

AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

CITATION: WHITING AND ACT HEALTH AND CALVARY HEALTH
CARE (ACT) LTD [2008] ACTDT 1 (4 MARCH 2008)

DT05/211, DT05/572 and DT05/573

Catchwords: Discrimination in employment – disability – complainant employed by private hospital as mental health nurse – complainant had previously taken voluntary redundancy from ACT government due to back injury – private hospital treats public patients under arrangement with ACT government – complainant refused shifts in public mental health ward – whether hospital's conduct was because of disability.

Discrimination in employment – disability – damages – ACT government admitted liability – complainant claimed damages for lost wages, medical expenses and general damages – principles of assessment of damages for discrimination.

Discrimination Act 1991, ss 4A, 5AA, 8, 10, 99

IW v Perth (1998) 191 CLR 1

Purvis v NSW (2003) 217 CLR 92

Hall v A & A Sheiban Pty Ltd and ors (1989) 20 FCR 217

Alexander v Home Office [1988] 2 All ER 118

Re Marshall and Discrimination Commissioner & ors [1998] ACTAAT 287

Walker v Advance Supermarkets [2000] ACTDT 5

Butcher v The Key King Pty Ltd [2000] ACTDT 3

Lewin v ACT Health & Community Care Service [2002] ACTDT 2

Hughes v Car Buyers Pty Ltd [2004] FMCA 526

Gama v Qantas Airways Ltd (No 2) [2006] FMCA 1767

Planet Fisheries Pty Ltd v La Rosa (1969) 119 CLR 118

Spencer v Dowling [1997] 2 VR 127

Redden v Forde [1998] ACTSC 42

Bloomfield v Westco Jeans Pty Ltd [2001] ACTDT 4

Kilgariff v Aerial Taxi Cabs Ltd [2001] ACTDT 3

Nester v ACT Fire Brigade [2004] ACTDT 2

H Luntz, Assessment of Damages for Personal Injury and Death, 4th ed, 2002

Tribunal: Mr R J Cahill, President

Date: 4 March 2008

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT05/211
DT05/572
DT05/573

RE: **JUDY WHITING**
Complainant

AND: **ACT HEALTH**
First Respondent

AND: **CALVARY HEALTH CARE
(ACT) LTD**
Second Respondent

ORDER

Tribunal : Mr R J Cahill, President

Date : 4 March 2008

THE TRIBUNAL ORDERS:

1. That the Respondent ACT Health pay the Complainant Judy Whiting the sum of \$2,500 by way of compensation for the loss and damage suffered as a result of the unlawful discrimination of the Respondent.
2. That the complaint against the Respondent Calvary Health Care (ACT) Ltd be dismissed on the ground that it has not been substantiated.

.....
President

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT05/211
DT05/572
DT05/573

RE: **JUDY WHITING**
Complainant

AND: **ACT HEALTH**
First Respondent

AND: **CALVARY HEALTH CARE
(ACT) LTD**
Second Respondent

REASONS

4 March 2008

Mr R J Cahill, President

1. This case concerns three applications, one alleging victimisation and two alleging discrimination on the basis of disability contrary to the *Discrimination Act 1991* (ACT) (the Act). On 12 February this year I announced my decision orally and indicated I would provide full written reasons later. I now provide those reasons.

Parties

2. The Complainant in all three matters is Judy Whiting, a Registered Nurse level 1 who works in the mental health care field. At the time she made the complaints, she was employed casually at Hyson Green, a mental health facility at Calvary Hospital.

3. The Respondent in matters DT05/211 and DT05/572 is ACT Health, the ACT government department responsible for the delivery of public health services and the administration of public hospitals, and the former employer of the Complainant.

4. The Respondent in matter DT05/573, Calvary Health Care ACT Inc (Calvary) is the private operator of Calvary Hospital, where the Complainant worked at all times material to this matter. Pursuant to an arrangement with the ACT government, part of the hospital is used for treating public patients and is funded by ACT Health.

5. Calvary Hospital provides facilities and services for both public and private mental health care. Private mental health patients are treated at Hyson Green. Public patients, some of whom are subject to orders of the Mental Health Tribunal, are treated at a facility referred to as Ward 2N.

6. Staff who work in the public division of Calvary Hospital, including Ward 2N, are subject to the provisions of the *Public Sector Management Act 1994* (ACT), and must sign a contract to work in the public division.

Procedural History

7. The Complainant has made two complaints to the (then) Human Rights Office in this matter. The first complaint, in matter DT05/211, was made against ACT Health in August 2004, alleging that she was being victimised due to an earlier complaint. After an unsuccessful attempt at conciliation, the matter was referred to this Tribunal on 18 May 2005.

8. The second complaint was made to the Office about six months after the first complaint. In it, the Complainant alleges discrimination on the basis of perceived disability by both Calvary and ACT Health. She also reiterates the victimisation complaint against the latter. The Discrimination Commissioner conducted a single investigation into the matters raised by this complaint. Following another unsuccessful attempt at conciliation, the matter was referred to this Tribunal on 19 December 2005, and listed as matters DT05/572 and DT05/573.

9. In relation to matter DT05/211, I made orders by consent on 10 June 2005 to hold the matter off in abeyance until the second complaint then pending before the Discrimination Commissioner was referred to the Tribunal, so that all the complaints could then be dealt with together. From then on, all three matters were dealt with together.

10. Protracted discussions were held between the parties with a view to settlement, and numerous documents and pleadings were filed. Ultimately the Tribunal was informed that the matter had been settled. However, that was not quite the situation.

11. Ms Whiting still put in a substantial submission, with supporting statements from work colleagues and relatives, stating her claimed losses and relying on the Tribunal to quantify damages. She never conceded that Calvary couldn't be liable, nor did Calvary admit liability. That is still a live issue in this case. ACT Health, however, did concede that its actions amounted to unlawful discrimination under the Act, and its submissions were limited to the issue of damages.

Background

12. In order to more fully understand Ms Whiting's complaint against ACT Health, it is necessary to set out some background facts. These appear sufficiently from the submissions and the T documents prepared by the Discrimination Commissioner.

13. Ms Whiting qualified as a registered mental health nurse in 1974. She worked for ACT Health (then Mental Health ACT) from September 1991 to July 2000. For the first three years of that period, she worked as a public division employee at Calvary. Subsequently, she worked at Hennessy House, although it is unclear when she started there or how long she worked there.

14. In 1999, she became involved in a dispute with ACT Health. In that year she developed a back condition and took time off work. In July 1999 she was informed that a medical review had found that she was unfit to restrain aggressive patients and thus could not work at Hennessy House or the Psychiatric Services Unit at Canberra Hospital. A further review concluded that she could return to work provided she was

not required to restrain patients by herself. Following this report, she was advised she could resume working at Hennessy House from 18 October 1999.

15. Despite this, the dispute was not resolved, and the Complainant pressed ahead with a complaint to the Discrimination Commissioner. This complaint was apparently successfully conciliated, with the outcome being a voluntary redundancy from the ACT Public Service, effective from 1 June 2000.

16. Following that redundancy, she worked in the aged care sector from August 2000 to April 2002. In 2004 she was given casual employment with Calvary, working in the private mental health facility Hyson Green. Her employment was renewed for a year in August 2004.

Facts

17. The facts of the 2004 incident about which Ms Whiting complains emerge from the T documents and the submissions. On 13 July 2004 Ms Whiting rang the roster office at Calvary and spoke to Di Silk, the roster clerk, to enquire about the availability of spare work shifts on Ward 2N. Ms Whiting had previously worked a number of shifts on Ward 2N, despite not having a public division contract.

18. Ms Silk replied that she had been instructed not to use Ms Whiting on Ward 2N anymore. Ms Whiting alleges that Ms Silk told her the reason for this was because of a previous work injury she had suffered, namely the back condition she contracted while working for ACT Health in 1999. The day after Ms Whiting's call, in response to an email request from Mary-Ann O'Sullivan, the Assistant Human Resources Manager at Calvary, Ms Silk stated that she was asked not to use Ms Whiting "as she had previously worked for [ACT Health] and had had a workers compensation claim".¹ In a statement supplied to the Discrimination Commissioner, Ms Silk stated that she told Ms Whiting that she thought it had "something to do with a compensation claim when she worked in the community [ie the public sector], and that it may be seen as a conflict as [ACT Health] now provides the funding for 2N."²

19. Ms Silk explained to Ms Whiting that these instructions had come from Carmel Ronning, the Team Leader for Public Mental Health Services at Calvary. In an internal email to Sue Minter, forwarded to Ms O'Sullivan, Ms Ronning explained that she informed the roster office not to use Ms Whiting on Ward 2N as "there had been employment issues in the past when she was employed by [ACT Health], possibly resulting in a compensation payment being made."³ Ms Ronning didn't refer to the type of compensation payment made.

20. Ms Whiting was upset upon hearing what Ms Silk said. She complained to Tony Sherbon at ACT Health, and had communications with Human Resources at Calvary. On 22 July, she met with Ms Ronning and Ms O'Sullivan. At this meeting, she asked Ms Ronning whether she had been influenced by ACT Health to give the instructions to the roster office. Ms Ronning denied being influenced. Ms Whiting was offered

¹ Email from D Silk to M O'Sullivan dated 14 July 2004; document T15h(iii) in matter DT05/573

² Statement by Diane Silk, dated 27 September 2004; document T9 in matter DT05/211 and T15e in matter DT05/573

³ Document T15h(i) in matter DT05/573

the opportunity to apply for a public contract that would allow her to work in Ward 2N, but it was necessary for her to give Calvary permission to clarify the details of the previous incident with ACT Health. Ms Whiting “expressed strongly” that ACT Health’s involvement with Calvary meant she couldn’t pursue the offer, and expressed “dismay” at the involvement of ACT Health.⁴

21. At the meeting, Ms Whiting was supplied with a copy of the email which Ms Ronning had sent to Ms Silk instructing Ms Silk not to use Ms Whiting on Ward 2N. Before it was given to her, Ms Ronning added a handwritten note.

22. The email was sent on 6 July 2004. It reads:

Di, I am currently on leave, but needed to let you know that Mental Health ACT [now ACT Health] has had past experience with Judy Whiting, whom I noticed last week had a few shifts on 2n. I had declined a casual contract, she was given one for Hyson Green. If we could avoid using her on 2n once the rostered shifts are completed, I would be grateful. The issue was one of a compensation payout, which *Mental Health ACT don't won't* [sic] *the chance to be repeated*, as they are our funding body now for 2n, I have to listen!!!
[italics added]

23. The words in italics were underlined by Ms Ronning. The handwritten note read: “The above comment (underlined) refers to communication with MH ACT regarding another employee – and is not related to Ms Whiting.” Ms Ronning signed her name and gave the date as 22 July 2004.

24. On 17 August 2004, Calvary offered Ms Whiting a public contract allowing her to work in Ward 2N. Ms Whiting rejected the offer.

The Legislative Scheme – Discrimination

25. As Calvary’s liability is disputed, it is necessary to consider whether its actions amount to discrimination.

26. Section 8 of the Act defines discrimination. It reads:

8 What constitutes discrimination

- (1) For this Act, a person *discriminates* against another person if—
 - (a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7; or
 - (b) the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging people because they have an attribute referred to in section 7.
- (2) Subsection (1) (b) does not apply to a condition or requirement that is reasonable in the circumstances.

⁴ Statement by Carmel Ronning, dated 15 September 2004, reproduced in letter by Brian Jacobs, General Manager, Mental Health ACT to Discrimination Commissioner dated 29 September 2004 (document T10a in matter DT05/211)

- (3) In deciding whether a condition or requirement is reasonable in the circumstances, the matters to be taken into account include—
- (a) the nature and extent of the resultant disadvantage; and
 - (b) the feasibility of overcoming or mitigating the disadvantage; and
 - (c) whether the disadvantage is disproportionate to the result sought by the person who imposes or proposes to impose the condition or requirement.

27. Among the attributes mentioned in section 7 is disability. Section 5AA of the Act defines disability further:

5AA Meaning of *disability*

- (1) In this Act:

disability means—

- (a) total or partial loss of a bodily function; or
 - (b) total or partial loss of a part of the body; or
 - (c) malfunction of a part of the body; or
 - (d) malformation or disfigurement of a part of the body; or
 - (e) the presence in the body of organisms that cause or are capable of causing disease; or
 - (f) an illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour; or
 - (g) an intellectual disability or developmental delay.
- (2) Except in section 49 (Work related discrimination) and section 50 (Discrimination by qualifying bodies etc), ***disability*** includes a disability—
- (a) that the person has, or is thought to have (whether or not the person in fact has the disability); or
 - (b) that the person had in the past, or is thought to have had in the past (whether or not the person in fact had the disability); or
 - (c) that the person will have in the future, or is thought will have in the future (whether or not the person in fact will have the disability).

28. Subsection (2) makes it clear that a person need not actually have a disability in order to be discriminated against; it is sufficient if the alleged discriminator *thinks* they do and treats them accordingly.

29. An act that is discriminatory within the meaning of s 8 will not by itself be unlawful; it must occur within one of the areas of public life covered in Part 3. The relevant area in this case is employment. The relevant section is s 10(2):

10 Applicants and employees

...

- (2) It is unlawful for an employer to discriminate against an employee—
- (a) in the terms or conditions of employment that the employer affords the employee; or
 - (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training or to any other benefit associated with employment; or
 - (c) by dismissing the employee; or
 - (d) by subjecting the employee to any other detriment.

30. ACT Health has admitted it discriminated against the Complainant; Calvary, however, has not. It is therefore necessary to examine whether Calvary has discriminated against the Complainant.

31. For an act to be discriminatory, it must have been done *because of* the attribute concerned. Section 4A(2) states that:

In this Act, a reference to doing an act because of a particular matter includes a reference to doing an act because of 2 or more matters that include the particular matter, *whether or not the particular matter is the dominant or substantial reason for doing the act.* [Emphasis added]

32. In *IW v Perth*⁵ Kirby J stated that the test for causation in discrimination matters is whether the attribute was a “not trivial or insubstantial” reason or ground for the action, and that it “truly played a causative part”.⁶ His Honour was in dissent in that case, however the majority of the High Court did not address the issue of causation in their respective judgments. In *Purvis v NSW*⁷ Gummow, Hayne & Heydon JJ stated that the central question is “*why* was the aggrieved person treated as he or she was?”⁸ Their Honours further stated that “Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression ‘because of’.”⁹

33. Calvary submits that the refusal to use Ms Whiting on Ward 2N was because:

- She did not have a public contract
- There were concerns that employing her would be in breach of Calvary's contract with ACT Health
- There were concerns that employing her would be in breach of ACT Government rules prohibiting the re-employment of those who have taken voluntary redundancies

⁵ (1998) 191 CLR 1

⁶ (1998) 191 CLR 1 at 63

⁷ (2003) 217 CLR 92

⁸ (2003) 217 CLR 92 at 163 [236] (emphasis in original)

⁹ (2003) 217 CLR 92 at 163 [236]

34. I accept that Calvary acted on these grounds. However, that will not absolve Calvary from liability if *part* of their reasons for their decision included Ms Whiting's disability.

35. The evidence does not show that Ms Silk raised the issue of the lack of a public contract with Ms Whiting, although she did mention that "it would be seen as a conflict" for her to work in Ward 2N due to ACT Health's funding.¹⁰ This alludes to the concerns referred to in the second and third dot points above.

36. The email from Ms Ronning to Ms Silk dated 6 July 2004 read "The issue was one of a compensation payout which Mental Health ACT don't [want] the chance to be repeated". That email also failed to mention the lack of a public contract, although it does say Ms Ronning "declined a casual contract"; it evinces a concern that the compensation payout might be repeated if Ms Whiting worked on Ward 2N. The lack of a contract was raised at the meeting between Ms Whiting, Ms Ronning and Ms O'Sullivan.

37. This evidence is ambiguous. To contend that it shows Calvary discriminated against Ms Whiting on the ground of disability requires one to interpret the concern about compensation payouts as proof that Calvary knew of her back injury and feared she would aggravate it or re-injure herself. It is equally possible that the concern related to the third dot point above.

38. Ultimately, it can't be shown that lack of work in Ward 2N by Ms Whiting was because of any previous complainant under the Act, any back condition or other disability or any belief on behalf of Calvary that the complainant suffered a disability or any instruction from any arm of government. It was for the reasons listed in the dot points. Furthermore, Calvary did offer Ms Whiting a public contract, which she refused.

39. In those circumstances I don't believe it can be established in any way by any evidence before me that any discrimination, unlawful or otherwise, occurred in respect of Ms Whiting at the hands of Calvary.

The Legislative Scheme – Remedies

40. As ACT Health has admitted its liability, it is necessary to address the question of the appropriate remedy. At the time the acts took place, the Tribunal's power to award remedies was contained in s 102(2)(b). The current provision is s 99(3) of the Act, and is not materially different:

99 Decisions following hearing

...

- (3) If the tribunal is satisfied that the respondent has engaged in unlawful conduct, the tribunal must make 1 or more of the following orders:
 - (a) that the respondent not repeat or continue the unlawful conduct;

¹⁰ Email to Ms O'Sullivan, 14 July 2004 (Doc T15h(iii) in DT05/573)

- (b) that the respondent perform a stated reasonable act to redress any loss or damage suffered by a person because of the unlawful conduct;
- (c) except if the complaint has been dealt with as a representative complaint—that the respondent pay to a person a stated amount by way of compensation for any loss or damage suffered by the person because of the unlawful conduct.

41. Ms Whiting seeks damages and an apology published in the staff newsletters of Calvary and Canberra Hospitals.

42. I say at the outset that due to the effluxion of time, the nature of the incident and the involvement of quite a number of agencies, I reject the remedy of an apology at Canberra Hospital as being impractical, of no weighty use and inappropriate.

43. As ACT Health's concession is limited to the events of July 2004, only damage flowing from those events is compensable.

44. In her statement of losses filed on 11 July 2006, Ms Whiting claims almost \$400,000 in lost wages and almost \$20,000 for antidepressant medications. Most of these amounts are for claimed future expenses and losses.

45. In *Alexander v Home Office*, May LJ declared that the objective of awards of damages in discrimination cases was restitution.¹¹

46. In *Hall v A & A Sheiban Pty Ltd & ors*,¹² the full Federal Court discussed the principles applicable to awards of damages under anti-discrimination laws. French J stated that the measure of damages was to be found in the words of the statute and not through the principles applicable to damages in tort.¹³ His Honour continued:¹⁴

It may be that while there are events for which the conduct complained of is a sine qua non, they would not be recognised in any practical sense as arising "by reason of" it. Exclusion principles analogous to concepts of remoteness, and failure to mitigate may then be seen to operate. In the end, however, these are to be subsumed in a practical judgment of cause and effect.

47. Lockhart J took a similar approach to French J. His Honour stated that it would be "difficult" and "unwise" to prescribe an inflexible measure of damages in discrimination cases; "in particular, to do so exclusively by reference to common law tests in branches of the law that are not the same, though analogous in varying degrees, with anti-discrimination law."¹⁵ Nevertheless, Lockhart J accepted that the measure of damages in tort was the closest analogy and one that "in most foreseeable cases" was a "sensible and sound" test.¹⁶

¹¹ [1988] 2 All ER 118 at 122

¹² (1989) 20 FCR 217

¹³ (1989) 20 FCR 217 at 281

¹⁴ (1989) 20 FCR 217 at 281

¹⁵ *Hall v A & A Sheiban Pty Ltd & ors* (1989) 20 FCR 217 at 239

¹⁶ *Ibid.*

Generally speaking, the correct way to approach the assessment of damages ... is to compare the position in which the complainant might have been expected to be if the discriminatory conduct had not occurred with the situation in which he or she was placed by reason of the conduct of the respondent.

48. The ACT Administrative Appeals Tribunal, citing *Hall v Sheiban*, accepted that, while tort may be a useful analogy, “the extent of damages must be governed by the language of the statute.”¹⁷ This Tribunal has previously endorsed Lockhart J’s approach to damages quoted above.¹⁸

Special damages

49. This Tribunal has awarded special damages in the past. In *Butcher v The Key King Pty Ltd*¹⁹ the complainant was compensated for lost wages that resulted from his unlawful termination. In *Walker v Advance Supermarket*²⁰ the complainant was awarded a sum to make up for a protracted unlawful underpayment of wages.

50. It must be noted that, in both of these cases, the loss being compensated was directly caused by the unlawful conduct. In *Butcher* the complainant’s sacking was itself the discriminatory act, as was the underpayment of the complainant in *Walker*. Ms Whiting was not sacked or underpaid; instead, she made a personal decision not to seek work in the public sector ever again.

51. This Tribunal has only made one award of compensation including an amount for treatment, in the matter of *Lewin v ACT Health & Community Care Service*.²¹ In that case \$1,000 was awarded for past physical therapy and \$2,500 was awarded for access to counselling services. A further \$2,500 was expressed to include future physical therapy as well as general damages.

52. Decisions in other jurisdictions establish the need for a person claiming damages for medical expenses to prove a causal link between the discriminatory conduct found to exist and the existence or exacerbation of the condition requiring treatment, and also the necessity or appropriateness of the claimed treatment.

53. In *Hughes v Car Buyers Pty Ltd & ors*²² the Federal Magistrates Court refused to award compensation for future medical expenses in the absence of expert evidence “as to an appropriate diagnosis, preferred treatment program and prognosis” (at [58]). In *Gama v Qantas Airways Ltd (No 2)*,²³ by contrast, the Federal Magistrates Court found that “the medical evidence does support an argument that the found discriminatory events did contribute to Mr Gama’s depressive illness” (at [125]). Furthermore, one of the doctors giving evidence “[made] a clear distinction between the causative effect of comments and that of more tangible discriminatory acts such as restricting access to promotion or transfer Whilst the comments alone would not

¹⁷ *Re Marshall and Discrimination Commissioner & ors* [1998] ACTAAT 287 at [7]

¹⁸ *Walker v Advance Supermarkets* [2000] ACTDT 5 at [82]

¹⁹ [2000] ACTDT 3

²⁰ [2000] ACTDT 5

²¹ [2002] ACTDT 2

²² [2004] FMCA 526

²³ [2006] FMCA 1767

account for the extreme seriousness of his condition they would contribute towards it” (at [125])

54. In *Gama*, like in the present case, the complainant claimed medical expenses up to the expected end of his life. Raphael FM stated: “I do not think the ‘foreseeable [sic] future’ means from now until the end of Mr Gama’s life expectancy” (at [130]).

55. In the present case, there is no medical evidence whatsoever establishing the need for Ms Whiting to take medication or the expected duration of that need. There is also the fact that Ms Whiting has been on antidepressant medication since about 1999. This use of antidepressants seems, like her lack of trust in ACT Health, to be a consequence of the earlier dispute between her and ACT Health. It is unclear whether her use of antidepressants has increased as a result of the events in this case. One could assume that those latter events would prolong her use of antidepressants, but it is impossible to say by how much.

56. Accordingly, I reject the view that there are any special damages in relation to wage loss as argued by Ms Whiting and I reject other heads of damages. It seems to me that the question of general damages is what remains.

General damages

57. In its “Submissions on Penalty” ACT Health submits that the law should be predictable, and that this Tribunal should bear that in mind when awarding damages. The submissions then go on to cite several cases where this Tribunal has awarded damages before concluding, on this basis, that compliance with the doctrine of predictability mandates an upper limit of \$2,500 on any award.

58. Of course it is not particularly productive to try and compare facts and situations. Each case of discrimination before the Tribunal is different. But if one takes the narrow view which is appropriate that here the incident of July 2004 was a short-term incident in circumstances where Ms Whiting herself had felt aggrieved before and after that, I believe an approach looking at the range is an appropriate course.

59. There is long-standing High Court authority to the effect that courts are prohibited from making comparisons between awards of general damages in torts cases: *Planet Fisheries Pty Ltd v La Rosa*.²⁴ This, however, is not a case in tort; rather, a discrimination case which, although similar, is ultimately *sui generis*.²⁵ Furthermore, as Professor Luntz notes:²⁶

Although there has been some indication that the High Court might reconsider this attitude, lower courts continue to regard themselves as bound by the decisions. Nevertheless, they often express regret at having to do so, or distinguish it, or simply ignore it, and do make reference to comparable cases in order to ascertain the general level of damages for the type of injury.

²⁴ (1968) 119 CLR 118

²⁵ See *Spencer v Dowling* [1997] 2 VR 127 at 144 per Winneke P

²⁶ H Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002) at 217 [3.1.5] (footnotes omitted)

60. In the ACT, the courts have tended to ignore the rule in *Planet Fisheries*.²⁷ The Full Court of the ACT Supreme Court in *Redden v Forde*²⁸ declared that “it is appropriate (even inevitable) that a court should remind itself of the level of damages that have been awarded in the recent past by members of that court, or by courts by whom its awards are subject to appellate review” (at [29]).

61. Ms Whiting asserts that she was “shocked and embarrassed” by the contents of Ms Ronning’s email of 6 July 2004. In her statement of losses, she says she has suffered loss of confidence, paranoia and anger. The antidepressant medication, she claims, has led to her putting on 20 kg and needing to buy new clothes. She further claims nausea, palpitations and sleep disturbance connected with attending the Discrimination Commissioner and this Tribunal. Lastly, she attributes the breakdown of her marriage to the “psychological weight of persecution” at the hands of ACT Health.

62. Hurt to feelings, distress, anger and humiliation, and similar consequences of discriminatory conduct, are not reducible to a number; therefore, assessors of damages must exercise their judgment in reaching a figure for general damages.²⁹ When assessing damages, it must be borne in mind that injury to feelings, which is usually of short duration, is less serious a matter than serious physical or psychological injury, the consequences of which may be permanent.³⁰ In discrimination matters, like in tort, discriminators take their victim as they find them.³¹

63. The awards for general damages made in this Tribunal range from \$250³² to \$3,000,³³ with \$2,500 being the most frequently awarded amount. Complainants have been found to be “angry and distressed”,³⁴ “stressed and insecure”,³⁵ and to have suffered “physical and emotional distress”,³⁶ “hurt and humiliation”,³⁷ and “substantial hurt to [their] feelings”,³⁸ as a result of discriminatory conduct.

64. It seems to me that Ms Whiting has indeed suffered a great deal of distress and of course that has amplified her existing dissatisfaction with those that have allegedly mistreated her and her whole feeling of antipathy towards the ACT Health service, particularly mental health services, over a great number of years, commencing many years before the events of July 2004.

65. In my view it is appropriate in this case to award general damages of \$2,500 which is within the range of damages awarded for acts of discrimination. In coming to that view I have rejected the view that there is any evidence that can justify a finding that there has been any victimisation by ACT Health.

²⁷ See cases cited in Luntz, *supra*, at fn 33

²⁸ [1998] ACTSC 42

²⁹ *Hall v Sheiban* (1989) 20 FCR 217 at 256 per Wilcox J

³⁰ *Alexander v Home Office* [1988] 2 All ER 118 at 122 per May LJ

³¹ *Hall v Sheiban* (1989) 20 FCR 217 at 256-7 per Wilcox J

³² *Bloomfield v Westco Jeans Pty Ltd* [2001] ACTDT 4

³³ *Kilgariff v Aerial Taxi Cabs Ltd* [2001] ACTDT 3

³⁴ *Walker v Advance Supermarkets* [2000] ACTDT 5 at [89]

³⁵ *Butcher v The Key King Pty Ltd* [2000] ACTDT 3 at [9]

³⁶ *Lewin v ACT Health and Community Care Service* [2002] ACTDT 2 at [63]

³⁷ *Nester v ACT Fire Brigade* [2004] ACTDT 2 at [109]

³⁸ *Walker v Advance Supermarkets* [2000] ACTDT 5 at [89]

**AUSTRALIAN CAPITAL TERRITORY
DISCRIMINATION TRIBUNAL**

APPEARANCE DETAILS

To be completed by Member's Staff

FILE NO: DT05/211, DT05/572
& DT05/573

COMPLAINANT: JUDY WHITING
FIRST RESPONDENT: ACT HEALTH
SECOND RESPONDENT: CALVARY HEALTH CARE (ACT) LTD

COUNSEL APPEARING: **COMPLAINANT:**
FIRST RESPONDENT: MS B BOSS
SECOND RESPONDENT: MR S HAUSFELD

SOLICITORS: **COMPLAINANT:**
FIRST RESPONDENT: ACT GOVERNMENT
SOLICITOR
SECOND RESPONDENT: BLAKE DAWSON
WALDRON

OTHER: **COMPLAINANT:** SELF
RESPONDENT:

TRIBUNAL MEMBER: MR R J CAHILL, PRESIDENT

DATE OF HEARING: 21 JULY 2006
12 FEBRUARY 2008 **PLACE:** CANBERRA

DATE OF DECISION: 4 MARCH 2008 **PLACE:** CANBERRA

COMMENT:
