining some advantage for which they were not designed or some collateral advantage beyond what the law offers.

20. There is obviously a difficulty in too readily imputing a purpose of the conduct of a person with an attribute of the kind which is acknowledged by the respondent. More

significantly, it seems to me, any finding by the Tribunal as to the purpose of the complainant in initiating the proceedings may be affected by an assessment of the evidence related to the history of dealings between the complainant and the respondent. It would be premature, in my view, to exclude consideration of matters raised at the hearing of the complaint from consideration of the respondent's contention.

21. I therefore conclude that the respondent's application to strike out the complaint should be dismissed.

**AUSTRALIAN CAPITAL TERRITORY
DISCRIMINATION TRIBUNAL**

APPEARANCE DETAILS

To be completed by Member's Staff

FILE NO: DT06/242

COMPLAINANT: MICHAEL FIRESTONE
RESPONDENT: LEGAL AID OFFICE (ACT)

COUNSEL APPEARING: **COMPLAINANT:**
RESPONDENT: DR D JARVIS

SOLICITORS: **COMPLAINANT:**
RESPONDENT: ACT GOVERNMENT SOLICITOR

OTHER: **COMPLAINANT:** SELF
RESPONDENT:

TRIBUNAL MEMBER: MR M H PEEDOM, DEPUTY PRESIDENT

DATE OF HEARING: 20 OCTOBER 2006 **PLACE:** CANBERRA

DATE OF DECISION: 25 OCTOBER 2006 **PLACE:** CANBERRA

COMMENT:
