

## AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

**CITATION:** KWESIUS AND ACT HEALTH [2008] ACTDT 3 (28 APRIL 2008)

**DT07/19**

**Catchwords:** Discrimination in employment – suspension because of presumption of psychiatric disability – inadequate legal basis for suspension – failure to afford procedural fairness – reinstatement to position before suspension – compensation – expenses – claims of discrimination by failure to provide training and overtime lacking substance

Discrimination Act 1991, ss 4A, 5AA, 7, 8, 10, 99  
Freedom of Information Act 1989

Briginshaw v Briginshaw (1938) 60 CLR 336

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

Dixon v Commonwealth of Australia (1981) 3 ALD 289

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

Waters v Public Transport Commission (1991) 173 CLR 349

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

**Date:** 28 April 2008

AUSTRALIAN CAPITAL TERRITORY )  
DISCRIMINATION TRIBUNAL )

NO: DT07/19

RE: **TANIA KWESIUS**  
Complainant

AND: **ACT HEALTH**  
Respondent

### DECISION

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

**Date** : 28 April 2008

**Decision** :

1. The Tribunal is satisfied that the respondent has engaged in the unlawful conduct specified in subparagraphs (i), (ii) and (iii) of paragraph 2 of the Tribunal's reasons for decision;
2. The respondent is ordered to reinstate the complainant to the position which she occupied immediately prior to 18 January 2006;
3. The respondent is ordered to pay the complainant a sum to be stated by the Tribunal by way of compensation for the loss or damage suffered by the complainant because of the unlawful conduct which is to include the sum of \$5,000 by way of general damages;
4. The Tribunal is satisfied that the complaints referred to in subparagraphs (iv), (v) and (vi) of paragraph 2 of the Tribunal's reasons for decision lack substance and are dismissed.

Note: The Tribunal will hear the parties further as to the question of expenses.

.....  
Deputy President

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### REASONS FOR DECISION

28 April 2008

Mr M H Peedom, Deputy President

#### The complaint

On 17 January 2007 the complainant lodged a complaint with the Discrimination Commissioner. In her complaint she said that she was presently and at all relevant times employed by ACT Pathology, an agency of the respondent, as a professional officer. She alleged that, during the course of her employment, she was unlawfully discriminated against in various ways by officers of the respondent. She alleged that the reason for the conduct of which she complained was that the respondent's officers presumed that she had a psychiatric disability or imputed such a disability to her.

2. The conduct of which the complainant complained, as particularised by her legal representative at the hearing, was:

- (i) suspending her from work;
- (ii) failing to afford her natural justice in dealing with her suspension;
- (iii) failing to revoke the suspension upon receipt by the respondent of medical reports in relation to her fitness to work;
- (iv) denying her an opportunity to make a submission that she be permitted to return to work;
- (v) failing to provide her with adequate training as to her duties prior to her suspension; and
- (vi) removing her from an overtime roster and continuing failure to place her on an overtime roster.

#### The hearing

3. At the hearing of the appeal, the complainant was represented by Dr M Spry, of counsel. The respondent was represented by Ms L Walker, of counsel. The complainant gave evidence and a number of documents were tendered in evidence on her behalf. Evidence was given on behalf of the respondent by Ms T Wheeler, Professor J Potter, Dr P Hickman, Ms R Huggett, Mr G Koerbin and Ms M Brady. A number of documents were also tendered in evidence on behalf of the respondent.

### **The complainant's evidence**

4. The complainant gave evidence and presented a number of documents to the Tribunal. She said that she held a Bachelor of Applied Science in Medical Laboratory Science degree. She commenced work as a Professional Officer Level 1 in the Virology/Microbiology unit of ACT Pathology in 1992 and continued in that role until 1997. She was then employed as a Professional Officer Level 1 in Bacteriology/Microbiology until April 2000 when she was stood down from her position. In December 2001 ACT Pathology placed her at the Port Macquarie Base Hospital as a Professional Officer within Pathology but her salary continued to be paid by the respondent. In December 2002 she returned to ACT Pathology as a Health Professional Level 2 within the Immunoassay Laboratory where her duties were restricted to virology for about 12 months and she continued in that position until her suspension on 18 January 2006.

5. On 28 May 2004 the complainant raised concerns regarding a lack of overtime allocated to her as compared to other officers. On 4 June 2004 Ms C Gray, one of her supervisors, had said that she had spoken to a laboratory manager and asked her to get a plan together so that the complainant could gain the competencies necessary to qualify her to work overtime.

6. Between 26 June 2004 and September 2004 the complainant performed overtime and filled in for shift (after hours) duties on an emergency basis. She was not otherwise rostered to perform overtime or shift work during this period. She was placed on an overtime roster on 10 September 2004 and allocated overtime in the same manner as other officers.

7. She continued to receive equitable access to training opportunities until September 2004 and gained basic competencies in "EPPs" and the operation of the C8000 equipment. On 2 September 2004 Ms Brady, her supervisor, told her that once she could do C-numbering she could do overtime.

8. On 28 September 2004 Ms M Brady advised the complainant that she had cancelled her overtime for the long weekend in October and subsequent weekends where Ms A Simpson was rostered. Ms Brady told her that Ms Simpson had issues working with the complainant.

9. In November 2004 the complainant took extended annual leave. She decided to take that leave because of her removal from the overtime roster on 28 September 2004, the priority given to the training for Christmas overtime of another staff member and the decision made by Ms Brady to cancel her overtime. While she had been on recreation leave, two officers, Ms J Stapleton and Ms Petrie, had been able to gain competencies on the C8000.

10. When she returned to work on 26 April 2005 Ms Brady told her that her incorporation into the overtime roster was dependent on her gaining competencies and the rate at which she learned and that overtime required competencies in the areas of chemistry.

11. The complainant said that from April 2005 she was excluded from training and was not permitted to gain the required competencies. At the same time, new staff including new graduates and temporary staff were being provided with training in the specific areas that were denied to her. She said that a new graduate employed in the laboratory in 2003 had had significant absences from work due to illness. As at 10 September 2004 Ms Petrie's competencies were similar to her own. However, while the complainant was waiting for



training Ms Petrie was given training priority and in a short space of time was able to be rostered to perform overtime during the Christmas period in 2004. She had gained competencies on the C8000 and in areas of chemistry.

12. The complainant raised the issue of training and overtime with the core laboratory manager, Mr G Koerbin. He had referred to extracts of medical reports and told her that she was entitled to work overtime. The complainant complained to the Director of Microbiology, Infectious Diseases, Dr P Collignon in June 2005 about Mr Koerbin's reference to the medical reports as a breach of confidentiality. Dr Collignon had told her that, if it had to do with the mind, then he considered that it was OK for Mr Koerbin to access the reports. Dr Collignon had asked her if she was on anything for her bipolar and she told him that she did not believe that she had a bipolar disorder.

13. The complainant said that she had not been given the same training as other staff since April 2005 including training on the Ci8000 machine processes which accounted for approximately 75% of the core laboratory's work. She had also been excluded from learning basic competencies in areas of chemistry such as in the blood gas analysers and osmometers. Her duties had been restricted to those in which she had gained competencies prior to September 2004 and they were being scaled down as the tests she was performing had been transferred to new technologies. Other officers including Mr Euan Miller and Ms Petrie had been granted large amounts of flextime in response to their requests for a lot of overtime. She had asked for the same but her request had been denied.

14. On 20 October 2005 the complainant lodged a workplace grievance with the then Chief Executive of ACT Health, Dr T Sherbon. She complained that her repeated requests for training across all areas of Immunoassay and equitable access to weekend overtime had been ignored and her request to work a shorter (9 day/fortnight) had been refused. She had received an acknowledgment of the grievance on 27 October 2005.

15. Because she received no other communication about her grievance, she wrote a number of incident reports stating that the failure to investigate it was causing her to feel stressed and anxious. She also asked Ms Gray and the Human Resources Manager, Mr Hobday, about how she could progress her grievance and made a request to Dr Sherbon in writing that it receive his urgent attention.

16. In mid-December 2005 the complainant received a telephone call from Ms V Bennett, an early intervention officer from the Injury Prevention Management Unit, who asked whether the complainant knew that the respondent had organised for her to attend a fitness for duty assessment. On 10 January 2006 at the direction of her employer she attended for an assessment with an occupational physician, Dr V Pascall. In a briefing letter to Dr Pascall dated 19 December 2005, a copy of which the complainant was given after making a request for access to documents of the respondent under the Freedom of Information Act 1989 on 10 March 2006, Ms Bennett provided some background information regarding the complainant's employment with ACT Pathology and referred to a diagnosis of the complainant of bipolar disorder in 1999 and to serious and chronic under-performance by the complainant. She said that the complainant should be examined to determine whether or not a medical condition might be at the root of these problems. The briefing asked for a report regarding the complainant's fitness for continued employment; fitness for employment on current duties; restrictions placed on employment and opinion on redeployment prospects in regard to those restrictions; and the granting of further sick leave.

17. In a report addressed to Ms Bennett and dated 18 January 2006, a copy of which was also provided to the complainant pursuant to her FOI request, Dr Pascall said that the complainant was capable of full time employment; she was fit for her full range of current duties; there were no medical restrictions required in her current employment or redeployment; and she did not require further sick leave at that time. The report said that the complainant had an anxiety personality trait and her obsessiveness was a result of her anxiety. Her condition required her to do things in a ritualistic way to control her environment, otherwise "terrible things will happen"; there was uncertainty about what the terrible things were but a fear of them. Dr Pascall considered that the complainant had this condition more as a personality trait than to the full extent of being a disorder. She was likely to be meticulous in her work. People with her condition tended to be inflexible. She also considered that the complainant quite likely was not bipolar. She was, however, manic as an acute anxiety episode rather than part of a specific disorder such as bipolar. Like bipolar the manic episodes could arise again if her fears became uncontrolled.

18. Dr Pascall recommended a plan of action that would defuse the complainant's anxiety, allow her to get on with her job and provide her management, if not her co-workers, better insight in how to handle her and prevent future episodes. The plan included providing the complainant with a plan for training in new equipment; she could be working on the 7 day on/7 day off or 24/7 roster; there had to be presented to her as a rule the need to assist other workers and to be part of a team; guidance to her as to how to display enthusiasm; the provision of reassurance to her that there was not a conspiracy to remove her from her job; leaving her alone to do her work as she was unlikely to contribute well to a team unless her portion of the task was made clear; there was no medical reason to prevent her working at the same pace as other technicians; she should be directed to complete each step of a task before proceeding to the next one; and she should be listened to when she seemed to be annoying.

19. On 18 January 2006 Professor Potter gave her a letter which directed her to stand down on full pay. When Professor Potter gave her the letter she said words to the effect "Tania, there have been a few incidents. You will be stood down on full pay and we are referring you to an expert psychiatrist at which time you may be asked to take personal leave. I will expedite the matter".

20. The letter from Professor Potter to the complainant directed the complainant to be absent from her place of work on full pay from the close of business on Wednesday, 18 January 2006 until such time as she was notified in writing otherwise. The direction was said to be issued under the Public Sector Management Standard 3, Part 18, Section 406 which states:

- (1) *If a chief executive determines that an officer is in such a state of health as to render them a danger to other officers or the public, they may require the officer to obtain and furnish a report as to their condition from a medical officer.*
- (2) *Having regard to the medical report, the chief executive may require the officer to take personal leave.*

The letter went on to say that the reason for issuing the direction was "on the basis of concerns raised by your local management and other staff in the Immunoassay laboratory regarding recent behaviour and issues in the workplace. The issues that have been raised

with me leave me to believe you may be a danger to yourself or other staff'. The letter further advised that the complainant would not be able to return to the workplace until ACT Health received an appropriate assessment from a qualified psychiatrist and an appointment would be arranged and she would be notified in writing of the details.

21. On 24 January 2006 Professor Potter wrote to the complainant stating that she had been advised that the complainant had not been informed about an investigation conducted by Mr W Lee in relation to her grievance. She said that she considered it was inappropriate for Mr Lee to have reached the stage of forwarding a preliminary report to her (Professor Potter) without having spoken to the complainant. As a consequence, she would be asking Mr Lee to make contact with the complainant to arrange a suitable meeting time and location for her to speak with him as soon as possible. The complainant contacted Mr Lee after receiving a copy of his report and requested an opportunity to speak to him but Mr Lee did not follow up on her request.

22. On 10 March 2006 and 19 June 2006 the complainant made application under the Freedom of Information Act 1989 for access to:

- (1) Documents providing reasons for her suspension by Professor Potter;
- (2) A copy of the draft report prepared in response to her grievance;
- (3) All of the documents provided to Mr Lee to investigate her grievance;
- (4) A copy of Mr Lee's report; and
- (5) Documentation regarding the reasons for Mr Koerbin's work performance report in relation to her.

Documents were subsequently provided to her in response to her request. They included reports prepared by Ms Brady and Ms C Gray and a report by Mr Lee relating to her grievance, Ms Bennett's briefing letter to Dr Pascall dated 19 December 2005, Dr Pascall's report dated 18 January 2006 and other letters and email communications including an email from Professor Potter dated 28 November 2005 to Mr Hobday in which she wrote 'I do not believe that the major issues underlying this woman's alleged problem have been discussed by any party'. The complainant had not previously been given or seen these documents before.

23. The report from Mr Lee was dated December 2005 and was entitled as a preliminary assessment report and it was said to arise from the complainant's grievance. The report made the following recommendations:

*That Ms Kwesius be provided with this report and all the attachments.*

*That ACT Pathology Management, and IPM assist Ms Kwesius arrive at a training program consistent with her needs and the overall needs of the Section and other staff.*

*That serious consideration is given to appointing a professional mentor to assist with this process.*



*That Ms Kwesius is asked to inform (with the assistance of her mentor), the Director of Pathology in writing on a monthly basis about any ongoing concerns she has about the implementation of paragraphs 19-22 should such an approach be adopted.*

24. On 6 April 2006 the complainant received a letter from the Director of Workplace Relations which directed her to attend an appointment with psychiatrist, Dr J Thompson, for an "assessment for fitness duty to determine future direction". The letter stated, inter alia, that the complainant had made a threat to harm herself and made reference to a statement made by her about managers being responsible for adverse reactions from her.

25. In an email obtained under FOI from Ms P Brown, Mental health Services, to Mr Faulks, Director, Workplace Relations, dated 14 March 2006 regarding a suitable psychiatrist to assess the complainant, Ms Brown gave the name of one psychiatrist and said that she could not think of others "that won't be more likely to be soft".

26. On 7 April 2006 the complainant's solicitors, KJB Law, wrote to Professor Potter stating, inter alia, that the complainant had not been provided with details of why she may be a danger to herself and to others in the workplace and requested that they be provided with those details. The letter stated that the complainant wished to return to work and that she would be prepared to follow a program for return based on the recommendations made by Dr Pascall. The letter stated that the complainant was prepared to meet with Mr Lee and it may be appropriate for him to provide a preliminary report to her prior to any meeting.

27. In a letter dated 12 April 2006 from KJB Law to Professor Potter serious concerns were raised about the email dated 14 March 2006 (referred to in paragraph 25 above) but the complainant's willingness to attend the appointment with Dr Thompson on 21 April 2006 was confirmed. The letter noted that reports from Mr Lee and Dr Pascall had recommended that the complainant be provided with a training framework for her to return to duties and she wished to return to work. A reminder letter dated 17 May 2006 to Professor Potter requested a response to earlier letters.

28. On 21 April 2006, in response to a direction from ACT Pathology, the complainant attended an appointment with Dr Thompson. She was not informed of what information had been given to Dr Thompson or the purpose of the assessment.

29. Dr Thompson provided a psychiatric report to the respondent in relation to the complainant dated 26 May 2006. She based her report on the complainant's history and examination of her. For the purpose of preparing the report she was provided by the respondent with reports and other documents copies of which were subsequently given to the complainant pursuant to her FOI request.

30. Dr Thompson concluded that the complainant was not suffering from a mental illness nor a mental disorder. There were mild indications of paranoid thinking, particularly with regard to work. She was fit to return to work but there was obviously interpersonal conflict at the laboratory and indications that the complainant, and others, were stressed. She suggested that the complainant be given an opportunity to train and update her skills at a hospital within reasonable travelling range from Canberra for a period of 3 months, with the proviso that, if her work was assessed as being competent, that she be employed by that hospital as a supernumerary until a position for her was available. She agreed with Dr Pascall that the



complainant needed to be treated with patience and respect and that, in regard to her present work environment, she would not function well as a team member.

31. On 20 June 2006 Professor Potter wrote to the complainant and advised that she had received a report from Dr Thompson and forwarded a copy of the report to her. She said that a meeting had been arranged for the complainant to discuss the findings and her future employment on 28 June 2006. On 22 June 2006 the complainant wrote to Professor Potter asking for a new date for the meeting because her lawyer would be unable to attend on that date. On 23 June 2006 Professor Potter wrote to the complainant advising that the meeting would proceed as arranged and that she had been contacted by the complainant's solicitor who said that he would attend. On 27 June 2006 KJB Law wrote to Ms Gray stating that they had been advised by the complainant that the meeting for 28 June 2006 had been cancelled and requested reasonable notice of any proposal to reschedule the meeting.

32. The complainant said that when she had a discussion with Ms Brady on 6 December 2005 she had said to her that: "People in my situation have been known to commit suicide .....". She denied that she had threatened to commit suicide. She said that she felt sheer terror when advised of Professor Potter's decision to order a psychiatric report and that she may have to take personal leave. She felt hurt and indignation at the way in which her grievance had been handled and by the manner in which staff had openly discussed her psychiatric issues.

33. The complainant was cross-examined by Ms Walker. In response to questions she said that she was permanently allocated to the Immunoassay area in February 2004 prior to which she had been restricted to Virology. She was then permitted to work in other areas of Immunoassay. After 9 months she then took 5 months recreational leave. After she returned to work she took 3 days leave in October as well as some sick leave and was put on reduced hours of 4 hours per day for 5 days per week. She returned to full time hours between 24 April 2003 and November 2005. On three occasions after return to full time work she requested long service leave. She did not take any of the leave applied for but went to reduced working hours.

34. In 1999 the complainant was admitted to the psychiatric unit of the Canberra Hospital and was subsequently treated with medication for bipolar disorder. She considered that she did not suffer from this condition but it was made a condition of her return to work that she undertake the treatment prescribed.

35. She agreed that after September 2004 she continued to work on the weekend overtime roster every second weekend when Ms Simpson was not rostered to work.

36. She agreed that she did not have C-numbering competencies that were required to work a four-hour shift during 2005-06 but said that this was because she had been denied the necessary training. She agreed that she had been told on occasions by Ms Brady that she could not be given training on a particular day because too many people were on leave and there were not enough staff to train her. She accepted that there had been two occasions between April and December 2005 on which she had made an error in conducting tests but said that it had subsequently been shown that they were training errors rather than technical errors and had not been reported. She was aware that four other members of staff had reported that they had difficulty working with the complainant but she had not been given an

explanation of the difficulties. She agreed that she had complained about the lack of training provided to her at the Port Macquarie pathology.

### **Respondent's evidence**

37. Ms Wheeler is the Executive Officer, Human Resources Management Branch, ACT Health. She was responsible for arranging the medical assessments of the complainant by Dr Thompson and Dr Pascall. Following receipt of their reports, she formed the view that the complainant was not suited to work in a team environment. She was also concerned about information provided to her that the complainant had threatened self-harm and to implicate other employees in this threatened action. As a consequence, she said, attempts were made to identify a suitable alternative position for the complainant in ACT Health but that had not proved possible. The difficulty had been complicated by conflict which, she said, existed between the complainant and other staff members.

38. Ms Huggett is a Senior Microbiologist who commenced employment with ACT Pathology in 1992 and worked at that time in the Virology area with the complainant. She gave evidence that when she came to work one weekend she discovered that something had not been done with a particular machine. She discussed the matter with the complainant who had become upset and abusive towards her and then proceeded to criticise her to other members of staff. In around in September 2004 the complainant started to telephone her at home in the evenings and the very early hours of the morning. She would call and then hang up without speaking. She subsequently pressed charges against the complainant but they were ultimately dropped because of the complainant's mental illness. She became aware that the complainant had been admitted to the psychiatric ward of Canberra Hospital although she did not know the nature of the illness. In July 2005 she was approached by the complainant at work and started to talk to her about past events such as the nuisance calls. She said to the complainant that that was all in the past and she did not want to talk about it. The complainant then said words to the effect "I'll make you pay one day". She felt threatened by this. Ms Huggett agreed that the complaint which she had made about this comment had been investigated and the conclusion reached was that there was insufficient evidence to support the complaint.

39. Professor Potter is the Executive Director of ACT Pathology, having been appointed to that position in March 2003. After the complainant returned from Port Macquarie she was undertaking limited work in a section of the Immunoassay area on a return to work program with the intention that she would return to the Microbiology laboratory. She had not been returned to that area immediately because she had previously made harassing phone calls to some of the staff who worked there and she had previous microbiology experience. It was planned to train the complainant in the full range of tests and equipment. She understood that the complainant had a psychiatric illness but that it posed no difficulties at that time. After a time she received reports of the complainant taking a lot of leave, that the complainant had complained about not being placed on the after hours roster, that the complainant did not have the full range of competencies for after hours work, that a number of staff members were having difficulty working with her and that she would occasionally leave without completing her work. There was suspicion that the complainant was responsible for a rack of samples going missing but ultimately found tucked at the bottom of the fridge and concern that she had initiated an instance of confrontation with a previous colleague from Microbiology. There were also concerns that the complainant's unpredictable behaviour

might endanger preparation for the Immunoassay laboratory preparation for re-accreditation in mid to late 2005.

40. In October 2005 the complainant had submitted a grievance to Dr Sherbon, CEO of the respondent and Mr J Mollett, General Manager of Canberra Hospital alleging lack of access to training and work on the after hours rosters. Mr W Lee had been commissioned to investigate the grievance and a report was received from him in mid to late December 2005.

41. A work performance report in relation to the complainant was carried out by Mr Koerbin in December 2005 specifically to address concerns about the complainant's inappropriate behaviour and as part of the preparation for a fitness for duty assessment of her according to standard operating practice.

42. Professor Potter was also made aware of what she took to be a threat made by the complainant to Ms Brady along the lines that if the complainant decided to harm herself, she would ensure that everyone would know that Ms Brady was responsible. She was extremely concerned about this and about the complainant's mental state. She sought advice from Human Resources and Injury Prevention Management. She considered that an escalation in the complainant's behaviour was taking place. She said that, given her own medical training and being more attuned to the significance of the complainant's behaviour than a lay person and knowing the complainant's previous history of psychological decompensation in the work place, she was fully aware that there was a risk of recurrence. She was concerned about the complainant's ability to work in a team and to produce diagnostic results of the highest possible quality and the possible impact on service provision to the community.

43. She described the laboratory as a hub of activity, like a beehive, with constant interaction and said that team work for a laboratory scientist was essential. The morale of the section was poor and distraction from her work was affecting the team. Because of her view that aspects of the complainant's behaviour may have been consistent with mental illness, she considered it necessary to investigate the matter further.

44. She said that the complainant was not stood down because she suspected that the complainant was mentally ill, although she did hold this concern, but because of her concern that the complainant's behaviour indicated a possible risk to herself, to the physical and psychological health of other staff and to their ability to provide services seamlessly and faultlessly.

45. Professor Potter said that the complainant had indicated on a document dated 17 January 2006 that managers of ACT Pathology would be responsible for "adverse reactions". This precipitated a meeting with Associate Professor Hickman and Mr Koerbin. Following advice with Human Resources input she decided that it was not feasible to continue to address the complainant's situation whilst she was still working in the laboratory. On 18 January 2006 she had the complainant attend her office and formally stood her down on the terms detailed in a letter handed to the complainant. She said that the complainant was informed as to the reason at that time.

46. Subsequently, Professor Potter received Dr Pascall's report which she considered highlighted the problems with the complainant working in a team. She also considered that the recommendations in Dr Pascall's report and Mr Lee's report that there be one to one mentorship and isolation of work for a single individual in a busy laboratory in which team



work and quick turn-around were paramount, were totally impractical. This approach was taken when the complainant returned from Port Macquarie and had not achieved a smooth and sustainable return to fully productive capacity. She also found Dr Pascall's report to have not really addressed the complainant's state of mind, about which she was concerned. For that reason, she requested a psychiatric report. She considered that Dr Thompson's report confirmed the complainant's unsuitability for team work.

47. A meeting had been scheduled between Professor Potter and the complainant after receipt of Dr Thompson's report but it did not take place as the complainant had indicated she was bringing her lawyer and, acting on legal advice, the meeting was cancelled.

48. She considered that because of the complainant's particular support needs and operational requirements it would not be possible to place the complainant in ACT Pathology.

49. In answer to questions asked by Dr Spry at the hearing, Professor Potter said that she had delegated responsibility for investigating the complainant's grievance to Ms Gray and Ms Brady. She could not recall whether she had asked them to advise the complainant that her grievance was being investigated. A process had been agreed at the outset to engage a consultant to undertake the investigation and that Ms Gray and Ms Brady would provide the necessary information to the consultant.

50. In relation to the threat which she had been informed had been made by the complainant to Ms Brady on 6 December 2006, Professor Potter said that she did not consider it likely that the complainant would commit suicide and that she regarded the complainant's statement as manipulative. She regarded the complainant as a threat to herself in the work place because of her inability to deal with her duties. She accepted that her failure to explain in her letter to the complainant dated 18 January 2006 the reasons for the belief which formed the basis for her direction to suspend the complainant was an omission but she did not want to interfere with the complainant's medical treatment.

51. Dr Hickman is the Director, Chemical Pathology, ACT Pathology with responsibility for the day to day running of the Immunoassay laboratory. He said that the complainant began to make complaints about the lack of provision for training sometime in 2005 and that she had not been placed on the after hours roster. He said that in order to be placed on the after hours roster, employees must be flexible and be able to work unsupervised. Working on the after hours roster could be very demanding and had to be dealt with often on an urgent basis with high level of stress on laboratory staff. In his opinion, the complainant had not reached a level of competence that would enable her to be placed on the after hours roster. This was not because she had been denied training opportunities but was attributable to the fact that she was slow to learn new skills and often needed to be told how to do something repeatedly. Her ability to participate in training was impeded by the fact that she was frequently absent from the work place, sometimes for long periods. She seemed to lack the ability to see things from another's point of view and he did not think she possessed the necessary flexibility to be able to adapt to the situations that invariably arose in the laboratory outside ordinary hours. Because of his understanding that she had difficulties with other staff members, he inquired of Professor Potter and Professor Collingnon as to her history at ACT Pathology. He was informed that she had suffered a significant psychotic episode for which she had been treated some years previously that had necessitated an extended absence from work. He also learned that at around the same time she had been involved in making harassing phone calls to other

members in Microbiology. A number of staff had expressed their unwillingness to work with the complainant who seemed to be incapable of functioning as a team member which was essential in the work setting. When Ms Brady was scheduled to go on leave, he was unable to find a replacement to backfill her position because all of the suitable candidates refused to accept it on the basis that it would require them to manage the complainant. He was concerned that her behaviour threatened to undermine the provision of client services to the high standard required.

52. At some time in early December 2005 Ms Brady came to see him in a distressed state and told him that the complainant had said words to the effect that if she (the complainant) harmed or killed herself, she would make sure that everyone knew it was Ms Brady's fault. On 16 January 2006 he received a memorandum from Mr Euan Miller dated 16 January 2006, a medical scientist in Immunoassay, who was one of the complainant's supervisors. He complained about the complainant's competence, reliability and relations with other staff members. Mr Miller requested that the complainant be evaluated for other duties outside the department. Dr Hickman wrote to the Human Resources advisor, ACT Health, on 18 January 2006 and requested that the complainant be stood down. He identified problems relating to the complainant in recent times as being:

- the threat made by the complainant to Ms Brady that she would kill herself and that Ms Brady would get the blame;
- removing herself on several occasions from the work place without permission to write grievance documents;
- refusing to work in an area and being rude and threatening to other staff; and
- frequently absenting herself from work on grounds of illness or stress.

53. In cross-examination Dr Hickman agreed that on 18 January 2006, in response to a question asked by him, the complainant said that she intended to leave work at about 10 minutes to 5 on that day. He had then asked her to come and see him before she left. She had come to see him about 10 minutes before that time and he had said to her words to the effect "Things have got bad. You are to see Professor Potter, she has a letter for you." The complainant turned and walked away. He agreed that by 18 January he had formed the view that it was not the intention of the complainant to commit suicide but he accepted that it would have been better for him to have had a discussion with the complainant about the comment made by her to Ms Brady on 16 January 2006. He agreed that he had never had a discussion with the complainant about her performance or about discussions which he had with Professor Potter regarding his concerns about the effect of the complainant's behaviour on staff in the laboratory prior to her being stood down and that he may have not received Mr Miller's email to him dated 16 January 2006 until 31 January 2006.

54. Mr Koerbin is the Principal Scientist for ACT Pathology and commenced that role in September 2004. He became aware that there had been some personal conflict in Microbiology involving the complainant and other staff. In late 2005 he became aware that the complainant had made a threat to Ms Brady. He said that the complainant was given the same training opportunities as her colleagues but the fact that she took extended leave on at least one occasion may have hampered her ability to access training. Prior to her taking leave in November 2004 he advised her that, in practical terms, she would miss out on training on the Ci8200 instrumentation that was about to be provided by the company that produces the machine but that the training was ongoing and she would have ample opportunity to undertake on-site training on her return from leave. He considered that the training provided

to the complainant was appropriate to her role but that, due to external factors such as leave taken by her in 2004-2005 and that the fact that she did not have any background in general clinical chemistry, she was not sufficiently multi-skilled to be rostered for out of hours duty. Because of operational requirements and the extended leave taken by her, training could not have been provided to her within the timeframe which she had requested to enable her to work outside normal hours. In addition, in 2005, training needs changed dramatically as almost all of the instrumentation in ACT Pathology was replaced. It had been necessary to prioritise training for staff so that those with responsibility for operating the new instrumentation were adequately trained. This training took precedence over other training requests that were not immediately essential to the operation of the laboratory.

55. In late 2005 Ms Brady came to see him and advised him that the complainant had threatened to kill herself and had said words to the effect that if she killed herself, she was going to make sure that everyone knew that it was Ms Brady's fault. Ms Brady was very distressed about this and he recommended that she go home. He telephoned the director of injury prevention and management and asked for his advice about what to do next. He was advised that he should offer the complainant assistance through the employee assistance program. He went and spoke to her and offered her that assistance and she replied in an aggressive tone words to the effect "Do you think I really meant it?". The complainant had been stood down shortly after this.

56. In answer to questions asked by Dr Spry, Mr Koerbin said that there were more than 40 staff in Immunoassay, each with different levels of experience, training, qualifications and backgrounds all of which affected their responsiveness to training. Many of the staff never achieved full competencies in all of the duties performed in the area in which they worked. Most of the people who worked on night shifts had 20 to 30 years of experience. The capacity of ACT Pathology to provide training to the complainant had been affected by the fact that, at various stages, she was not working full time but was on reduced hours. If an employee requested training in a particular area arrangements were generally made for that to be provided but the availability of it was affected by operational requirements. It was necessary to strike a balance between the need for training of individual staff members and operational requirements being provided at an appropriate level of service. Training for the complainant had also been affected by the fact that she indicated that she did not wish to be trained in certain areas. In relation to the Ci8200 he said that the amount of time required to obtain full competency in its operation ranged from 3 months to never. Some staff did not have the technical and clinical background to achieve full competency. Capacity to provide training was also affected by the availability of staff members with training skills. If there was a high demand for people with those skills to attend to operational requirements it became necessary to reduce the amount of training provided to other staff members.

57. He had been shown a copy of Mr Lee's report and discussed the recommendations with Professor Potter. He suggested that the recommendations should be adopted but was unsure who might be made available as a mentor for the complainant because of the grievance she had lodged and frictions that had arisen with other staff members.

58. Ms Brady is the Chief Scientist, Immunoassay, ACT Pathology. She was appointed to that position in July 2004. Prior to that she was a senior scientist in Serology, which is part of Immunoassay. While working in Serology, she became responsible for supervising the complainant when she commenced work again in that section in December 2002 as part of her return to work program being co-ordinated by Human Resources. The purpose of placing



the complainant in Serology was to assess her capability to return to work generally with a view to her being able to return to Microbiology after 6 months. Serology was initially a part of Microbiology and the complainant was therefore familiar with some of the techniques that were being used there.

59. Ms Brady was asked to assess the complainant's performance and to offer her as much support as possible. She said that it became evident that the complainant needed some training in bench work and instrumentation in order to carry out tasks in her section and it was her job to supervise the complainant's training in that regard. The training was completed on the job and the complainant did achieve competency in these areas under Ms Brady's supervision.

60. In February 2004 it was determined that the complainant would not return to Microbiology but would stay in Immunoassay and she was transferred to that section on a permanent basis and was able to be trained within other areas of Immunoassay. Ms Brady understood that the complainant had a mental illness which might have been a bipolar disorder and that there had been a history of conflict in her former work place which involved making harassing phone calls to other staff members.

61. The complainant could not be placed on the after hours roster initially because she did not have training in all of the areas required to work after hours. After she obtained all competencies she was incorporated into the overtime roster in June 2004. Most of the training of staff was in the form of on the job training which had to be factored in alongside meeting work requirements. In general, two weeks was sufficient for most staff to obtain the level of competency required to perform required tasks but some staff required more training than others and the complainant was one of these people. Every effort had been made to accommodate the complainant's request for training but she had missed out on a number of opportunities when she took 5 months' leave at the end of 2004. When she returned in April 2005 steps were taken to give her the training she needed to work on weekends including secondary numbering. Arrangements were made for her to be provided with this training in conjunction with other staff. After two weeks of training in the chemistry area, Ms Brady and the supervisor of the chemistry section concluded that the complainant had not achieved competency in the relevant areas and she was placed on a roster to return to the chemistry area so that she could attempt to achieve those competencies. Training was also offered to the complainant on the running of the C8000. The availability of that training depended upon an experienced staff member being available. Because the key operator was about to go on leave she would need to undertake the training in a period of one week. If she was unable to achieve this it was agreed that she would not remain on the instrument but would receive further training upon the key operator's return from leave. During the week that had been allocated for that purpose, staff shortages due to illness meant that the complainant was only able to spend two days training with the key operator as she was needed for other duties. It was explained that further training would be provided in about one month when the key operator returned from leave.

62. Ms Brady produced a report which detailed the training which the complainant had undergone. She said that there were a variety of training needs and the provision of them was affected by operational requirements. This included the fact that when instrumentation was replaced it was necessary to give priority training to particular staff members. On one occasion the complainant declined the offer of training on particular equipment because she understood it would soon become obsolete. That instrument was still, however, in operation.

Her ability to undertake training was further impeded in practical terms by the fact that on three separate occasions she requested long service leave. These requests were later cancelled. Her requests to be allocated overtime had been affected because rosters were prepared for 6 months in advance and persons expected to be unavailable could not be included on a roster. It was also affected by the fact that by the end of 2005 she commenced a period of part-time work. On a number of occasions the complainant told her that she was stressed and couldn't cope as she felt that she was not receiving adequate training. She would often ask to go home. She was told that she would be supported in her efforts to gain competencies but that she needed to stay at work to be able to do this.

63. Prior to going on leave in 2004 the complainant was placed on an overtime roster as she had gained the competencies in the areas required. One of the weekends on which she was rostered was a long weekend. Another member of staff who had been rostered on for the same period said that, due to incidents that occurred when she worked with the complainant in Microbiology and her own medical condition, she had concerns for her physical and mental wellbeing if rostered on to work with the complainant. Ms Brady had then ordered the roster to move the complainant to work on the following weekend. The following weekend she received a report that the complainant and another member of staff had made inappropriate comments to each other and they were both asked to provide statements about the incident.

64. The complainant often made complaints to Ms Brady about not being included on rosters and in receiving training in an aggressive and demanding manner. On 7 November 2005 Ms Brady met with the complainant to discuss her future including her training needs. The complainant appeared to understand the discussion but the next day said that she did not understand why she could not be trained. Ms Brady then provided a written account of what had been said during their meeting and gave it to the complainant but she refused to sign it.

65. Ms Brady found the complainant's behaviour increasingly confronting and in late 2005 was followed into her office by the complainant who stood in the doorway asking why she had not been incorporated in the overtime roster. Ms Brady explained the requirement to obtain competencies which they had previously discussed and asked the complainant to leave. The complainant replied "I am not leaving". After a time, she left.

66. In early December 2005 the complainant came to the door of Ms Brady's office and said words to the effect "If I commit suicide I will make sure everybody knows that you are responsible". Ms Brady replied "Let's go and see HR". The complainant said "No" and Ms Brady sent an email to Mr Koerbin explaining what had happened. She said she found the incident extremely distressing and was advised to go home for the rest of the day by Mr Koerbin. She was scheduled to take leave for a period of 14 months commencing on 14 December 2005. She said that if had not planned to take this leave, she was reasonably certain she would have resigned from her position as she could not have continued to have worked with the complainant.

67. She agreed that Ms Simpson had been given more training than the complainant. This was because Ms Simpson was a long-standing member of staff who had completed her training in all areas over a long period of time. Ms Miller also received more training than the complainant but she had more than 20 years' experience in chemical biology.

68. The complainant had not handled stress well at work and on a number of occasions had asked to leave the work place. Other staff members had expressed concern about the complainant. Ms Brady considered that she could not work as a team member.

69. In cross-examination Ms Brady was shown a document recording details of the complainant's leave and which recorded as the reason for her leave from November 2005 to April 2006, "bring leave to deeming". She disagreed with the suggestion that the complainant had been directed to go on leave. She had merely been told in response to a request that she work shortened hours that it was preferable for long leave to be taken in a block and that it was the practice for such leave to be automatically approved.

### The law to be applied

70. Provision making unlawful discrimination of the kind alleged by the complainant in this case is contained in section 10(2) of the Discrimination Act ("**the Act**") which provides:

- (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.*

71. Relevantly to this case, discrimination occurs in the circumstances set out in section 8(1)(a) of the Act. It provides:

- (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;*

The attributes specified in section 7 include disability (see section 7(1)(j) of the Act). "Disability" is defined in section 5AA as meaning, inter alia:

**disability** means—

.....

- (f) *an illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour;*

72. Section 7(2) of the Act provides:

- (2) *In this Act, a reference to an attribute mentioned in subsection (1) includes—*



- (a) *a characteristic that people with that attribute generally have; and*
- (b) *a characteristic that people with that attribute are generally presumed to have; and*
- (c) *such an attribute that a person is presumed to have; and*
- (d) *such an attribute that the person had in the past but no longer has.*

73. Section 4A(2) of the Act makes it clear that, provided the complainant's disability was one of the reasons for the respondent's treatment of the complainant, it will still be regarded as unlawful even though the disability was not the dominant or a substantial reason for the treatment. Section 4A(2) provides:

*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.*

74. Unlike other anti-discrimination legislation in Australia which involves concepts of differentiation or distinction in the consequences of the impugned treatment as between persons with different characteristics or attributes, discrimination under section 8 of the Act is constituted by conduct which treats another person unfavourably (see Edgley v Federal Capital Press of Australia Pty Ltd [1999] ACTSC 95 (1 October 1999)).

75. In proceedings before the Tribunal the allegations of discrimination made by the complainant are required to be proved to a proper standard based upon proper evidentiary material (see De Domenico v Marshall (unreported) [1999] ACTSC 1 (3 February 1999)). It is not necessary that the allegations be proved beyond reasonable doubt but 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 inferences (see Briginshaw v Briginshaw (1938) 60 CLR 336).

76. Section 8 of the Act also makes it necessary to establish a causative link between the conduct complained of and the adverse consequences for the person making the complaint (see Waters v Public Transport Commission (1991) 173 CLR 349). It is necessary, therefore, to seek out the true basis of the respondent's conduct insofar as it may be found to constitute unfavourable treatment. It is unnecessary, however, to establish that the conduct complained of was intended or motivated by a discriminatory attitude (Edgley v Federal Capital Press of Australia Pty Ltd).

### **Reasons for decision**

77. The complainant's complaint in relation to the level of training provided to her was that it was inadequate as to her duties prior to her suspension on 18 January 2006. She specified April 2004 as the date from which she was excluded from training given to other staff.

78. Evidence was given to the Tribunal that records were kept by the respondent detailing the nature and extent of training provided to each staff member in ACT Pathology. Training

records in evidence kept in relation to the complainant itemised the detail of the training provided to her as part of her general initial training and out of hours initial training. The records contained the comments of the trainer involved and the complainant. References made by her and Ms Brady to other training which she had undertaken suggest that the Tribunal was not provided with a comprehensive record of the specific training provided by the respondent to the complainant during the relevant period. Nor was it provided with a record of the training provided to other staff in the areas in which she worked. As a consequence, specific findings in relation to the nature and level of training provided to the complainant and determining the extent of any disadvantage which she may have suffered relative to other staff members is made difficult.

79. Be that as it may, the evidence given on behalf of the respondent accepted that in some respects the complainant did not receive the same level of training as other staff. The respondent's evidence sought to explain the reasons for that difference.

80. By itself the provision of a different level of training to the complainant does not establish unfavourable treatment of her. Any lack of the kind of training ordinarily to be regarded as appropriate for staff in the complainant's area of work could not be regarded as unfavourable treatment of her if it was attributable to the complainant's own conduct or beyond the control of the respondent. I accept the evidence of Mr Koerbin and Ms Brady that the capacity of the respondent to provide training to the complainant was affected by the extended leave taken by her and the reduced hours which she worked. I see no reason to not accept that the reservations expressed by Dr Hickman, Ms Brady and Mr Koerbin as to the complainant's skill levels were not reservations genuinely held by them. I also accept the evidence given on behalf of the respondent that the capacity of the respondent to provide training to the complainant was affected by the unavailability of appropriately qualified staff to provide training, the need to provide training to other staff members, in some cases on a priority basis, the response of particular staff members to training provided to them, preferences expressed by individual staff members as to their training requirements, the introduction of new technology and other factors. An omission in the provision of training to a staff member if made necessary because of operational requirements and sound management decisions designed to ensure the provision by ACT Pathology of an adequate level of service to those dependent on it would not, in my view, necessarily involve unfavourable treatment of any affected staff members.

81. Similar considerations apply to the allocation of overtime. I accept that, in the case of the complainant, the allocation of overtime to her was also affected by her applications for long service leave which, if taken, would have made her unavailable to perform such duties and the extent of conflict in which she became involved with other staff members.

82. It is also a requirement to substantiate a complaint of unlawful discrimination under the Act that a causal connection between the conduct complained of and the relevant attribute of the complainant be established. While the evidence shows that there was a general awareness on the part of staff involved in the provision of training and allocation of overtime to the complainant that she had suffered from a mental condition, the evidence does not, in my view, establish such a connection. Nor does the evidence establish that the reason for the cancellation of overtime allocated to her in September 2005 was a psychiatric condition which other staff had imputed to her. In my view, the evidence shows that the true reason for the cancellation of overtime which had been previously approved was the receipt of a complaint from another member of staff as to the likelihood of personal conflict with the

complainant during a period of limited supervision to the potential detriment of ACT Pathology service provision.

83. I conclude that the complaints referred to in subparagraphs (v) and (vi) of paragraph 2 above have not been substantiated.

84. In relation to the suspension of the complainant from work on 18 January 2006, it was conceded by the respondent's counsel that she had been treated unfavourably. At that date, the complainant had been given no response to her grievance despite repeated requests and other action taken by her that was designed to obtain information about it and despite the fact that a preliminary investigation had been undertaken and a report provided to the respondent by the investigator which did not support the decision to suspend her. The letter dated 18 January 2006 to the complainant informing her of her suspension lacked sufficient detail to enable her to derive any proper understanding of the reasons for her suspension. The complainant was not cross-examined so as to challenge her version of what she was told when given the letter. Professor Potter did not give evidence of any explanation provided by her to the complainant but accepted that it was an omission on her part not to have explained the reasons for her belief which formed the basis for her decision to suspend the complainant. There is no evidence before the Tribunal that would justify a finding that she was properly informed of the reasons for her suspension.

85. Public Sector Management Standard Section 406, which was relied upon as the basis for requiring the complainant to be absent from work on full pay, authorises the making of such a requirement where a determination has been made by the Chief Executive as to the specified state of health of the officer concerned and the officer has been required to obtain and furnish a report as to his/her condition from a medical officer and the medical report has been considered by the Chief Executive.

86. The terms of Ms Bennett's briefing letter to Dr Pascall dated 19 December 2005, the terms of Dr Pascall's report and the receipt of it by Professor Potter subsequent to the complainant's suspension make it clear that Dr Pascall's report is not a medical report obtained and furnished to the Chief Executive for the purposes of section 406. Dr Thompson's report was not provided to the respondent until more than four months after the date of the complainant's suspension. It is also not a medical report to which Professor Potter had regard in making her decision to suspend the complainant. No suggestion was made to the Tribunal that regard was had to any other medical report in making the decision to suspend the complainant. Public Sector Management Standard Section 406 did not provide a lawful basis for the action taken to suspend the complainant.

87. The complainant was plainly dealt with in a manner that was unfair and without any apparent lawful basis. The concession that she was treated unfavourably was correctly made.

88. I conclude that the complainant was treated unfavourably by the respondent in the conditions of employment that the respondent afforded her contrary to section 10(2)(a) of the Act or, alternatively, that she was subjected to another detriment contrary to section 10(2)(d) of the Act.

89. As to the reason for that unfavourable treatment, I note that a number of references were made by officers of the respondent to the complainant suffering from bipolar disorder. The briefing to Dr Pascall to enable her to report on the complainant's fitness for her duties



referred specifically to an earlier diagnosis of the complainant of bipolar disorder. In the course of her evidence, Professor Potter acknowledged her understanding that the complainant had a psychiatric illness and behaved unpredictably and inappropriately. She expressed extreme concern about the complainant's mental state. Her evidence shows that she relied upon her own judgement in forming a view that there was a risk of recurrence of the complainant's psychological decompensation in the work place and that she was concerned that Dr Pascall had not adequately addressed the complainant's state of mind in her report. She imposed a condition on the lifting of the complainant's suspension that the respondent receive an appropriate assessment from a qualified psychiatrist.

90. While the evidence suggests that Professor Potter took into account a range of factors in making her decision to suspend the complainant from duty, I consider that the evidence clearly shows that one of the reasons for Professor Potter's decision to suspend the complainant from duty was a psychiatric disability which she presumed the complainant to suffer from or which she imputed to the complainant.

91. I conclude that the complainant has substantiated the complaints referred to in subparagraphs (i), (ii) and (iii) of paragraph 2 above.

92. In relation to the complaint referred to in subparagraph (iv) of paragraph 2, I note that submissions were, in fact, made by the complainant's solicitors that the complainant be permitted to return to work. She was not, in that event, denied opportunity to do so.

### Remedy

93. Section 99(3) of the Act provides:

- (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;*
  - (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.*

94. I have earlier concluded that the legal basis relied upon for the complainant's suspension was misconceived and that the process followed in ordering her suspension involved a denial of natural justice. Reliance was placed by the respondent upon evidence before the Tribunal that the complainant was unable to work as a member of a team, a quality said to be essential to the proper discharge of her duties as justification for her suspension and not permitting her return to work.

95. A letter from the Chief Executive of the respondent to the Discrimination Commissioner dated 28 March 2007 gave as the reason for the complainant's suspension remarks made by her on several occasions that she may harm herself or take her own life. He said that the view

was taken that an attempt to harm herself may be carried out at the work place thereby constituting a danger to the safety or health of work colleagues or the public. Professor Potter, in her evidence to the Tribunal, said that she did not consider it likely that the complainant would commit suicide and regarded the complainant's comments, as reported to her by Ms Brady, as manipulative. This opinion was shared by Dr Hickman.

96. Irrespective as to any justification that may exist for the complainant's exclusion from her place of work and the continuation of that exclusion, the reasons for taking that action have not, according to the evidence before the Tribunal, been adequately explained and opportunity has not been given to her to respond on a properly informed basis. A failure to accord procedural fairness is not excused by a suggestion that the correct decision was made (see Dixon v Commonwealth of Australia (1981) 3 ALD 289 at 294).

97. In my opinion, an appropriate order for the Tribunal to make to redress the loss or damage suffered as the result of the respondent's unlawful conduct is to order that she be reinstated forthwith. Such an order also takes account of the prolonged period of time during which the complainant has been absent from work without redress for that conduct and the absence of any indication that she might be afforded a remedy.

98. The complainant has continued to be paid during the period of her suspension. I accept, however, that she suffered hurt and humiliation in consequence of her suspension and the persistent failure of the respondent to address the complainant's requests and those of her solicitors to be provided with adequate particulars of the legal basis for her suspension, the reasons for it and the material on which it was based and proper opportunity to challenge the findings made against her. I consider that she should be compensated by an award of general damages and that \$5,000 is an appropriate sum.

99. Provision is made by section 99(4) and (5) of the Act for the Tribunal to make orders for the payment of expenses. Any amount ordered to be paid pursuant to section 99(3)(c) is required to be specified as a stated amount and may include a sum in respect of expenses. Final orders are unable to be made without resolution of the issue of expenses. Leave is given to the parties to make further submission in relation to the question of expenses.

**AUSTRALIAN CAPITAL TERRITORY  
DISCRIMINATION TRIBUNAL****APPEARANCE DETAILS**

To be completed by Member's Staff

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**FILE NO:** DT07/19**COMPLAINANT:** TANIA KWESIUS  
**RESPONDENT:** ACT HEALTH**COUNSEL APPEARING:** **COMPLAINANT:** DR M SPRY  
**RESPONDENT:** MS L WALKER**SOLICITORS:** **COMPLAINANT:** KJB LAW  
**RESPONDENT:** ACT GOVERNMENT  
SOLICITOR**OTHER:** **COMPLAINANT:**  
**RESPONDENT:****TRIBUNAL MEMBER:** MR M H PEEDOM, DEPUTY PRESIDENT**DATE OF HEARING:** 8-10 APRIL 2008 **PLACE:** CANBERRA**DATE OF DECISION:** 28 APRIL 2008 **PLACE:** CANBERRA**COMMENT:**

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