

## AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

**CITATION:** FLETCHER AND RSPCA [2007] ACTDT 5 (19 JUNE 2007)

**DT 07/1**

**Catchwords:** Discrimination in provision of goods and services – sexual harassment – strike out application – inferences to be drawn from evidence.

Discrimination Act 1991 ss 79, 81(1), (2)(a),  
Post November 2006 ss 7, 58(1), 62, 79, 93, 108

Firestone and Legal Aid Office (ACT) [2006] ACTDT 3

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

Lucy Cooper and ACT Housing (DT 03/18 dated 22 June 2004)

Jones –v- Great Western Railway Co [1930] 144 LT 194

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

**Tribunal:** Mr G C Lalor, Deputy President

**Date:** 19 June 2007

**AUSTRALIAN CAPITAL TERRITORY  
DISCRIMINATION TRIBUNAL**

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**DT 07/1**

**RE: GRAHAM FLETCHER**  
Complainant

**AND: RSPCA**  
Respondent

**ORDER**

**Tribunal** : Mr G C Lalor, Deputy President

**Date** : 19 June 2007

**THE TRIBUNAL ORDERS** that pursuant to section 79 of the Discrimination Act 1991 the complaint be struck out on the ground that it lacks substance.

.....  
Deputy President

AUSTRALIAN CAPITAL TERRITORY )  
DISCRIMINATION TRIBUNAL ) NO: DT07/01

RE: **GRAHAM FLETCHER**  
Complainant

AND: **RSPCA**  
Respondent

### REASONS

19 June 2007

Mr G C Lalor, Deputy President

1. On 30 May 2006 the complainant complained to the Human Rights Office of the Australian Capital Territory of discrimination against him on the grounds of disability, relationship status, religious conviction and sex in the areas of "*access to premises*", "*provision of goods, services or facilities*" and "*a request for information*". Further, the complainant alleged sexual harassment by a member of the respondent's staff.
2. Following a lengthy investigative period during which both parties were given the opportunity to fully make representations to the Commissioner, she declined the complaint as lacking substance in accord with subsections 81(1) and (2)(a) of the ACT Discrimination Act 1991 (the Act) as they then were. The Commissioner made this decision on 31 July 2006.
3. Exercising his statutory right, the complainant, following this decision, by letter dated 23 August 2006 requested the Commissioner to refer his complaint to the Discrimination Tribunal. The papers were received by the Tribunal on 12 January 2007.
4. On 31 January 2007 directions were given in the matter and one such was that the complainant was to file a statement with the Tribunal by 4pm 23 February 2007 setting out the person it was alleged treated him unfavourably, the nature of that alleged unfavourable treatment, the date on which it occurred and the grounds of the alleged discrimination. Further, it was directed that the complainant file by 4pm 23 February 2007 a statement of any witness on which he sought to rely at the hearing of the matter, a list of documents sought to be relied upon including documents forwarded to the Tribunal from the Commissioner and any other material on which he wished to rely. The matter was listed for further Directions on 30 April 2007 with a view to setting a hearing date for the matter.
5. By application dated 26 March 2007 the respondent to the original application filed an application for orders that the Complaint be struck out by this Tribunal pursuant to Section 79 of the Discrimination Act 1991. That Section provides:

*“The person against whom a complaint is made may, at any time after the complaint is referred to the Tribunal and before the Tribunal begins hearing the complaint (other than a time when the complaint is being conciliated under the HRC Act), apply to the Tribunal to strike out the complaint on any of the following grounds:*

- (a) the complaint is frivolous, vexatious or not made honestly;*
- (b) the complaint lacks substance.”*

6. This application was lodged prior to a date being set for the hearing and so is filed within the time set by the Act.
7. On 10 April a further Directions Hearing was held and the application was adjourned to 15 June 2007 at 10am and a direction was given that the respondent to this application under Section 79 of the Act be served with a copy of the application and the affidavit supporting the application prior to his leaving the Court precincts. The Directions date of 30 April was vacated pending the hearing of this application.
8. The complainant has made several applications to the Tribunal for orders pending the hearing of the substantive issues of his complaint. The Commissioner when referring the complaint to the Tribunal under the provisions of the Act forwards a copy of all the documents in her possession which she used in her deliberations to the Tribunal. These documents are those filed by the complainant and the respondent and the correspondence between the Commissioner and the parties. The Tribunal then invited the parties to inspect these documents and copy any that is not held by them. The complainant objects to having this inspection in the presence of a Tribunal staff member and has demanded a copy of the documents be forwarded to him. That demand has, not unreasonably, been refused.
9. The complainant then sought an order that the registry staff not communicate with him in such a way that their conversations with him might be overheard. He sought this order initially under Section 108 of the Act as it was before the amendments that became effective from 1 November 2006. That section prohibited the publication of evidence given before the Tribunal or the publication of the contents of a document produced to the Tribunal or the publication of information that might lead to the identification of a party who has appeared before the Commissioner or the Tribunal. That application was refused on the papers as it was not competent.
10. The complainant then made further application under Section 93 of the Act which has the same effective provisions as the repealed Section 108 as outlined above. Again, I declined to make the orders sought as the application was not competent and without foundation.
11. The complainant made a further application dated 5 March 2007 for orders pursuant to Section 93 of the Act on the basis of victimization as he was being approached by strangers in various locations in the Australian Capital Territory who, as he alleged, appeared not only to know of his application before the tribunal but also of the contents. Again I declined to make any orders sought but made an order that no further application was to be received pursuant to Section 93 of the Act without leave of the Tribunal. The applications had, in my view, been unmeritorious and frivolous.



12. Another matter that I should mention is that at the Directions Hearing on 10 April 2007 I observed the complainant to have a tape recorder sitting on the table in front of him. I asked him whether it was operating and he said that it was. I advised him that I would refer the matter to the Australian Federal Police for investigation as it was my view that he may have committed an offence in doing so. I did so.
13. Danyel Andrew Kynaston, a solicitor in this Territory, affirmed that following the making of orders at the Directions Hearing of 31 January the complainant filed a document on or about 19 February with the Tribunal which it is said does not comply with the directions given. Further it is then alleged that the documents lodged fail to disclose "*a seriously arguable cause of action against the respondent*".
14. I set out the documents filed by the complainant in response to the Directions of 31 January 2007:

*Response to Directions*

- (a) *Ms Lyndal Keen, Ms Karen Hewston, Bon, I believe it was, Ms Lorraine Hamilton and Mr Michael Linke.*
- (b) *Undue harassment from RSPCA staff, discounting and ignoring most of what I said, experienced and informed comment discounted and ignored mostly, failing to answer any questions, failing to appreciate the "companion dog" relationship that caused me to try and purchase Floyd, little respect shown to me and personal and private aspects treated as "need to know" by RSPCA staff, management at RSPCA failed to adopt reasonable current acceptable standards of practice. Location RSPCA site Weston ACT on both days 26/5/06 and 29/5/06.*
- (c) *Provision of goods services and facilities, requests from me for information.*
- (d) *sex, disability, relationship status, religious conviction*
- (e) *sex, relationship status, religious or political conviction, disability (Sections 7,8,20,23,58, 62, 68) poss 19*

*Statement from complainant*

- (a) *With reference to the letter of reply from RSPCA to HRO dated 19/9/06 written by M Linke (CEO) and my complaint document to HRO dated 30/5/06 and attachments 2-4 with 19/9/06 letter. There are two references of significance on page 2 and page 4 of RSPCA letter of 19/9/06 where attempts are made to deal with the reasons RSPCA used to refuse me the purchase of dog Floyd on 29/8/06.*

*Page 2: Reference to backyard inspection by RSPCA staff. At no time did I advise any person at RSPCA on 26/5/06 or 29/5/06 of any problems with my yard security. I informed them fences etc were replaced and are sound and yard is secure including locked gates.*

*Page 4: No information provided to Ms Hewston on 29/5/06 or any other person, could have caused any reasonable person to raise the "lack of any outdoor shelter" for my dogs use, as in any way relevant, as it was advised 24 hour to and from access to my house was able to be achieved through a 'dog door' in the main door to the back yard and if I am away a boarding kennel is where the dog stays. I advised the correct and state of repair and security of my yard to be used to allow my dog to go into from the house and stay in as long as needed each day.*

*However, Ms Hewston was not interested in the details I had offered her and was totally unconvincing when she asserted all back yards were inspected (as past experience of mine with dog purchase from RSPCA) indicated was not true and other persons I know have had experiences where backyards were not inspected and her agreeing to a viewing from the boundary changed after some time to being necessary for her to check each individual fence paling. She was totally unconvincing as to her need to visit or why she thought it was necessary.*

*I was not offered any dog training as I believe Ms Hewston was a dog trainer at RSPCA some years ago and when I purchased a dog there then (without all the drama) I paid for dog training (app \$95 I believe) at time of purchase but months later was given a refund as no training was ever arranged. Almost all the comments made in the RSPCA letter of 19/6/06 from M Linke to HRO are inaccurate or never occurred, where attributed to me, and references to my behaviour attitude and person are also inaccurate/false. What I allegedly said and how it was said are all concocted, intended to deceive. While it is probably true RSPCA was provided a set of records that usually are used as part of their standard procedure for pet adoption, standard procedure as 'they' now indicate it to be did not occur in my case.*

*Details of attachments 2-4 (I not their product)*

*Attachment 2 I was not provided with or had any input to the production of that document in the office on 29/5/06.*

*Attach 3: I was never provided with that document*

*Attach 4 Papers Ms Hewston held and appeared to write on at times during the interview on 29/5/06 were torn up in my presence after she rejected my purchase of the dog.*

*I felt I was being sexually harassed on both my visits on 26/5/06 and 29/5/06 through the first leading into the subject by referring to dogs sexuality then getting more specific when relating to me."*

15. 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 (DT 03/18 dated 22 June 2004)).”
16. I assume for the purposes of this application by the respondent that the factual allegations made by the complainant are true. In doing so I make no finding as to the truth of the inferences he draws from those facts. I must then draw inferences in favour of the complainant from those established facts.
17. The complainant has asked that the Tribunal draw inferences and make findings that the respondent has discriminated against him in its refusal to allow him to purchase a dog named Floyd on the basis of his disability, relationship status, religious conviction and sex. Those grounds are contained within the range of grounds covered by the Act as set out in Section 7. In his original application to the Commissioner he set out details of his allegations. He said that the disability for which he was treated unfavourably was a mobility restriction, the relationship status that formed the basis of his unfavourable treatment was “single/divorced”, the religious conviction he possessed was “humanist” and the further allegation for the unfavourable treatment was his sex.
18. The complainant/respondent on the hearing of this application before me accepted that nowhere in the documents forwarded to the Tribunal by the Commissioner or in his statement filed on 19 February 2007 has he addressed the question of a physical disability he possesses, having a mobility restriction. He submitted that it was obvious from his physical appearance that he possessed this disability and he asked that the Tribunal draw an inference that this formed part of the reason he was refused the right to purchase a dog from the respondent/applicant.
19. Similarly there was no evidence before the Tribunal in any manner that the fact of his marital status was known to the respondent/applicant. The complainant/respondent submitted that he was known to the staff of the RSPCA, having previously purchased a dog from it. He said that the documents furnished to the Commissioner and ultimately to the Tribunal were concocted and false, having been prepared following his complaint to the Commissioner. This allegation is serious, bearing not only on the integrity of the people concerned, but alleges a possible criminal offence. The allegation is also contained in the document filed on



19 February 2007. Even allowing that this allegation is correct, there is no evidence to support the contention that the respondent/applicant reached its decision as alleged.

20. In so far as the allegation that the complainant/respondent was treated unfavourably because of his religious conviction, he asserted in his original application and adhered to it before me that his religion was “*humanist*”. I am of the view that this is not a religion as defined within the Act. Humanism is a philosophy which is found in some religions but of itself is not a religion. Section 7 of the Act provides that it applies to “*discrimination on the ground of any of the following attributes*”, one such being “*religious or political conviction*”. The complainant/respondent agreed in submission that humanism was in fact a philosophic tenet. There is no definition of “*religious conviction*” under the Act. In the documentation it is alleged that the staff at the RSPCA were aware that he was a non-Catholic and that that organization was a “*catholic front group*” and that a staff member was “*not pleased with my lack of interest in particularly some Catholics and Catholic establishments*”. There is no evidence before the Tribunal to support this assertion.
21. The complainant/respondent has also alleged that he suffered sexual harassment at the hand of the RSPCA staff. Pursuant to Section 62 of the Act:  
*“it is unlawful for a person to subject another person to sexual harassment in the course of providing, or offering to provide, goods, services or facilities to the other person”.*
22. Section 58(1) of the Act provides:  
*“a person subjects someone else to sexual harassment if the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person or engages in other unwelcome conduct of a sexual nature in circumstances in which the other person reasonably feels offended, humiliated or intimidated”.*
23. There is no evidence in any documentation before the Tribunal that the staff of the RSPCA have done anything to bring them within the purview of section 62 of the Act.
24. In his submission the complainant/respondent has, as I have said, asked that the Tribunal draw inferences favourable to him from the statements provided by the Commissioner and further documents filed by him. Those inferences, he submitted, would lead the Tribunal to find that he had been treated unfavourably because of the designated attributes taken from Section 7 of the Act as set out in his original application to the Commissioner.
25. The distinction between conjecture and inference is often difficult to draw as was said by Lord McMillan in Jones –v- Great Western Railway Co [1930] 144 LT 194:  
*“The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof.”*



26. I am of the view that to do what the complainant/respondent seeks the Tribunal to do would not be to draw inferences but to enter the realm of conjecture. There is no credible evidence from which appropriate inferences might be drawn to support his complaint.
27. The applicant/respondent has sought to have the complainant's application struck out pursuant to Section 79 of the Act and submits that in order for the complaint to proceed any further there must be some evidence favourable to his complaint which would, taken at its highest would render it seriously arguable – Legal Aid Commissioner (ACT) & Ors –v- Grundy [1999] ACTSC 318 cited and followed in Couper –v- ACT Housing [2004] ACTDT 4.
28. In making this application the applicant/respondent bears the onus of proof. Adopting the words of the Deputy President in the *Firestone application* (supra) I am of the view that “*it is clear beyond doubt that the complainant has no arguable case which should be allowed to be resolved at a full hearing*”. This complaint should be struck out on the ground that it lacks substance.

I certify that this and the 6 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: 19 June 2007

**AUSTRALIAN CAPITAL TERRITORY  
DISCRIMINATION TRIBUNAL**

**APPEARANCE DETAILS**

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**FILE NO:** DT 1 of 2007

**COMPLAINANT:** GRAHAM FLETCHER  
**RESPONDENT:** RSPCA

**COUNSEL APPEARING:** **COMPLAINANT:**  
**RESPONDENT:**

**SOLICITORS:** **COMPLAINANT:**  
**RESPONDENT:** MALLESONS  
STEPHEN JAQUES

**OTHER:** **COMPLAINANT:**  
**RESPONDENT:**

**TRIBUNAL MEMBER:** MR G C LALOR, DEPUTY PRESIDENT

**DATE OF HEARING:** 15 June 2007 **PLACE:** CANBERRA

**DATE OF DECISION:** 19 June 2007 **PLACE:** CANBERRA

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**COMMENT:**