

## AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

**CITATION:** FIRESTONE AND LEGAL AID OFFICE (ACT) [2007] ACTDT 3 (26 FEBRUARY 2007)

**DT06/242**

**Catchwords:** Discrimination in the provision of services – psychological disability – “treatment” of complainant – unfavourable treatment – connection between treatment and disability – frivolous or vexatious complaint.

Discrimination Act 1991, ss 7, 8, 20, 68, 72, 89, 99, 116

Domestic Violence and Protection Orders Act 2001, s 101

Human Rights Commission Act 2005, ss 42, 43

Legal Aid Act 1977, ss 25, 94

Supreme Court Act 1971 (NSW), s 84

A & B v Director of Family Services [1997] ACTSC 17

Attorney-General v Wentworth (1988) 14 NSWLR 481

Briginshaw v Briginshaw (1938) 60 CLR 336)

De Domenico v Marshall (unreported) [1999] ACTSC 1 (3 February 1999)

Edgley v Federal Capital Press of Australia Pty Ltd (2001) 108 FCR 1

Edgley v Federal Capital Press of Australia Pty Ltd [1999] ACTSC 95 (1 October 1999)

Firestone v Australian National University [2004] ACTSC 76 (1 September 2004)

Lewin v ACT Health & Community Care Service [2002] ACTDT 2 (5 February 2002)

State Electricity Commission v Rabel [1998] 1 VR 102

**Tribunal:** Mr M H Peedom, Deputy President

**Date:** 26 February 2007

AUSTRALIAN CAPITAL TERRITORY )  
DISCRIMINATION TRIBUNAL )

NO: DT06/242

RE: **MICHAEL FIRESTONE**  
Complainant

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

### ORDER

**Tribunal** : Mr M H Peedom, Deputy President

**Date** : 26 February 2007

**Order** :

The Tribunal is satisfied, after hearing the complainant's complaint, that the complaint lacks substance.

THE TRIBUNAL ORDERS, pursuant to section 99(2) of the Discrimination Act 1991, that the complaint be dismissed.

.....  
Deputy President

AUSTRALIAN CAPITAL TERRITORY )  
DISCRIMINATION TRIBUNAL )

NO: DT06/242

RE: **MICHAEL FIRESTONE**  
Complainant

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

## REASONS

26 February 2007

Mr M H Peedom, Deputy President

### The complaint

The complainant in this case lodged a complaint with the Discrimination Commissioner on 1 November 2005. In the complaint he alleged that he had been treated unfavourably by the respondent in the provision of legal services because of a psychological disability from which he suffered. He queried whether he may have been victimised by the respondent because he had made the complaint. He further alleged that he had suffered distress and anxiety as a consequence of the unfavourable treatment.

2. The complainant did not provide any written narrative or other evidence of any witness in support of his complaint. In those parts of the form provided to him by the Discrimination Commissioner for the purpose of explaining the details of his complaint, he directed attention to an attachment to the form. It set out the following particulars of the complaint:

*1. (February 2003)*

*My solicitor made representations to the (Director of Public Prosecutions) about not proceeding with a charge against me. I don't know why he didn't show me this correspondence or even consult with me about its contents.*

*2. (March 2003)*

*When I expressed reservations about accepting an offer in which I would give very strict undertakings, my solicitor said that if I didn't accept the offer, he would recommend that my grant-of-aid be terminated (as accepting the offer was 'in my best interests').*

*3. (March 2003)*

*My solicitor advised me to act like a 'wombat' (in relation to the University, the Complainant against me): confining contact with University staff to an absolute minimum. I said I couldn't or wouldn't do this. He just again advised me to do it. My concerns about managing Depression seemed to count for nothing with him. And my attempts to avoid making a complaint of Discrimination against the University were also very important to me at this time.*

4. (March 2003)

*My various solicitors wrote about me (among themselves) in terms which no-one with mental-health problems should have to put up with.*

5. (May 2003)

*My original solicitor left Legal Aid; I found out about this sometime later. I asked my new solicitor to call some witnesses; she didn't call these witnesses. She called other witnesses, and didn't consult me about who she would or wouldn't call. I finally got to talk to her on the Sunday-afternoon, less than a day before the Monday-hearing.*

6. (May 2003)

*After my hearing, I was astonished to learn that my solicitor had decided not to call each of the University's witnesses (supposedly to avoid creating a cumulative impression on the magistrate); I had no input into this decision, and would never have agreed to it if I had known about it beforehand.*

7. (May 2003)

*My solicitor decided (in general) not to contest the University's affidavit evidence; I had no input into this decision, and would never have agreed to it if I had known about it beforehand. (This failure to contest evidence also had implications for my Appeal later.) I was even taken to task (by the University's barrister) for trying to challenge affidavit evidence from the witness-stand.*

8. (May 2003)

*My solicitor(/barrister) cross-examined some witnesses. I couldn't see the point of the questions they were asked. I don't know why I wasn't consulted about these matters. The University got everything they asked for.*

9. (May 2003)

*A finding was made that I was unfit-to-plead. My solicitor didn't really explain the implications of this finding to me at the time. Apparently, she had formed an opinion that it was not relevant to the civil cases, but I only found out about this in October (when the Appeal-Hearing was vacated).*

10. (October 2003)

*My Appeal-Hearing was 'vacated' because I may have been lacking in competence (perhaps supported by the finding in May that I was unfit-to-plead). Looking back, I should have dismissed Legal Aid immediately (and tried to 'shepherd' through the competence issue myself); Legal Aid should probably have pointed out this option to me.*



11. (October 2003)

*My solicitor seems to have then told the other Legal Aid solicitors (in the 'D.V. Unit') not to assist with my other civil cases or even talk to me at all. I wish I had been told about this beforehand; I felt ostracised even more.*

12. (November 2003)

*My solicitor told the University (on request) that she wasn't acting for me in the other civil cases. I wish she had told me that she had told the University this; instead, I had to find it out from the University in the courtroom.*

13. (January 2004)

*My other solicitor(again) made representations to the D.P.P. about not proceeding with a charge against me. I don't know why he didn't show me this correspondence or even consult with me about its contents.*

14. (March 2004)

*I finally took over the representation for my own cases. On inspecting my Legal Aid files, I came across the emails from March 2003 (paragraph 4., above). I found the comments rather deeply troubling. My solicitors immediately apologised for the comment(s), claiming that the comment(s) should not be taken to imply any lack of professionalism in their handling of my cases. But I just don't know what to think about that now.*

15. (September 2005)

*The C.E.O. wouldn't discuss my concerns about Legal Aid's treatment of me, and insisted that I re-apply for a grant-of-aid (rather than simply use (what I took to be) his very broad discretion to grant me aid himself).*

- *On the whole, I suspect that I was nevertheless very happy with the efforts made by Legal Aid on my behalf.*
- *Do the concerns listed above actually involve 'Discrimination'? (Lewin decision, 2002)*
- *I submit that my concerns do seem to involve a questioning of the willingness or ability of A.C.T. Legal Aid to act in the best (overall) interests of people with psychological problems.*

## **Background**

3. In response to directions given by the Tribunal to the complainant to file and serve a document outlining the particulars of his complaint and the evidence in support of it, the complainant, who represented himself at the hearing, submitted a number of documents comprising mainly correspondence and email exchanges between him and staff of the respondent. The detail of some of that material is referred to elsewhere in these reasons for decision. He did not provide a statement of his own evidence or of any other witness relating to the circumstances of his complaints. The circumstances of the complaint are

better understood by reference initially to material presented in evidence at the hearing on behalf of the respondent.

4. A written statement of Mr Martin Hockridge was tendered in evidence on behalf of the respondent. Mr Hockridge was at all relevant times the principal solicitor in the criminal law section of the Legal Aid Office (ACT) the name under which the respondent performs its functions (see section 94 Legal Aid Act 1977 – “**the Legal Aid Act**”). Part of his role was to supervise other solicitors in the respondent’s office in relation to the conduct of criminal law matters. Mr Hockridge gave the following evidence.

5. On 5 December 2002 the complainant was charged with a breach of a protection order. He was granted legal assistance on 8 December 2002 to defend the charge. The matter was handled by Mr D Malcolmson who was then a solicitor with the respondent’s office. Mr Malcolmson was also the solicitor with the carriage of a civil law file which related to an application to obtain a workplace protection order against the complainant. Counsel had been brief to appear in the Magistrates Court to represent the complainant in relation to the protection order. Assistance was also approved for counsel to appear in the Supreme Court on an appeal challenging the making of the protection order.

6. Limits of restriction apply to the publication of proceedings under the Domestic Violence and Protection Orders Act 2001 (see section 101). I shall in these reasons for decision refer to the other party to the proceedings in the Magistrates Court and the Supreme Court as “the third party”.

7. Following an adjournment of the matter in the Magistrates Court Mr Malcolmson reported to his supervisors, Ms L Crebbin and Mr M Hockridge that at a conference, counsel briefed to represent the complainant, Mr C Erskine, had advised the complainant that he should “keep his head down” with the third party, that is, to keep contacts with third party staff to a minimum, pending hearing of the protection order application. It had been alleged by the third party that the complainant harassed and pestered various of its personnel by repeatedly telephoning or emailing them. The advice given to him by counsel was that he should avoid this kind of conduct pending the hearing of the matter.

8. In February 2003 representations were made to the Director of Public Prosecutions that the criminal charge against the complainant not proceed. Advice was given by letter dated 6 March 2003 that those representations had been unsuccessful.

9. When the criminal charge came before the Magistrates Court on 21 March 2003, on the complainant’s instructions, the Court was asked to refer the question of the complainant’s fitness to plead to the charge to the Mental Health Tribunal. Such an order of referral was made by the Court.

10. In a report to Ms Crebbin dated 21 March 2003 recommending that the complainant’s grant of aid in relation to the civil proceedings in which the complainant was involved be terminated, Mr Malcolmson referred to counsel’s advice to the complainant that he restrict his contact with the third party to a minimum and not to

pursue other grievances against the third party until after the conclusion of the matters before the Court. The complainant, despite that advice, had ongoing contact with the third party. After giving that advice, the complainant had asked to use Mr Malcolmson's phone. Mr Malcolmson agreed but found out that the complainant had used the phone to telephone an officer of the third party to demand an appointment. He informed the complainant that he was less than impressed with his conduct and again reminded him that he should have minimal contact with the third party's employees until after the matter was finalised and that his actions had effectively scuppered any chance of settlement before the hearing. He told him that the making of an interim order could have been avoided if he had accepted the advice he had been given.

11. In an email message dated 21 March 2003 addressing the issues raised in Mr Malcolmson's letter to Ms Crebbin, Mr Hockridge said as follows:

*I guess a referral to the MHT for fitness to plead could be done, but I note your comments, Don (Malcolmson), 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 implications 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 (Crebbin), ..... It is a pity that the client here is such a dick head – it is not a good vehicle to run important arguments.*

12. Mr Hockridge said that, in referring to the complainant as a "dick head", he was making reference to the conduct of the complainant contacting the third party. He said that he had no information to suggest that the complainant's failure to follow the advice was a result of any mental disability from which he suffered and which he understood to be depression, albeit a condition controlled by medication. He considered that Mr Malcolmson believed the complainant was stubbornly following his own agenda with the third party and the complainant was not helping his own cause. The recommendation by Mr Malcolmson that the grant of legal aid in connection with the civil cases had been rejected. He said that (after the complainant became aware in March 2004 of the contents of the email and had drawn attention to it) he sent a written letter of apology to the complainant and expressed regret for any offence caused to the complainant as the result of reading a comment made in the course of email correspondence relating to his matters.

13. The Mental Health Tribunal found that the complainant was unfit to plead and this caused the criminal proceedings to be adjourned. Mr Malcolmson had then left the respondent's office and Mr Hockridge personally took carriage of the criminal law file.



He made further representations to the Director of Public Prosecutions to discontinue the charges but those representations were rejected. The complainant was later found fit to plead but the proceedings in the Magistrates Court were adjourned until the issue of the validity of the protection order was determined by the Supreme Court. He again made representations to the Director of Public Prosecutions but it was about that time that the complainant decided to represent himself.

14. A written statement of Ms L M Crebbin was also tendered in evidence on behalf of the respondent. Ms Crebbin is a legal practitioner and was, at relevant times, employed by the respondent and a statutory partner of the Legal Aid Office (ACT). She had carriage of some of the legal matters for which the complainant was granted assistance under the Legal Aid Act. She also had responsibility for supervising other legal practitioners employed by the respondent who also gave him advice and provided him with legal representation. Ms Crebbin gave evidence of the following matters.

15. In January 2003 the complainant was granted aid for representation before the Magistrates Court in relation to a workplace protection order. He was also granted aid for an appeal against the decision of the Magistrates Court to the Supreme Court that was heard on 11 June 2004. During this period there were also other matters involving the complainant and protection orders.

16. The appeal of the Supreme Court was initially listed for hearing on 17 October 2003. Prior to the hearing of the appeal, counsel representing the respondent to the appeal, the third party, raised a question as to the complainant's capacity to provide instructions to his representatives. An assessment had been made in the criminal jurisdiction that the complainant was unfit to plead in relation to the criminal charge for a period of 6 months from the date shortly before the hearing of the charge in the Magistrates Court and the complainant had made an application in the Magistrates Court to revoke a consent order made in those proceedings. The application had relied upon doubt as to his competence as a ground for the application. As a consequence of these matters being raised, the Supreme Court vacated the hearing of the appeal and gave permission for it to be re-listed at a future date.

17. Ms Crebbin advised the complainant in a letter dated 21 November 2003 that before the appeal could proceed it would be necessary for a psychiatric assessment to be undertaken to determine his capacity to provide instructions to his representatives. The letter explained in detail the implications of any incapacity to provide instructions to legal representatives and the courses of action that were open to the complainant to progress the matters in respect of which he was being provided with representation.

18. In an email message dated 16 January 2004 the complainant indicated that he had decided he would now have to begin to take steps to act for himself in all his legal matters. In a letter dated 10 March 2004 the complainant confirmed his decision that he cease to be represented by the respondent. He expressed praise for the efforts for the many different Legal Aid Office staff he had dealings with and requested that he be



provided with all documents related to his matters. An arrangement was made for the complainant to inspect all of his files which he did on or about 16 April 2004.

19. It appears that the Supreme Court appeal was heard on 11 June 2004 and the complainant represented himself. On 1 September 2004 the decision of the Supreme Court was handed down. Ms Crebbin agreed to appear when the decision was given in case there was an issue as to costs. The complainant's appeal to the Supreme Court was unsuccessful. She informed the complainant that the respondent would consider the reasons of the Supreme Court for its decision and give an opinion about a further appeal and other legal matters. The respondent advised the complainant by email dated 9 September 2004 that the decision of the Supreme Court was unlikely to be overturned on appeal.

20. On about 13 September 2004 the complainant left a message for Ms Crebbin requesting advice about what issues were involved in him making an application for costs. On about 21 September 2004 an officer of the respondent sent an email message to the complainant confirming that an appeal was unlikely to be successful and that it was unlikely that legal aid would be granted to appeal the decision of the Supreme Court. In an email message dated 6 November 2004 the complainant said that he had decided that his best option was to claim inadequate representation by the respondent from the very start. He referred to the apology which he had received from Mr Hockridge and noted that he "wasn't really insisting on that". He went on to say that he had no current issue with Mr Hockridge or Ms Crebbin.

21. In a further email to Ms Crebbin dated 7 November 2004 he said that he saw Mr Hockridge at court sometimes and that Mr Hockridge had "sometimes seemed more troubled about that 'dick head' business than I myself temporarily was".

22. On 9 March 2005 the complainant lodged a further application for legal aid in relation to an appeal against the decision of the Supreme Court and in relation to the making of a complaint against 'The Canberra Times' which had made a report of that decision. By letter dated 10 March 2005 the complainant was advised that his application for legal assistance had been refused.

23. In an email message dated 10 May 2005 Ms Crebbin advised the complainant, in response to requests from him, that she was unable to meet with him but that if there was something within her realm of responsibilities that he wished to discuss, then she would endeavour to see him. In a letter dated 2 June 2005 the complainant stated that he wanted the respondent to assist him with his various cases whether or not they considered those cases had good prospects of success. He criticised the professionalism with which the respondent had handled his matters. He noted that the respondent was on a call-over list of the Discrimination Tribunal as a respondent.

24. On 7 June 2005 the complainant spoke with Ms Crebbin outside the entrance to the respondent's offices. He said that he wanted to talk to her about his letter and what he described as 21 cases. Ms Crebbin said that she would send a response to his letter

shortly. On 8 June 2005 he left a document containing a list of 21 matters or legal issues that he wished to discuss in an appointment. In a letter dated 10 June 2005 Ms Crebbin advised the complainant that she was not prepared to meet with him to further discuss any of his matters and that if he wanted to request further assistance he would need to make an application for it. In an email response dated 10 June 2005 the complainant said that he would address the respondent's office through standard formal channels and that at some stage he would like to point out some possible failings in legal aid as he had experienced it and that these matters might justify some special consideration for his applications.

25. In a letter dated 31 August 2005 the complainant said that Ms Crebbin had misunderstood a remark he had made earlier about the respondent being a respondent in proceedings in the Discrimination Tribunal as indicating his intention to lodge a complaint against the respondent with the Tribunal. He said that the thought had not then occurred to him but that he now suspected he would indeed be making a complaint to the Tribunal. He said: "I see no other way to get your fullest attention and, frankly, all other considerations point in this direction also. So please don't let such a complaint come to you unexpected. (I do not particularly like having to make such complaint)." He went on to say: "If you are prepared to give me what I've wanted (such as assistance in undoing the damages to me), without strings attached, I may look on this in a favourable light".

26. In a reply dated 14 September 2005 the Chief Executive Officer of the respondent said that the complainant's letter "reads as though you might not proceed with the complaint if I were to make a decision to provide you with assistance for unspecified matters subject to no terms or conditions." The letter went on to say that any application for assistance under the Legal Aid Act would have to be considered within the framework of that legislation and relevant guidelines and that in exercising its discretion the respondent would not be swayed by what could be interpreted as a vague threat to take some unfounded action against the respondent if he was not given what he wanted. He was advised to make any further application for grant of legal aid in the usual way.

27. In an email message dated 15 September 2005 to the respondent the complainant said, inter alia:

- 1. I believe Legal Aid did bad things to me, in the past.*
- 2. I believe Legal Aid will do those same bad things to someone else in my circumstances in the future (call him MF-2006, or whatever).*
- 3. I want Legal aid to do good things for me now*

*These 3 matters can be treated with a degree of independentness.*

*Let's look at point 3 here.*

*(But perhaps keeping the others as background if/when appropriate)*

He went on to say that he found that the standard process of applying for a grant of aid was excruciating and that he could not make his best case within the confines of a standard form. The Chief Executive Officer of the respondent replied on 15 September 2005 stating that he had nothing to add.

28. In an email message dated 18 September 2005 the complainant stated that he intended to proceed with the legal actions he had previously mentioned. In an email message dated 6 January 2006 the complainant requested a meeting with Ms Crebbin and another officer of the respondent to discuss the decision of the Supreme Court and a possible appeal against it. In a response dated 9 January 2006 Ms Crebbin advised the complainant that she was reluctantly prepared to meet with him. She said that she was aware of his recent dealings with the Discrimination Commissioner and was reluctant to meet with him while his complaint remained unresolved. She would do so, however, because of his constant stressing of the importance of accommodating his request. She emphasised the need for any meeting to have a clear agenda which focussed on the issues on which he sought advice.

29. In an email message dated 9 January 2006 to the Chief Executive Officer of the respondent the complainant said that he wished to arrange a meeting between himself, Ms Crebbin and two officers of the respondent, Mr Hockridge and Mr Malcolmson, to forestall the lodging of professional conduct complaints against them. In a response dated 9 January 2006 Ms Crebbin, while acting as Chief Executive Officer of the respondent, declined to agree to such a meeting. She said that she regarded it as contradictory that the complainant would ask for a meeting to obtain legal advice and also for a meeting to discuss a complaint against officers of the respondent.

30. At a meeting with the complainant, attended by another officer of the respondent on 18 January 2006, Ms Crebbin discussed the decision of the Supreme Court with the complainant and told him that the respondent could do nothing about the matter unless he was given a grant of legal aid. The complainant said he wanted to re-apply but simply could not cope with the decisions that had to be made with filling out the form. Ms Crebbin offered to assist him complete the form. She asked him to complete the application form with his name and details of his income, satisfy himself that the information included in it was correct and sign it. He later submitted the application. In a letter dated 30 January 2006 the respondent advised the complainant that his application for assistance in connection with the appeal against the decision of the Supreme Court had been refused because it was not reasonable to spend scarce legal aid funds in circumstances where prospects of success were outside the respondent's guidelines of more likely than not to succeed. He was advised that he could ask for the decision to be re-considered. On 10 February 2006 the complainant requested that the decision be re-considered. Re-consideration of the request was undertaken by the Chief Executive Officer of the respondent and the conclusion reached that the complainant was not eligible for legal aid. He was advised of the decision by letter dated 14 February 2006 but he did not receive the letter until 3 March 2006. That decision was later referred to a review committee which affirmed the earlier decision of the respondent.



## The law to be applied

31. The allegations made by the complainant require consideration to be given as to whether the respondent acted contrary to section 20 of the Discrimination Act. Section 20 provides:

### **20 Goods, services and facilities**

*It is unlawful for a person (the **provider**) who (whether for payment or not) provides goods or services, or makes facilities available, to discriminate against another person—*

- (a) *by refusing to provide those goods or services or make those facilities available to the other person; or*
- (b) *in the terms or conditions on which the provider provides those goods or services or makes those facilities available to the other person; or*
- (c) *in the way in which the provider provides those goods or services or makes those facilities available to the other person.*

32. Pursuant to section 8(1)(a) of the Discrimination Act, discrimination is constituted by conduct which treats another person unfavourably because of an attribute referred to in section 7 (see Edgley v Federal Capital Press of Australia Pty Ltd [1999] ACTSC 95 (1 October 1999)).

33. The respondent did not dispute that the complainant suffered from depression or that his condition was an attribute within section 7 of the Discrimination Act.

34. For a complaint of discrimination to be substantiated it is necessary for the discrimination to be proved to a proper standard based upon proper evidentiary material and there must be a comfortable degree of satisfaction that they have been proved by evidence which is sufficiently robust to justify the conclusion arrived at rather than inexact proofs, indefinite testimony or indirect references (see De Domenico v Marshall (unreported) [1999] ACTSC 1 (3 February 1999) and Briginshaw v Briginshaw (1938) 60 CLR 336)).

35. To substantiate the complaint of victimisation it would be necessary for the complainant to establish that the respondent's conduct contravened section 68 of the Discrimination Act. Section 68 provides:

### **68 Victimisation**

- (1) *It is unlawful for a person (the **first person**) to subject someone else (the **other person**) to any detriment because—*



- (a) *the other person has—*
- (i) *begun a proceeding under this Act; or*
  - (ii) *given evidence, or produced a document or thing, to the tribunal; or*
  - (iii) *reasonably asserted any rights that a person (including the other person) has under this Act; or*
  - (iv) *claimed that a person has committed an act that is unlawful under this Act; or*
- (b) *the first person believes that the other person proposes to do something mentioned in paragraph (a).*
- (2) *Subsection (1) (a) (iv) does not apply in relation to a claim that is false and is not made honestly.*

### **Reasons for decision**

#### **Incidents 1 & 13**

36. The particular aspect of the respondent's conduct about which the complainant complains in relation to incidents 1 and 13 is the failure of the respondent's solicitors who represented him to consult him about the contents of representations to be made on his behalf to the Director of Public Prosecutions and to provide him with a copy of the representations.

37. The complainant did not give any evidence to explain the detail of any instructions he had given to the solicitors to make representations to the Director of Public Prosecutions in relation to the criminal charges or the circumstances surrounding the giving of those instructions.

38. According to Mr Hockridge's evidence, representations to the Director of Public Prosecutions were made on behalf of the complainant on three occasions. In apparent reference to the third occasion on which representations were made to the Director of Public Prosecutions, he accepted that he had not provided a copy of them to the complainant. In answer to a question asked in cross-examination by the complainant as to why he did not show the complainant a copy of the representations, Mr Hockridge said that he discussed the matters that were to be raised in the representations at length with the complainant and made him aware of the proposed representations. He also said that, at the time of writing some of the representations, the complainant had been found not fit to plead to the charges that were the subject of the representations.

39. I see no reason, in the absence of contrary evidence, to not accept Mr Hockridge's evidence. Accordingly, I am unable to find that Mr Hockridge did not consult with the complainant about the representations as alleged by the complainant in relation to incident 13.

40. In relation to both incidents, for such conduct to fall within the terms of section 20, in particular paragraph (c) of section 20 of the Discrimination Act, it would be necessary to find that the conduct involved, inter alia, treating the complainant in a particular way that was unfavourable to the complainant and that the reason for the unfavourable treatment of the complainant was his disability.

41. In Edgley v Federal Capital Press of Australia Pty Ltd (2001) 108 FCR 1 at 17 Beaumont ACJ said that the word "treat" was not defined and was not a term of art. He adopted the Macquarie Dictionary definition that it meant "1. To act or behave towards in some specified way: (eg) to treat someone with respect". He emphasised that the conduct must be aimed at, or towards, the person complaining of discrimination.

42. The absence of any evidence to explain the circumstances of the complainant's dealings with the solicitors who made the representations on his behalf does not enable any finding to be made as to whether, in the case of the first incident, any consultation or lack of consultation with the complainant or in the case of both incidents, the omission to provide a copy of the representations to him involved conduct that was aimed at or towards the complainant. The state of the evidence leaves open, for example, mere inadvertence as a possible explanation for the conduct complained of. Consequently, it is not possible to conclude that the omissions complained of involved some conduct that was aimed at or towards the complainant.

43. Even were the Tribunal to find that the matters complained of involved treatment of the complainant that was unfavourable, the Discrimination Act also requires that there be a causal nexus between the treatment and the complainant's disability.

44. The complainant's allegation that he suffered from the disability specified in the complaint to the Discrimination Commissioner was not disputed by the respondent. Details of that condition were not, however, the subject of any medical evidence nor other evidence that might explain the effect that such a condition might have on his behaviour or of any possible reaction to his behaviour.

45. The complainant relied upon a reference by Higgins CJ in his reasons for decision in the appeal by the complainant challenging the decision of the Magistrates Court to issue a workplace protection order against him (see Firestone v Australian National University [2004] ACTSC 76 (1 September 2004)) to the fact that the complainant's clinically diagnosed depression was a contributing factor to his disturbed and concerning behaviour which gave rise to the making of the order against him.

46. The evidence of such a clinical diagnosis to which his Honour referred was not presented in evidence to the Tribunal. I note that the respondent recorded in a letter to

the complainant dated 8 January 2003 that one of the reasons for approving his application for legal aid in relation to the criminal proceedings was the difficulty that would be involved in the complainant representing himself because of his mental health. Significantly, however, there was no evidence submitted to the Tribunal that would enable it to find that the reason for not consulting the complainant or not providing a copy of the representations to him was the disability from which he suffered.

47. I conclude that the complaint in relation to these incidents has not been substantiated.

### **Incident 2**

48. Mr Hockridge gave evidence in cross-examination that, in general, a grant of legal aid could, in accordance with guidelines under the Legal Aid Act, be terminated where the recipient of aid refused to follow the advice given by the respondent. Any proposition that a complainant should be regarded as having been treated unfavourably solely because of his/her attention having been drawn to the consequences of failure to comply with guidelines for a grant of legal aid made pursuant to statutory authority should, in my view, be rejected.

49. In any event, the terms of any offer put to the complainant for consideration in March 2003 was not the subject of any evidence to which the Tribunal was directed or from an examination of the material before the Tribunal that I can find. There is no basis for the Tribunal to find that the advice that the complainant should accept an offer was unfavourable to the complainant irrespective as to any reason that he might have had for reservations about it. Nor, having regard to the fact that the grant of aid was apparently not terminated, did the complainant suffer any disadvantage.

50. I conclude that the complaint in relation to this incident has not been substantiated.

### **Incident 3**

51. The complainant's allegation that he was advised to minimise contact with the third party was accepted by the respondent. The reasons for that advice, and consequences of failure to accept it, were recorded in an email sent by Mr Hockridge to Ms Crebbin on 20 March 2003 recommending the termination of legal aid to the complainant in respect of the civil proceedings in which he was represented by the respondent. The email was put in evidence by the complainant. It reported Mr Hockridge's view that the offer should be accepted so as not to prejudice any prospect of settlement of the proceedings; to avoid strengthening a case for making further orders against the complainant and to avoid the prospect of the complainant being arrested and subject to further criminal charge. I note further that the grant of legal aid to the complainant in respect of the civil proceedings was approved on the basis that, if the orders sought against him were made, he would suffer significant personal detriment.

52. Mr Hockridge's email also records reservations expressed by the complainant about accepting his advice as being related to the complainant's desire to avoid the need to

make a complaint of discrimination against the third party. In response to those reservations he advised that any action inconsistent with his advice should best be pursued after completion of the civil proceedings.

53. No suggestion was made to Mr Hockridge that his report of the advice given to the complainant was inaccurate. Nor was contrary evidence to support the complainant's assertions submitted to the Tribunal. There is no basis to support the inference in the complainant's complaint that his concern to continue contact with the third party was ignored.

54. It also remains unclear as to why conduct which the complainant's legal representatives advised could prejudice his position in the conduct of legal proceedings they were conducting on his behalf and which could expose him to the risk of further criminal charges, which advice he did not seek to contradict, should nevertheless be engaged in as a means of managing the complainant's depression. Nor is it clear why such conduct would assist his attempts to avoid making a complaint of discrimination against the third party. Ultimately, however, it was a matter for the complainant to balance what appear to be competing considerations and make his own decision having regard to the possible consequences.

55. In the circumstances, I conclude that the evidence before the Tribunal does not support a finding that the complainant was treated unfavourably by the respondent in relation to this incident.

56. In addition to a requirement that there be a finding of unfavourable treatment it would be necessary for the Tribunal to find that a reason for any such treatment was the complainant's disability. The only evidence that bears upon that issue in relation to incident 3 is the reference in Mr Hockridge's report to the fact that the complainant does have some mental health issues. He continues in the report, however, to note that the complainant's behaviour, at that time, seemed to be largely under control due to medication. The evidence does not support a finding that the reason for any treatment of the complainant relating to incident 3 was the complainant's disability.

57. I conclude that the complaint in relation to this incident has not been substantiated.

#### **Incidents 4 and 14**

58. The complainant identified these incidents as the matters of major concern to him. The text of the communication to which his complaint relates is set out in paragraph 11 above. He became aware of the communication when he was given access to the respondent's file after it ceased to represent him. According to Ms Crebbin's evidence this occurred on 16 April 2004. Letters of apology sent to the complainant dated 16 and 17 March 2004 would suggest, however, that the inspection of the file more likely occurred on or about 11 March 2004, the date suggested by the complainant. The complainant drew the attention of the respondent's officers to the final paragraph of the email and asked:



*Is it unreasonable of me to be rather deeply troubled by the manner of expression used in this paragraph? Please comment.*

59. The context in which the comment was made is that it responded to a recommendation made by Mr Malcolmson, then representing the complainant, that the assistance being provided to the complainant in connection with civil litigation in which he was involved be terminated. As noted above, Mr Malcolmson had reported that his recommendation was based upon the complainant's failure to follow the legal advice he had been given. In attempting to find an explanation for the complainant's refusal to accept that advice, he reported as follows:

*Frankly, I think that for some reasons known only to him, Mr Firestone wants to be made a martyr for some unknown cause that he wishes to pursue, possibly to self destruction. He does have some mental health issues but his behaviour now seems to be largely under control due to medication. Notwithstanding, he has received significant legal assistance from Legal Aid but has jeopardised his prospects because he failed to follow our advice.*

60. The references in the final paragraph of Mr Hockridge's email message dated 21 March 2003 were, in my opinion, used as a means of describing the complainant's conduct in refusing to accept the advice he had been given with the possible consequences of which he had been advised. Mr Hockridge's acknowledgement of Mr Malcolmson's advice that the complainant's mental health issues were largely controlled by medication supports the view that the references complained of were not attributable to the complainant's disability but was attributable to conduct not affected by any disability from which he suffered. The reference made in the second paragraph of the email to the issue of the complainant's mental health having to be taken into account suggests that to the extent that the complainant's disability was a factor proposed to be taken into account in any consideration as to whether legal aid should be terminated, it was a factor supporting the continuation of legal aid rather than terminating it and therefore not unfavourable to the complainant.

61. By itself the final sentence of the second paragraph is clearly unfavourable treatment of the complainant. In my opinion, however, the evidence does not justify a finding that the reason for such treatment was the complainant's disability.

62. I conclude that the complaint in relation to this incident has not been substantiated.

### **Incidents 5 – 8**

63. The evidence relied upon by the complainant in relation to these incidents was an email message sent by him on 13 May 2003 to Ms Crebbin responding to a request from Mr Malcolmson as to the witnesses who the complainant wished to be called to give evidence in proceedings in which the third party had applied for a workplace protection order against him. He identified 6 persons, including himself, as witnesses and, if some

of them were already witnesses for the respondent, he identified another 7 persons. He said in the email that it was very important to cross-examine as many of those witnesses as possible. He also drew attention to a letter written on behalf of the third party after the conclusion of the proceedings which placed reliance upon the fact that the complainant had seen an affidavit sworn by one of its witnesses in the Magistrates Court work protection order proceedings which was adverse to the complainant and not challenged it.

64. In cross-examination by the complainant Ms Crebbin said that she attended a conference with the complainant and counsel on the day before the hearing. There was discussion about the witnesses to be cross-examined by counsel and the questions they were to be asked. Some of the witnesses the complainant identified were to be called as witnesses for the respondent. An explanation was given by counsel as to the witnesses who would be called. She had a clear recollection that, amongst other things, counsel had advised the complainant that there was a limit on some of the questions that the complainant had proposed be asked in cross-examination without him knowing what would be the complainant's evidence on particular issues. It was explained that it would be improper for counsel to ask those questions without knowing what the complainant's evidence was. She agreed that she had advised the third party prior to the conference that some of the third party's proposed witnesses would not be required to attend court to be cross-examined. However, she said that the reasons for doing so had been explained in detail at the conference.

65. The burden of the complainant's complaint in relation to incidents 5-8 appears to be that he provided his legal representatives with specific instructions regarding the witnesses to be called in the proceedings and as to the nature of cross-examination of the third party's witnesses and those instructions were not followed.

66. The absence of any detailed information about the nature of the proceedings that were the subject of these incidents does not enable any view to be formed by the Tribunal as to whether, had the instructions the complainant said he gave to his legal advisers been followed, his case might have been assisted. His assertion that his instructions were ignored, however, was contradicted by Ms Crebbin's evidence. I see no reason to not accept Ms Crebbin's evidence. She had a clear recollection of the discussion that occurred at the conference attended by counsel, herself and the complainant prior to the hearing. Her version of the discussion was consistent with propositions put to her during cross-examination of her evidence by the complainant that he had questioned some of the advice given by counsel as to the manner in which the proceedings were to be conducted. His questions were inconsistent with any suggestion that the matter was not discussed at the conference.

67. I conclude that the evidence does not support a finding that the complainant was treated unfavourably, nor does it support a finding that the reason for the manner in which the proceedings was conducted was because of the complainant's disability.

### **Incident 9**

68. It appears from correspondence dated 21 November 2003 from the respondent to the complainant that an assessment had been made that the complainant was unfit to plead to the charge against him for a period of 6 months from a date shortly before the hearing in the Magistrates Court, understood by the Tribunal to be on 18 June 2003. The letter dated 21 November 2003 set out in some detail the consequences of the complainant's possible lack of competence to give instructions. It appears from that letter that Ms Crebbin had formed a view that the complainant was competent to give her instructions in the civil matters and that cause for her to form a different view only arose on 17 October 2003 when the matter was drawn to the attention of the Supreme Court by the counsel for the third party. It also appears that counsel briefed to represent the complainant shared Ms Crebbin's opinion that the complainant was competent to provide instructions to his lawyers. The complainant's allegation appears to accept that his lawyers had not formed a view, at least until 17 October 2003, that the finding that he was unfit to plead had any implications for the complainant's civil cases. There is no evidence available to the Tribunal to enable it to conclude that, on the basis of the information then available to them, they should have arrived at a different view of the matter in which case the occasion for giving the advice, which the complainant complains he was not given until October 2003, did not arise. Further, the omission of which the complainant is made does not, in my view, involve any treatment of the complainant in the sense described in Edgley's case.

69. In the circumstances there is no basis upon which to conclude that the complainant was treated unfavourably.

### **Incident 10**

70. The implications of the complainant's lack of competence to instruct his lawyers in relation to the civil proceedings were set out in detail in Ms Crebbin's letter to the complainant dated 21 November 2003. In the letter she referred to the explanation that she had given to the complainant after the Supreme Court had vacated the hearing date for the appeal on 17 October 2003. She pointed out that the appeal could not proceed without an assessment first being provided by a psychiatrist as to the complainant's capacity to provide instructions to his representatives and that, without that capacity, it would be necessary to have a competent person appointed by the court to act in the complainant's best interests.

71. The respondent did not dispute the complainant's assertion that he was not advised that he could terminate the services being provided to him by the respondent and attempt to deal with the issue of his competence in the Supreme Court himself. It does not seem to me, however, that the option which the complainant complains he was not offered was a viable option or that there is any basis for finding that such an omission could involve conduct that was aimed at or towards the complainant. Nor, in my opinion, could the Tribunal conclude that, in the circumstances of uncertainty then surrounding the



complainant's mental health, the omission complained of was unfavourable to the complainant.

72. I conclude that the complaint has not been substantiated.

### **Incidents 11 and 12**

73. The complainant did not give any evidence in relation to the assertions made by him in relation to these incidents nor did he cross-examine the respondent's witnesses about them or identify the evidence on which he relied to substantiate the complaints. In the absence of such evidence there is no basis upon which to make findings in accordance with the facts alleged or to conclude that the conduct alleged was unlawful under the Discrimination Act.

74. I conclude that the complaints have not been substantiated.

### **Incident 15**

75. The main element of the complaint in relation to incident 15 appears to relate to the requirement that the complainant complete a written form of application for legal aid. The references made by him to the decision of the Tribunal in Lewin v ACT Health & Community Care Service [2002] ACTDT 2 (5 February 2002) and to the broad discretion available to the Chief Executive Officer of the respondent in determining whether legal aid should be granted to an applicant infer that the respondent should have assisted the complainant complete the required form of application or dispensed with the requirement that the form in use for the purpose be completed and the application be resolved on the basis of explanations to be given by him at a meeting with the respondent's officers.

76. In general, it is a requirement of the Legal Aid Act that an application for legal aid be in writing. Such a requirement may not apply to assistance consisting of legal advice and an application may be treated as having been properly made even if not in a form approved by the respondent (see section 25 Legal Aid Act).

77. The evidence before the Tribunal does not make clear the kind of assistance that the complainant was requesting. The reference in his letter dated 2 June 2006 to "various cases" and "whether or not Legal Aid considers them to have good prospects of success" suggests that his request was not confined to the giving of legal advice. The Tribunal was not provided with any evidence as to whether a form for the making of an application for legal aid had been approved or was in use. Nor was there any evidence available to the Tribunal that might explain what effect, if any, the complainant's disability might have on his capacity to comply with the respondent's requirements for making an application for legal aid. The Tribunal is not in a position, in that event, to form a view as to whether it would have been reasonably open to the respondent to dispense with any requirement that a form of application be completed on the basis that special circumstances existed or make any finding that the complainant was treated unfavourably. Nor does the available



evidence afford a basis for conclusion that the reason for any of the treatment complained of was the complainant's disability.

78. I conclude that the complaint has not been substantiated.

### **Victimisation**

79. The complainant did not specify in his complaint or otherwise what conduct of the respondent involved a contravention of section 68 of the Discrimination Act.

80. The first reference in the evidence to any kind of discrimination is contained in the letter from the complainant to the respondent dated 2 June 2005. In that letter the complainant notes that the respondent was on a Discrimination Tribunal call-over list as a respondent. Ms Crebbin gave evidence that she mistakenly understood this to be an expression of intention by the complainant to make a complaint under the Discrimination Act against the respondent. Although according to her evidence, the complainant informed Ms Crebbin on the following day that that was not his intention. The complainant did more clearly foreshadow his intention to make a complaint of discrimination in his letter to the respondent dated 31 August 2005.

81. Section 68(1)(b) of the Discrimination Act (set out above) extends to conduct by a person that subjects another person to any detriment because the former person has a belief that the complainant proposes to take any of the action referred to in section 68(1)(a) of the Discrimination Act.

82. There is a basis for finding that from 2 June 2005 until 1 November 2006, the date on which the complaint was lodged with the Discrimination Commissioner, the respondent had a belief that the complainant proposed to make a claim that it had acted in a way that contravened section 68(1)(a) of the Discrimination Act.

83. In the letter from Ms Crebbin to the complainant dated 10 June 2005 and the letter from the respondent's Chief Executive Officer dated 14 September 2005, however, the complainant was advised that any request made by him for legal aid would be assessed in accordance with the requirements of the Legal Aid Act and relevant guidelines made under it. His right to have any unfavourable decision reviewed was drawn to his attention. There is no evidence the complainant's failure to obtain the assistance he was requested was dealt with in any other way. There is no basis, therefore, for a finding by the Tribunal that the complainant was subjected by the respondent to any detriment in dealing with his application for legal aid irrespective as to any belief the respondent's officers may have had about the complainant's intention to make a complaint of discrimination or otherwise to take action of the kind specified in section 68(1)(a).

84. I conclude that the complaint has not been substantiated.

**Whether complaint is frivolous or vexatious**

85. Section 99(2) of the Discrimination Act provides:

- (2) *If the tribunal is satisfied the complaint is frivolous or vexatious, is not made honestly, or lacks substance, the tribunal must dismiss the complaint.*

86. The power to dismiss a complaint under section 99(2) is able to be exercised after the Tribunal has heard the complaint (section 99(1)). In the event that the Tribunal were to dismiss a complaint pursuant to section 99(2) on the grounds that it is frivolous or vexatious or not made honestly it has a discretion to order the complainant to pay the respondent's expenses reasonably incurred in relation to the hearing (section 99(4)). By itself, a finding that a complaint lacks substance does not authorise the making of such an order.

87. The Tribunal previously dealt with an application made by the respondent before the matter was heard, for the complaint to be struck out pursuant to section 89 of the Discrimination Act. Section 89 empowers the Tribunal to strike out a complaint before it begins hearing the matter on the grounds that it is frivolous, vexatious, misconceived or lacking in substance or not made in good faith.

88. In rejecting the application that the complaint be dismissed as misconceived and lacking in substance, the Tribunal observed that it was required, in dealing with an application under section 89 to strike out a complaint as lacking in substance, to find whether there was some evidence favourable to the complainant's contentions which, taken at their highest in favour of those contentions, would render them seriously arguable and that in determining the issue it would ordinarily accept the factual allegations relied upon by the complainant as true and draw inferences favourable to the complainant that were open. It also noted that the Tribunal should only dismiss a claim as without substance with considerable caution. For the reasons which were given and which are attached to these reasons for decision, the Tribunal declined to strike out the complaint pursuant to section 89.

89. In now dealing with the respondent's submissions that the complaint be dismissed pursuant to section 99(2) as being frivolous and vexatious, the Tribunal has been asked to dismiss the application on different grounds after hearing all of the evidence of both of the parties and with the opportunity for it to be tested.

90. A complaint could be regarded as frivolous if it were clearly untenable, hopeless or doomed to fail (see State Electricity Commission v Rabel [1998] 1 VR 102) or baseless (see A & B v Director of Family Services [1997] ACTSC 17).

91. Proceedings may be properly regarded as vexatious on either objective or subjective grounds. The test for determining whether proceedings are vexatious was expressed in Attorney-General v Wentworth (1988) 14 NSWLR 481 at 491 as follows:

- 1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.*
- 2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*
- 3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.*

92. The Wentworth case involved an application made pursuant to section 84(1) of the Supreme Court Act 1971 (NSW) which made provision for the making of an order to prevent a person instituting proceedings in any court without leave where the person habitually and persistently and without any reasonable ground instituted vexatious legal proceedings. The test enunciated was, therefore, directed at determining whether the “proceedings” were vexatious.

93. The complaint in this case was made pursuant to section 72 of the Discrimination Act prior to its amendment by the Human Rights Commission Act 2005 (effective 1 November 2006). Section 116(3) of the Discrimination Act following 1 November 2006 deems the complaint to which the application was made to the Tribunal to have been made under the Discrimination Act following its amendment on 1 November 2006. The word “complaint” is defined in the Dictionary to the Discrimination Act as:

*a complaint about unlawful discrimination that may be made under the Human Rights Commission Act 2005.*

Section 42 of the Human Rights Commission Act provides for the making, inter alia, of complaints under section 20 of the Discrimination Act. Section 43 provides for such complaints to be made to the Discrimination Commissioner (see definition of “commission”).

94. It is clear that what section 99(2) empowers the Tribunal to dismiss is a complaint made to the Discrimination Commissioner to which a relevant ground referred to in that section applies.

95. The majority of the incidents which gave rise to the complainant’s complaints occurred prior to 10 March 2004, the date on which he complimented the staff of the respondent for the assistance which had been given to him and prior to which date there is no evidence of any concern expressed by him as to the service provided to him by the respondent. The matter which he agreed was his main complaint (incident 14 occurring in about March 2004 when he read the respondent’s file in relation to his matters) was described by him about six months later in November 2004 as temporary in its effect on him and more troubling to the person who made the statement than to him. The

complaint to the Discrimination Commissioner was not made until more than 2 years after the incidents that were the subject of it. The commencement of his expressions of concern did not arise until such time as it was made clear to him that he was unlikely to be given further assistance by the respondent. His responses to indications given to him that further assistance was unlikely to be forthcoming were expressed in terms of threats to commence action against the respondent under the Discrimination Act, which action might not be proceeded with if he was dealt with favourably. At the time he made his complaint to the Discrimination Commissioner he had not received notice from the respondent that the Chief Executive Officer had rejected his claim for legal aid.

96. These matters provide a strong basis for conclusion that the complaint was made to annoy or embarrass the respondent and for the collateral purpose of being used as a device for obtaining a further grant of legal aid irrespective as to his proper entitlement to such a grant.

97. It is less clear, however, that the complaint was not also made for the legitimate purpose of having it investigated on the issues that gave rise to it. In particular, the inference of the description of the complainant in the letter dated 21 March 2003 as a person engaging in foolish behaviour at a time when the complainant was suffering some, albeit unexplained, degree of mental difficulty in the context of consideration being given as to his continued entitlement to legal aid does not enable the Tribunal to be satisfied that the complaint warrants a finding that it was frivolous or vexatious.

98. Accordingly, I conclude that the complaint should not be dismissed as frivolous or vexatious pursuant to section 99(2) of the Discrimination Act.



**AUSTRALIAN CAPITAL TERRITORY  
DISCRIMINATION TRIBUNAL**

**APPEARANCE DETAILS**

To be completed by Member's Staff

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**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:** 7 & 8 FEBRUARY 2007 **PLACE:** CANBERRA

**DATE OF DECISION:** 26 FEBRUARY 2007 **PLACE:** CANBERRA

**COMMENT:**

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