

AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

CITATION: BAHGAT AND ACT DEPARTMENT OF DISABILITY, HOUSING & COMMUNITY SERVICES [2006] ACTDT 6 (29 NOVEMBER 2006)

DT05/527

Catchwords: Discrimination in employment – application to strike out complaint – causal connection between disability and refusal to permit return to work after recovery from disability resulting from injury at work.

Discrimination Act 1991, ss 4A, 8, 10, 73, 79, 89

Human Rights Commission Act 2005, s 115

Safety Rehabilitation and Compensation Act 1988 (Cth)

Bahgat and Serendipity Pty Ltd t/as Advanced Personnel Management
[2006] ACTDT 2 (23 October 2006)

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

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

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

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

Tribunal: Mr M H Peedom, Deputy President

Date: 29 November 2006

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT05/527

RE: **AHMED BAHGAT**
Complainant

AND: **ACT DEPARTMENT OF
DISABILITY, HOUSING &
COMMUNITY SERVICES**
Respondent

RULING

Tribunal : Mr M H Peedom, Deputy President

Date : 29 November 2006

Ruling :

The application made by the respondent pursuant to section 79 of the Discrimination Act 1991 to strike out the complainant's application is dismissed.

.....
Deputy President

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT05/527

RE: **AHMED BAHGAT**
Complainant

AND: **ACT DEPARTMENT OF
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Respondent

REASONS

29 November 2006

Mr M H Peedom, Deputy President

The strike out application

This is an application that was made by the respondent, pursuant to section 89 of the Discrimination Act 1991 as in force before 1 November 2006 (**“the pre-amendment Act”**). The application is that the complainant’s complaint of unlawful discrimination be struck out on the basis that it is lacking in substance.

2. As the strike out application was not withdrawn and not decided by the Tribunal immediately before 1 November 2006, the day on which amendments made to the pre-amendment Act came into force, it is taken, by section 115 of the Human Rights Commission Act 2005, to have been made under section 79 of the Discrimination Act 1991 (**“the Discrimination Act”**). Although section 89 of the pre-amendment Act and section 79 of the Discrimination Act are expressed in different terms, the differences do not affect the manner in which the application is required to be dealt with or the legal principles to be applied.

Background

3. Details of the complainant’s complaint and the factual background to it are set out in documents provided to the Discrimination Commissioner in the course of her investigation of the complaint pursuant to section 73 of the pre-amendment Act and documents submitted by the complainant to the Tribunal pursuant to directions given by the Tribunal on 2 December 2005 and 13 October 2006 and which were made exhibits in the proceedings at the hearing of the strike out application on 28 November 2006.

4. The more pertinent facts in relation to this case were set out by the Tribunal in an application by Serendipity Pty Ltd t/a Advanced Personnel Management (**“APM”**) to strike out a complaint of discrimination made by the complainant against it arising out of the same circumstances as have given rise to the complaint in this case. The Tribunal, in giving reasons for its decision to dismiss the complaint in that case (see Bahgat and Serendipity Pty Ltd t/as Advanced Personnel Management [2006] ACTDT 2 (23 October

2006)) set out the background to the matter and the law applicable to such an application. It is convenient to repeat, with some amendment, the observations made by the Tribunal in that case.

5. The complainant was, at all times, a youth worker employed by the Department of Disability, Housing and Community Services (“**the Department**”) at Quamby Detention Centre (“**the Centre**”).

6. On 13 November 2004 he suffered an injury at work as a result of an incident which involved him providing assistance to his supervisor, Mr J Wesney, to restrain an inmate at the Centre. He was absent from work for a period of time because of his injury and disability suffered as a result. He submitted a claim for worker’s compensation in which he attributed responsibility for his injury to Mr Wesney. APM, an approved rehabilitation program provider under the Safety Rehabilitation and Compensation Act 1988 (Cth), was appointed to manage the complainant’s rehabilitation and his return to work.

7. The complainant alleges that at a meeting in January 2005 attended by Mr C Shore, the Centre manager, Ms M Lam, an injury prevention manager, Mr T Day, operations manager at the Centre and Ms N Doolan, an officer of APM, to discuss his graduated return to work, Mr Shore accused him of upsetting his supervisor and made sarcastic comments about medical evidence submitted by him in support of his worker’s compensation claim.

8. On 11 March 2005 he was provided with a medical certificate by his doctor stating that he was fit to return to his pre-injury night shift duties for a period of 30 days and then to have his condition reviewed. Ms Doolan attended the visit with the complainant to the doctor who issued the certificate. Despite the issue of the medical certificate, the complainant was not requested to resume his duties at work. He alleges that he suffered psychological distress as a result.

9. The complainant’s psychologist made enquiries on the complainant’s behalf about the reasons for him not being returned to work. He was advised by the injury case manager that it was not appropriate for the complainant to return to work because of the low number of supervisors on night shift. A meeting was arranged for 16 March 2005 to discuss the matter but was cancelled on 14 March 2005 by Ms Lam, apparently because Ms Lam understood that the complainant was reluctant to attend any further meeting at which Mr Shore was present.

10. On 14 March 2005 Ms Doolan advised the complainant that his file had been temporarily closed because the respondent could not force any immediate resolution of the conflict between the complainant and Mr Shore.

11. The complainant was issued with a further medical certificate on 23 March 2005 which stated that he was fit to return to his pre-injury work.

12. On 12 April 2005 the complainant attended a meeting with Mr Shore, Mr Wesney, an operations manager, a shift co-ordinator and team leader from the Centre and Ms Butler and Ms S Arora, representatives of APM. Ms Butler stated that the purpose of the meeting was to discuss the complainant's return to his pre-injury duties in 2 weeks' time and to be monitored by the respondent. The complainant alleges that Mr Shore said that the complainant could not return to work unless he was sure that the complainant had no grudges against him and other staff at the Centre. The complainant said that he pointed out that this issue was not relevant to his return to work. He alleges that he felt bullied and intimidated by Mr Shore and left the meeting. He alleges that he was threatened with disciplinary action unless he applied for leave. After his union became involved in the matter, he was supplied with a roster for him to return to work.

13. A report provided by the respondent to Ms Lam recorded that the complainant's case was closed on 10 May 2005 at the request of Ms Lam.

14. The complainant alleges that he suffered psychological injury and loss of pay because of the conduct of APM and the Department.

15. The complainant alleges that he was treated unfavourably by the temporary closure of his file on 14 March 2005 and by the failure of the representatives of the respondent, who were present at the meetings attended by him with them and officers of the Department and otherwise, to take more effective action to prevent the discussions being distracted by issues unrelated to his rehabilitation and by otherwise neglecting to take appropriate measures to ensure his timely return to work. He also alleges that a consequence of his absence from work was, for part of the time, a loss of pay and that his absence was relied upon by the Department to threaten him with disciplinary action if he did not submit an application for approval of leave. He alleges that the reason for the Department's unfavourable treatment of him was the disability he suffered in consequence of his work injury.

16. The strike out application does not challenge the complainant's allegation that, at the relevant times, he suffered a disability, or that the treatment of which he complains was unfavourable to him. The basis for the making of the strike out application is the absence of evidence to establish a causal connection between the disability and the treatment.

The law to be applied

17. Section 79 of the Discrimination Act provides:

79 *Application to strike out complaint*

The person against whom a complaint is made may, at any time after the complaint is referred to the tribunal and before the tribunal begins hearing the

complaint (other than a time when the complaint is being conciliated under the HRC Act), apply to the tribunal to strike out the complaint on any of the following grounds:

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

18. In order for the complaint to be substantiated there would need to be some evidence favourable to the complainant's contentions which, taken at their highest in favour of those contentions, would render them seriously arguable: Legal Aid Commissioner (ACT) & Ors v Grundy [1999] ACTSC 318. In determining whether a complaint should be struck out pursuant to section 89 of the Act, the Tribunal ordinarily accepts that it should be assumed that the factual allegations relied on by the complainant are true and such inferences in favour of the complainant as are open should be drawn. If, however, it is clear beyond doubt that the complainant has no arguable case which should be allowed to be resolved at a full hearing, a complaint may be dismissed as lacking in substance (see State Electricity Commission v Rabel & Ors [1997] EOC 92/875).

19. The power to dismiss a claim as without substance is required to be exercised with considerable caution (see Clean Ocean Foundation v Environment Protection Authority (2003) 20 VAR 227 at 230-231. See also Lucy Cooper and ACT Housing (DT03/18 dated 22 June 2004).

20. The discrimination of which the complainant complains is that referred to in section 10(2) of the Discrimination Act. It provides:

10 Applicants and employees

.....

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

21. Under section 8(1)(a) of the Discrimination Act discrimination occurs if the person against whom the complaint is made treats the complainant unfavourably "because" the other person has a relevant attribute, in this case, a disability.

22. Section 4A(2) of the Discrimination Act makes it clear that the attribute is not required to be the only or the dominant or substantial reason for the unfavourable treatment complained of.

Reasons

23. In relation to the conduct of Mr Shore at the meeting held on 12 April 2005 which the complainant alleges was hostile to him and the Department's failure to take steps to re-instate him to the workplace despite him being certified fit to return to work, it was contended on behalf of the Department that the real reason for such treatment was Mr Shore's belief that the complainant held grudges against staff at the Centre. By its contention the Department concedes that it permitted Mr Shore's belief as to the complainant's future conduct to operate as the barrier to the complainant's return to work despite the medical evidence, that the respondent does not dispute was available to it, that he was fit to do so.

24. The complainant contended that the reason relied upon by the Department was irrelevant to any proper consideration of his return to work.

25. There was no material before the Tribunal to justify a refusal by the Department to permit the complainant to return to work after his recovery from disability because of a belief by his supervisor that the complainant held a grudge against him. No contention was made on behalf of the Department that a legal or otherwise justifiable basis for its conduct existed. Arguably, therefore, there was no justification for the withholding of his pay during his absence or the threat made to take disciplinary action if he failed to submit an application for approval of leave.

26. On the material before the Tribunal the Department has relied upon a spurious reason to frustrate the complainant's attempts to return to work and to otherwise disadvantage him.

27. The occasion which afforded the Department opportunity to subject him to such treatment was the disability suffered by him and consequent enforced absence from work. Were it not for that disability and absence from work, the Department would not have been in a position to take the course of action that it did. There was, in that event, a direct connection between the complainant's disability and the respondent's unfavourable treatment of him which would allow the complainant to argue that the cause of the unfavourable treatment was his disability.

28. I therefore conclude that the Department has not established that it is clear beyond doubt that the complainant's disability was not a reason for the unfavourable treatment of

which he complains. Accordingly, the application to strike out the complaint should be dismissed.

**AUSTRALIAN CAPITAL TERRITORY
DISCRIMINATION TRIBUNAL**

APPEARANCE DETAILS

To be completed by Member's Staff

FILE NO: DT05/527

COMPLAINANT: AHMED BAHGAT
RESPONDENT: ACT DEPARTMENT OF DISABILITY, HOUSING &
COMMUNITY SERVICES

COUNSEL APPEARING: **COMPLAINANT:**
RESPONDENT: MS G WONG

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

OTHER: **COMPLAINANT:** SELF
RESPONDENT:

TRIBUNAL MEMBER: MR M H PEEDOM, DEPUTY PRESIDENT

DATE OF HEARING: 28 NOVEMBER 2006 **PLACE:** CANBERRA

DATE OF DECISION: 29 NOVEMBER 2006 **PLACE:** CANBERRA

COMMENT:
