

AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

CITATION: BAHGAT AND ACT DEPARTMENT OF DISABILITY, HOUSING & COMMUNITY SERVICES [2007] ACTDT 8 (21 SEPTEMBER 2007)

DT05/527

Catchwords: Discrimination on the area of employment because of race and disability – complainant not permitted to return to work after being medically certified as fit for work – relationship problems between complainant and supervisor – reasons for complainant's treatment – allegations of racial taunts.

Discrimination Act 1991, ss 4A, 7, 8, 10, 73, 89, 99, 116
Safety Rehabilitation and Compensation Act 1988 (Cth)

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 [1999] ACTSC 95 (1 October 1999)

General Motors Holden's Pty Ltd v Bowling (1976) 51 ALJR 235

Penhall-Jones v State of New South Wales [2007] FCA 925

Purvis v New South Wales (2003) 202 ALR 133

Waters v Public Transport Commission (1991) 173 CLR 349

Tribunal: Mr M H Peedom, Deputy President

Date: 21 September 2007

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT05/527

RE: **AHMED BAHGAT**
Complainant

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

ORDER

Tribunal : Mr M H Peedom, Deputy President

Date : 21 September 2007

Order :

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

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

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Deputy President

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT05/527

RE: **AHMED BAHGAT**
Complainant

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

REASONS FOR DECISION

21 September 2007

Mr M H Peedom, Deputy President

The complaint

On 7 July 2005 the complainant, Ahmed Bahgat, lodged a complaint with the Discrimination Commissioner against the respondent, the Department of Disability, Housing and Community Services, and Advanced Personnel Management ("**APM**"), an approved program provider under the Safety Rehabilitation and Compensation Act 1988 (Cth). He named Mr C Shore as the officer of the respondent who had discriminated against him. He identified employment as the area in which the discrimination occurred and disability and race as the reasons for the discriminatory conduct which he alleged he had been subjected to.

The strike out applications

2. Applications were made by the respondent and APM pursuant to section 89 of the Discrimination Act 1991 as in force before 1 November 2006 ("**the pre-amendment Discrimination Act**") to strike out the complaints.

3. In a decision dated 23 October 2006 the Tribunal struck out the complaint against APM on the basis that it lacked substance.

4. In a decision dated 29 November 2006 the Tribunal dismissed the application by the respondent. It concluded that the respondent had not established beyond doubt that the complainant's disability was not a reason for the unfavourable treatment of which the complainant complained.

Background

5. The background to the complaint is as follows:

6. The complainant was, at all times, a youth worker employed by the respondent at Quamby Detention Centre ("**the Centre**").

7. 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 G Wesney, to restrain an inmate at the Centre. He was absent from work for a period of time because of his injury and the disability he suffered as a result. He submitted a claim form for worker's compensation in

which he attributed some responsibility for his injury to Mr Wesney. APM was appointed to manage the complainant's rehabilitation and his return to work.

8. The complainant alleged 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.

9. On 11 March 2005 the complainant 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.

10. 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.

11. 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.

12. 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.

13. 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 two weeks' time and to be monitored by the respondent. The complainant alleged 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 alleged that he felt bullied and intimidated by Mr Shore and left the meeting. He alleged 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.

14. 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.

15. The complainant alleged that he suffered psychological injury and loss of pay because of the conduct of the respondent.

16. The complainant alleged that he was treated unfavourably by the failure of the representatives of the respondent, who were present at the meetings attended by him with them 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 alleged 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 alleged that the reason for the Department's unfavourable treatment of him was the disability he suffered in consequence of his work injury.

17. The complainant also alleged that on an occasion when he was at work on the night of 14 December 2001 a number of telephone calls were made to him by staff members of the respondent who directed racial taunts at him and that he was the victim of further racial taunts by staff members in the staff room at the Centre on 21 June 2002.

The hearing

18. At the hearing of the complaint the complainant represented himself and, with the consent of the Tribunal, the respondent was represented by Ms T Anderson, of counsel. The complainant gave evidence and evidence was given on his behalf by Ms M Lam and Mr J Pomale. He tendered in evidence a number of documents including written outlines of his complaint which described the conduct of which he complained and a copy of the documents provided to, and generated by, the Discrimination Commissioner in the course of the investigation of the complaint pursuant to section 73 of the Discrimination Act. Evidence was given on behalf of the respondent by Mr Shore and Mr M Beardsley and a number of documents were tendered on its behalf.

The complainant's evidence

19. The complainant gave evidence that he had been subjected to abuse in the workplace by Mr Shore. This had commenced in July 2000. A number of employees at the Centre had graduated at the Canberra Institute of Technology and were due to be presented with their graduation certificates at a ceremony commencing at 7.00pm. Arrangements had been made for the shifts of various employees to be changed to enable the graduates to attend the ceremony. On the graduation day he was surprised to find that he and one of the other graduates had been allocated a shift that would prevent him from attending the ceremony but that all of the other graduates were taking the day off on full pay. He asked Mr Shore why he and the other employee were required to work and Mr Shore had responded "If you don't fucking like it, resign". He told Mr Shore not to speak to him in that manner and started to leave the office but had been ordered to come back by Mr Shore. Mr Shore then asked Mr Tony Day to come to his office. He handed a piece of paper on which he wrote the date and pushed it across the desk to the complainant and said to the complainant "resign". An argument had ensued but Mr Shore started to calm down and apologised for abusing the complainant. The complainant had refused to accept the apology. The complainant had left the room and went to the graduation ceremony.

20. There had been an occasion when the complainant was working in the control room tower at the Centre at about 11.00pm. He had received a phone call from a person who identified himself as Brad Heffernan. Mr Heffernan had said to him "what are doing cunt, I'm here in the carpark drinking". Mr Heffernan sounded as though he was under the

influence of alcohol. He asked Mr Heffernan to go away and not to ring him. Mr Heffernan responded that he would keep the complainant awake all night and started to laugh. He could hear other people laughing in the background. He hung up the telephone and it rang again and a person who he later ascertained was Mr Tony Day had telephoned and said that he had a person who was formerly a resident coming to the Centre in 10 minutes. He could hear a lot of laughter in the background. He asked who was talking and the phone was hung up. He went to the balcony and saw four or five people in the carpark. They included Mr Heffernan, Mr Paul McLeish and Mr Colin West. He could not identify the other people. He had written a report of the incident to the director, Mr Frank Duggan. Mr Duggan had said the important issue was that there had been consumption of alcohol in the carpark but the carpark was not part of the Centre premises. He thought the incident occurred on the 2nd or 12th of November and it could have been 2001. He had spoken to Mr Tony Day, the operations manager, the following day. Mr Day had asked him why he had made the incident report and said that he was there when the incident happened. He had told the complainant that the boys had been drinking. The complainant also said that when he was in the control room someone had said to him on the telephone "you fucking Egyptian camel-fucker, camel-fucker". This had been said to him by Mr Heffernan.

21. On another occasion he had sent an email to Mr Shore asking why he had been excluded from the opportunity to have team leader training like other staff members. Mr Shore had invited him to his office to discuss the matter. He asked Mr Shore why he had not been given any training. Mr Shore had responded by saying that the complainant did not like any decision that he made. Mr Shore had said that he could make the complainant casual staff and put him in a casual pool.

22. On another occasion he had been asked to work in a ward in which there were five female residents. He had been asked to work there with another male co-worker. There was a policy at the Centre that if there was a female worker available she should work in the unit in which females were located. He had asked Mr West if there was a female worker to work with him because he was concerned at the possibility that one of the female residents might make an allegation against him. There was a female worker on duty but Mr West had told him that he would have to work with a male co-worker. He had been asked by Mr Shore to attend his office the next day and Mr Shore told him that he had refused to work. He had explained to Mr Shore that there was an available female staff member who could have worked with him. He considered that Mr Shore was picking on him.

23. The complainant said that, on 13 November 2004, he was working in a 6-bed intensive care unit at the Centre. He was asked by his supervisor, Mr G Wesley, to remove a chair from the room of a resident. The resident had been agitated at the time. He went into the room with Mr Wesley. Mr Wesley tried to grab the chair from the resident and struggled to take the chair from him. The resident had let go of the chair and it had struck the complainant in the groin. He suffered an injury as a result and was absent from work for a period of time.

24. In January 2005 he had attended a meeting at the Centre. The meeting had been attended by Ms M Lam and Ms M Doolan from APM. Mr Day and Mr Shore had also been present. They had discussed how it might be possible for him to get light duty work in accordance with his medical certificate so that he could start on a graduated return to duties. Mr Shore and Mr Day had asked him for a copy of the medical report about his injury. They had asked him for details about difficulties that he was having with sexual activity at home and he had

refused to give them any information. He told them that if they wanted further information they would have to go to the urologist or to the medical officer. Mr Shore had taken a report that had been provided by the radiology centre and had made the comment that the matter was "only suspicious of a haemorrhage". The complainant found this to be offensive. Mr Shore then said that he would transfer the complainant to a government doctor for further consultation. The complainant considered that Mr Shore disbelieved his injury and was trying to intimidate him. Mr Shore had said he could give the complainant duties as a door-keeper to inspect trucks and vans coming into the Centre. The complainant said that he would consider the matter but would have to consult his medical officer to see if it was suitable for his injury or not. The case injury prevention manager had told him that the work was not suitable because it would involve standing for long periods. At the meeting Mr Shore had also said that comments that the complainant had made in his injury report had upset his supervisor, Mr Wesney. After the meeting he had sent an email to Ms Lam and asked her who was going to attend further meetings and said that he was not comfortable with meeting Mr Shore because he was always intimidating him. She had told him that Mr Shore would be at meetings because he was the manager.

25. Another meeting had been arranged for 16 March 2005 and it was to be attended by the complainant's psychologist. The date for the meeting had been changed to 12 April 2005 but his psychologist had been unable to attend. Mr Shore, Mr Day, Mr D Williams, Mr Wesney and Ms D Baker who all worked at the Centre were present at the meeting. They were all his supervisors and team leaders. He said that there was no need for them to be at the meeting. Another person at the meeting had said that the purpose of it was to discuss the complaint's return to work for two weeks under supervision. Mr Shore had then said that he would not have the complainant at the worksite "unless we solve the problem between him and Geoff Wesney, his supervisor". The complainant had said that they were not there to discuss that issue. There had been further argument about what was to be discussed at the meeting. Mr Shore had said that the complainant had a grudge against him, the unit manager, the team leader and co-workers. The complainant had asked if Mr Shore had any supportive documents. Mr Shore did not reply and continued to talk about the same issue. The complainant had said that the meeting was not going to go any further, that he did not feel comfortable and that he was leaving. He then stood up and a chair fell to the ground. He picked it up. Mr Shore then asked Mr Day if there was a leave form. The complainant had asked why they need a leave form and Mr Shore had said that he needed to apply for leave before he left. The complainant had said that he did not have to submit a leave form and that if he had to he would email. He then left the room. Mr Shore said that the complainant could not speak to him in that manner. He considered that he had been intimidated at the meeting. He said that another employee, Ms M Ramsay, had suffered a neck and back injury and her return to work had been facilitated.

26. The complainant said that he had received an email from Mr M Beardsley which told him that if he did not attend work he would be disciplined. The letter had given him a closing date. He had been denied payment of his salary for a period from when he left the meeting.

27. He had been sent a document dated 29 April 2005 outlining a program for his return to work over a two week period commencing on 21 April 2005 and concluding on 12 May 2005. He had sent it back to the Centre on 7 June 2005 stating that he would not agree to sign the document because it did not contain the signatures of Mr Shore and Mr Day in the space provided for their signatures. He said that, as there was no agreement by the Centre manager to return him to work, the document was invalid. He said that despite this he had

returned to work and he was getting legal advice. He had then received a letter from Mr Beardsley dated 26 June 2005 directing him to attend work by 29 June with advice that, if he did not attend work without reasons, disciplinary action would be taken against him. From 2 March 2005 to 12 April 2005 he had not been paid.

28. The complainant had been to see a lawyer about the non-payment of his salary but his lawyer had been a former colleague of Mr Beardsley. Mr Beardsley had offered that the matter be the subject of mediation but that the complainant would have to apply for sick leave during the period of his absence from work. The complainant had refused to do so. Mr Beardsley had offered to assist the complainant to obtain leave to pursue studies towards a dental degree. He considered this to be blackmail.

29. The complainant was cross-examined by Ms Anderson. He agreed that he had never made any complaint to anyone that Mr Shore had made a racial comment to him or that he had made such a comment about him to any other person.

30. The complainant was shown an email message which he had sent to Mr Shore and Mr Duggan on 15 December 2001 which complained about staff members who had been drinking in the carpark outside the Centre on the previous day and of what he described as filthy language used to him and that they were under the influence of alcohol. He asked for an apology and that the matter be investigated. He agreed that there had been no reference in the email to language using racial taunts but in his language any bad comment could be described as filthy language. He agreed also that he had submitted a report in relation to the incident and that he had not made any reference in that report to any racial comment being directed at him. He said that he had not included a reference in his report to him being referred to as an "Egyptian camel-fucker" because it was offensive and not the kind of thing was mentioned in his culture. He agreed that the expression "pyramid builder" was not used during any part of the conversation that occurred during the incident.

31. The complainant agreed that he was not present when racial comments were alleged to have been made about him in the staff room at the Centre on 5 January 2002. His complaint had been based upon what he had been told by others. He agreed that the language he complained of had never been said directly to him. He agreed that he had submitted a complaint to the Discrimination Commissioner on 21 January 2002 in relation to a number of incidents at work and that some of them made specific reference to racial taunts being made against him but that he did not make any such allegation in respect of the incident on 14 December 2001.

32. The complainant agreed that in the presence of three staff members he called one of them a liar. He agreed that it may have been unprofessional of him to do so but he explained his comment by saying that the employee to whom he had referred had told him that racial comments had been made about him but when he asked the employee to make a written statement he had given a different version of the facts. He further explained that he did not lie at the workplace and that was why he always got into trouble.

33. The complainant agreed that, in a statement he had provided to the Discrimination Commissioner about the incident that gave rise to his injury on 13 November 2004, he had said that he had collapsed on the floor from pain and a few minutes later went out onto the oval to continue his work duties. The pain was increasing and he started to feel uncomfortable. Mr Wesney said to him that if he felt bad he could go home. He went to the

staff room and rang the medical centre but could not get an appointment until Monday. He had then gone to the staff room toilet and noticed swelling in his left testicle. He had then walked out to inform a co-worker that he had to now leave for the hospital. Mr Wesney contacted him and told him that he should go home and rest and to collect an accident report form before he left work. He informed Mr Wesney that he must go to hospital as he was in severe pain and he went to return his keys and to collect the accident report form. He asked Mr Wesney if he had to fill in the form now and Mr Wesney told him to do so when he felt better and in a position to do so. He complained in the statement that Mr Wesney did not offer him first aid treatment or any kind of medical assistance on site or with assistance to transport him to hospital. In response to questions he said that it was not appropriate for Mr Wesney to have asked him if he would like to go home because there was a guideline at work that if there was an injury of either a client or a worker that they should be assisted first and then if he is able to be transferred to the hospital or given a lift home or something else and Mr Wesney had not offered to do this. He had only been offered to have a rest in the staff room. When asked if he had told Mr Wesney that he needed assistance he said that it was not normal practice to do so. Officers at the Centre were qualified for assisting and giving first aid treatment. He agreed that he did not ask Mr Wesney to give him first aid treatment for that part of his body that was injured but he should have given him a packet of ice. He agreed that he had not asked Mr Wesney to get him an ice pack but it was obvious that he had injury of his groin. He said that Mr Wesney should have told him that he needed an ice pack or to lift up his legs or to do something. The only thing he had done was to ask him if he was alright, to go to the staff room, to relax a little bit and then go home. He agreed that Mr Wesney should not have inspected the injury sustained by the complainant but he should have rung a medical assistant and transferred him or brought the medical assistant to see if the injury was massive or not. He said that he had told Mr Wesney that one of his testicles was actually huge and Mr Wesney had said to him to go home. He agreed that he had told Mr Wesney that he might call the medical centre or that he would try to call his doctor to look at it. He had told Mr Wesney that he would call the medical centre and he went and did that. He agreed that he had later telephoned Mr Wesney and told him that he had been examined at the hospital and that everything was fine.

34. The complainant agreed that the first contact he had had with Mr Beardsley was the receipt by him of an email message from Mr Beardsley dated 26 April 2005. The email had advised him that he was currently on unauthorised leave. He agreed that he had never submitted a leave application form for the period 12 April 2005 to 26 April 2005 when he was not at work. He said he did not have to because he was on a Comcare claim and he had not been placed in any job when he went to the meeting. He agreed that he had produced a medical certificate issued on 23 March which stated that he was fit to return to his pre-injury job. He had been told by Mr Shore at the meeting that he would not accept him back at work until issues were resolved. He agreed that before he left the meeting on 12 April 2005 he had said that if he had to fill in a leave form he would forward it to them. He had then been told that he had to fill in a leave form. He agreed that he had not informed the Department of his view that he was not required to put in a leave application form. He agreed that there was nothing in Mr Beardsley's letter that made any reference to his race. He agreed that at the time Mr Beardsley wrote to him requesting him to fill out a leave form that the last medical evidence provided to Mr Beardsley would have been the doctor's certificate which certified that he was fit to return to work. He had not submitted his worker's compensation claim in relation to the incident on 12 April 2005 until 2 June 2005. He said that he had told his lawyer that when he left the meeting on 26 April and said that he was going to leave the meeting that other people present might have misunderstood him as indicating that he was

going to apply for leave. He agreed that he left the meeting on 26 April having said to those present that he would send a leave form if he had to and he did not then complete a leave form. He had not done so because he had come to a view that he did not have to. He said "OK I will send one if I have to".

35. Ms M Lam is a rehabilitation officer. In 2005 she was employed in that role by the Department of Education and Training. She had been engaged as a rehabilitation provider to assist the complainant in his return to work following an injury he suffered when he was struck by a chair. She attended a number of meetings involving the proposed return of the complainant to work following the injury. She had no recollection of any of the events that took place at those meetings. She had no recollection of the complainant's file being closed and she did not know why it would have been closed.

36. Mr J Pomale is a senior youth worker in the Centre. He provided a statement to the Discrimination Commissioner dated 16 August 2005 in relation to the complainant's complaint. He said that he witnessed an occasion when Mr Day, Mr Heffernan and Mr P McLeish were standing outside the Centre carpark drunk. They telephoned the complainant in the control room using a mobile phone and hurled racial insults and derogatory comments that made the complainant very angry. They were singing out loud and yelling in the phone to the complainant "hey, you camel-fucker" "pyramid builder" words to this effect.

37. On the night of 4 January 2003 he was coming on shift as a team leader on night shift. Mr McLeish, the afternoon shift unit manager, left a note for him on the control room whiteboard to not hand over duties to the complainant and that this direction was from the manager, Mr Charlie Shore. On 5 January 2003 he told Mr Shore that he had received the direction and Mr Shore had said "I do not want anyone handing the Centre to him". He had been directed by Mr Shore to hand over duties to a casual youth worker regardless of the fact that the complainant and another permanent officer who was available were more senior and experienced. Mr Shore said that the other officer could not be handed the duties because she was on Comcare leave. The complainant appeared shocked when he was told what had happened. Mr Pomale said that the policy and procedure at the Centre was clear about handing over duties to senior staff and not casual staff.

38. In cross-examination Mr Pomale said that the incident in the carpark would have occurred after completion of the afternoon shift at 11.00pm. He said that he was married in New Zealand on 12 January 2002. He had had to apply for leave to go to New Zealand for the occasion. He was shown a leave roster which indicated that he had originally applied for leave from 18 December 2001 to 25 January 2002 but that the date had been changed to 11 December 2001 as the commencement of his leave. He was shown the Centre's control room duty log and he agreed that it showed that he was not on duty on 14 December 2001, the day of the alleged incident.

Respondent's evidence

39. Mr Shore was the Centre manager at the Quamby Detention Centre at all relevant times. He gave evidence that for his public service in the ACT he was given an ACT Commissioner for Public Administration Award. He resigned from his position at the Centre because he was spending more time on staffing issues than working with young people and it was starting to get him down. He suffered depression and decided it was time to move on. The primary difficulty he had at work was with the complainant. He said that he was unable to

manage him. When he gave him constructive criticism or advice, the complainant would become aggressive towards him.

40. Mr Shore said that he attended a meeting in late January or early February 2005 to discuss the complainant's injury. He had a vague recollection of being shown an ultra sound report at the meeting. He denied that he had made any sarcastic remark or smirked when shown the report. Ms Lam had said at the meeting that it was not appropriate for the complainant to return to work on night duty because of the low number of supervisors on night shift. There was only a skeleton staff and, if there was physical confrontation with an in-mate at night, it would be necessary for staff on duty to assist with any required physical restraint.

41. He attended a meeting on 12 April 2005. Also present were the complainant; Mr Wesney, the unit manager; Mr T Day, the operations manager; Mr D Williams, a shift co-ordinator; Ms D Baker, a team leader; Ms B Butler and Ms S Arora who both worked for APM. The complainant was supposed to have reported for duty prior to the meeting and he hadn't.

42. In a document prepared by Mr Shore and Mr Day in relation to the meeting on 12 April 2005 it was reported that the meeting was opened by Ms Butler and she outlined that its purpose was to discuss the complainant's return to work program and new roster. Mr Shore had said to Ms Butler that, prior to discussing the complainant's return of work, there were underlying issues that needed to be clarified in regard to grudges against management and senior staff and statements made surrounding his injury. The complainant had interrupted and stated that he was instructed not to discuss these issues and that there should be a separate session to deal with them. Mr Shore had explained that he needed to be able to manage his staff and these underlying issues with the complainant might compromise the operations of the Centre if he returned to work without them being resolved. The complainant then stated that the meeting was finished. Mr Shore had asked the complainant to submit a leave form and the complainant had said "I will send it to you in email". Mr Shore said that he required one immediately. The complainant had exclaimed that he was not happy with the meeting and he could not be spoken to like that and he then left. He said that he asked the complainant for a leave form because he had been instructed by Mr Beardsley from the human resources department for it to enable the complainant's pay to recommence.

43. Mr Shore said that he had asked the people involved in the incident in the carpark about which the complainant complained for full reports of the incident. He recalled that the complainant complained that some of the staff were using racist terms such as "you camel-fucker" and "you Egyptian fucker". He believed that incident had been cleared up.

44. He denied that the complainant had been treated differently in relation to his attendance at the graduation ceremony. He said that because the Centre operated 24 hours a day it was necessary to have staff to provide care to the young residents. People who had applied for time off in advance were given priority over people who were slower at getting their applications in. It had, however, been considered essential that the complainant attend the award ceremony because he was receiving a special award that night and there was no attempt by anyone to deny him access to the ceremony.

45. He denied that he ever abused the complainant. He denied that he had ever treated the complainant in any particular way because of his race. He recalled that on one occasion he

had said to the complainant that if he was not happy at the Centre he would be better off resigning and taking a new career. He had had a number of discussions with the complainant about his opportunities to advance in employment. He denied that he had ever said that he could make permanent staff go back to being casual. He said that he did not have such a power. He had no recollection of an incident that involved the complainant being asked to work in a female residents' unit with another male staff member.

46. Mr Shore was cross-examined by the complainant. In answer to the complainant's questions he said that, on around 12 April 2005, a mediation session had been arranged for the complainant following feedback that had been given to him regarding an application he had made for a team leader's position. The complainant was not feeling up to carrying on with the meeting and asked for it to be postponed. A number of attempts had been made to arrange mediation in relation to the incident in the carpark but that had degenerated into a yelling match. He recalled a meeting in his office attended by the complainant when Mr West had threatened the complainant. He had asked Mr West to behave in a professional manner. The complainant was also very agitated and had also been asked to behave in a professional manner.

47. He agreed that at the meeting in January 2005 it was possible that, after he looked at the medical report regarding the complainant, he had said that it was only suspicious and that he would transfer the complainant to a government doctor.

48. He agreed that he had denied the complainant's request to return to night duty because when a person returned to work they required a certain amount of supervision while they worked their way back into the system. The complainant had been away from work for five and half months and many of the residents had changed during that time. There were also new management instructions that had been brought into effect. He denied that a female member of staff who had suffered a neck and back injury was permitted to return to night shift while she was still undergoing medical treatment. He said that no-one was allowed to return to work without a full medical clearance.

49. He said that all of the people who attended the meeting on 12 April 2005 had a role to play in relation to the complainant's return to work. He denied that he had put any obstacles in the complainant's way to return to work but he said that the environment at the Centre required that all staff work harmoniously together and could support each other in an emergency situation. He needed to know that all staff who went out onto the floor were going to perform their duties to the highest level and that he was the person responsible for their care and well-being. He agreed that he had said at the meeting that he would not permit the complainant to return to work unless the problem with Mr Wesney and other managers and team leaders was resolved.

50. Mr Shore said that he became aware of the incident in the carpark on the day following it happening. He had carried out an investigation in the matter but he did not really know what the outcome of it was but the people involved were brought together for a discussion. They were told that their behaviour was inappropriate and were not allowed to carry on in that manner again. He recalled that reference was made in a telephone call to the complainant from the carpark that a female resident was going to be brought into the Centre. He said that this was a bit of institutional humour that happened from time to time. Staff members would ring the control room and tell the person on shift that a certain troublesome resident may be coming in. As far as he was aware, it had only ever been done in a humorous way.

51. Mr Shore agreed that he had handed a piece of paper to the complainant and said "resign". He said that he felt that he had tried his hardest in his dealings with the complainant but there was nothing he could do to make him happy. He had been suggesting to the complainant that he would be doing himself a favour to take himself out of the stressful environment that he obviously didn't enjoy working in.

52. Mr Shore said that he had endeavoured to solve issues between himself and the complainant by having him attend meetings. On some occasions the complainant had not attended meetings and at other times he had become agitated and walked out. He had had his line managers talk to the complainant and try to mediate to address his concerns.

53. Mr M Beardsley is the manager of workplace relations with the Department of Disability, Housing and Community Services. In a written statement he said he became involved with the complainant from 24 March 2005 when he was the acting human resource adviser to the Office of Children, Youth and Family Support. At that time, the complainant was on leave which had run continuously with his worker's compensation leave for a physical injury he sustained in the workplace in late 2004. The complainant had a medical certificate declaring him fit for full duties on 23 March 2005. On receipt of the certificate arrangements were made for a return to work meeting to be held between the complainant, his rehabilitation provider, his case manager and Mr Shore. The complainant failed to attend the meeting and another meeting was scheduled for 12 April 2005. The complainant was unhappy with the conduct of the meeting and departed before the scheduled business was concluded or resolved. It was reported in the management minutes and by the complainant that he would lodge a leave application for his continued absence because he was no longer covered by worker's compensation leave from at least 24 March 2005. Mr Beardsley wrote to the complainant on 26 April 2005 reminding him of his agreement and obligation to apply for leave for the period since 12 April 2005. He also informed him that, as he had not returned to work or applied for leave, he was not entitled to pay and he was also warned of the disciplinary consequences of not making application for leave for the period of his absence not covered by worker's compensation. He sent a copy of the minutes of the meeting to the complainant by email dated 28 April 2005. In the minutes it was recorded that, in response to Mr Shore's advice to the complainant that he would require a leave application form, the complainant had replied "I will send it to you in email". In his letter to the complainant dated 26 April he had stated that he understood that the complainant indicated to Mr Shore that he would be applying for leave to cover the period of his absence and that, unless he forwarded an application form immediately, he would be deemed to be on unauthorised leave. He had received an email reply from the complainant on 26 April 2005 which ignored the request to tender a leave application form. Mr Beardsley sent a further email to the complainant on 27 April 2005 in which he stated that, if the complainant did not formally apply for leave and indicate the type of leave, his absence would not be authorised. He also noted that there was discussion at the meeting on 12 April about his obligation to forward a leave application form and his acceptance of that. The complainant had returned to work on 29 April 2005 but suffered another injury on 11 May 2005 and was absent until 2 June 2005.

54. Mr Beardsley said that the complainant had sent an email to him on 2 June 2005 asking for an explanation as to why he had not been paid. Mr Beardsley replied on the same day explaining in general terms the process for payment where worker's compensation claims are pending. He also reminded the complainant of the warning he had previously provided to

him about not being entitled to pay for periods of absence that were not covered by leave. Mr Beardsley wrote again to the complainant on 7 June 2005 after he received information that the complainant had told the payroll section that he was on a graduated return to work for the period 24 March to 28 April 2005. He reminded the complainant that he was cleared fully fit on 23 March 2005 and therefore there was no requirement for graduated return to work and that his leave was unauthorised. The complainant replied accusing Mr Beardsley of cutting off his pay and stating that Mr Shore had asked him to apply for leave before he left the meeting on 12 April 2005 and asserting that a manager should never pressure an employee to apply for leave. Mr Beardsley responded on 8 June 2005 refuting the suggestion that he had been pressured but that if no-one had demanded that he submit a leave form, then he would most certainly have applied pressure of some form probably in the nature of disciplinary action. The complainant had replied by saying that he had not at any time volunteered to apply for leave. He said that his statements at the meeting of 12 April 2005 had been misunderstood and that all he said was that he was leaving the meeting. Mr Beardsley said that his communications to the complainant to this point had given the complainant adequate opportunity to explain the situation about why he had not submitted a leave application and he had not done so until his response of 8 June 2006. He said that all who were at the meeting on 12 April 2005 were left with the very clear understanding that the complainant was aware of his obligations to lodge a leave application as he was no longer covered under worker's compensation and that the complainant had acknowledged that requirement and assumed that he would forward an application later to cover his absence from that date. No return to work program had been initiated or agreed for the period 12 April to 28 April as the complainant was declared fit to return to pre-injury duties from 24 March 2005 and he should have done so.

55. Mr Beardsley denied that anything that he had done with respect to the complainant had in any way been connected with his race or with the disability that he suffered. On 26 April 2005 when he sent the first email to the complainant his understanding was that the complainant was fit to return to work because he had presented a medical certificate dated 23 March 2005 to that effect.

56. Mr Beardsley was cross-examined by the complainant. In answer to questions he said that, based on his understanding of the discussion that had occurred at the meeting on 12 April 2005 from the minutes of that meeting, in particular Mr Shore's concern to resolve issues about harmony in the workplace rather than the complainant's resumption of work upon being medically certified as fit to do so, was not Mr Beardsley's preference as to the way in which the meeting should have been run. He considered that distractions should be kept aside and the issues dealing with return to work and matters that were relevant to that issue should have been discussed. When asked whether it was appropriate for there to be five people attending the meeting, Mr Beardsley said that he could not speak for the manner in which Mr Shore organised the meeting but that's not how he would have organised it.

57. Mr Beardsley considered that the complainant was entitled to be paid for the period 23 March to 11 April 2005 because there needed to be some discussion with the complainant and the rehabilitation provider and the case manager about his return to work. That took place on 12 April 2005 and on that date the complainant indicated that he was applying for leave. Because of that no further action was taken in regard to a return to work program and it only became evident later in April that in fact he had changed his mind about that. However, there needed to be an authority to cover the earlier period to enable him to be paid. This authority would have to be the subject of a Comcare determination. Mr Beardsley said,

to the extent to which issues were raised at the meeting of 12 April 2005 which did not relate to the complainant's return to work, he was not in a position to say whether they were relevant to the development of a return to work plan or not. He said that if the employee involved in a return to work situation had indicated that he was not prepared to be in the presence of the manager of the Centre that it was an unacceptable situation. If people in the workplace were antagonistic towards each other the situation would be unworkable.

The law to be applied

58. The complaint in this case was referred to the Tribunal prior to 1 November 2006. Pursuant to section 116 of the Discrimination Act as in force from that date ("**the Discrimination Act**") the complaint is taken to have been made under the Discrimination Act when the complaint was made and the complaint is taken to be an application that may be heard by the Tribunal.

59. The discrimination which is alleged in this case is that which is referred to in section 10 of the Discrimination Act. Relevantly to the circumstances of this case section 10 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*

.....

(d) *by subjecting the employee to any other detriment.*

60. Relevantly to this case section 8(1)(a) of the Discrimination Act gives the following meaning of conduct which constitutes discrimination:

the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7.

61. The attributes which are specified in section 7 of the Discrimination Act include race and disability.

62. 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 Discrimination 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)).

63. 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).

64. Section 8 of the Discrimination 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 to establish that the conduct complained of was intended or motivated by a discriminatory attitude (Edgley v Federal Capital Press of Australia Pty Ltd). Motive is, however, a relevant factor to be considered in determining the cause of the complainant's treatment (see Purvis v New South Wales (2003) 202 ALR 133).

65. It is to be recognised that an employer will generally have more than one reason for acting in respect of an employee. Under the Discrimination Act, the fact that there was more than one reason for the treatment complained of does not avoid the application of section 10 of the Discrimination Act (see section 4A Discrimination Act). The complainant must prove, on the balance of probabilities, that the respondent treated him unfavourably and that one of the attributes specified in section 7 was a substantial and operative factor for doing so. The ground or reason relied on to establish a breach of the relevant legal obligation need not, therefore, be the sole factor but it must be a substantial and operative factor (General Motors Holden's Pty Ltd v Bowling (1976) 51 ALJR 235 at 241; Penhall-Jones v State of New South Wales [2007] FCA 925).

Reasons for decision

66. In his submissions to the Tribunal the complainant identified the manner in which he alleged that he had been treated by Mr Shore at the meeting on 12 April 2005 and the respondent's failure to make arrangements for him to promptly return to work upon him being medically certified as fit to do so and the subsequent non-payment of his salary when he failed to submit an application for leave as the principal basis of his complaint of discrimination.

67. Mr Shore's report of the meeting acknowledged that he had attempted to direct the discussion at the outset of the meeting on 12 April 2005 to the issue of grudges that he suggested were held by the complainant against staff at the Centre. He sought to explain this approach as being attributable to the complainant's non-compliant, argumentative behaviour and his refusal to accept the authority of his supervisors. The complainant's behaviour was regarded by Mr Shore as incompatible with the respondent's responsibilities to provide a safe and properly run place for the detention of young offenders.

68. I do not accept that the use of the occasion of the complainant's absence from work due to injury was an appropriate manner in which to address a disciplinary problem, assuming it to exist, in the workplace. If there was a problem that called for action to correct the complainant's behaviour in the workplace, it should have been taken before his absence from work on account of his injury or on his return. So much seems to have been accepted by Mr

Beardsley, an experienced public sector human resources manager, who gave evidence that he would have handled matters differently.

69. The non-payment of the complainant's salary resulted from the complainant's failure to submit a leave application. To that extent the reason for that conduct is not attributable to the respondent. Had the complainant been permitted to return to work, however, the occasion for him to submit an application for leave would not have arisen.

70. I accept the complainant's evidence that he was hurt and humiliated by the respondent's failure to permit him to return to work and that he suffered damage by the non-payment of his salary. I therefore find that he was treated "unfavourably" within the meaning of that word in section 8 of the Discrimination Act.

71. The further question to be resolved is whether the reason for the unfavourable treatment was the complainant's race or his disability.

72. The complainant agreed that Mr Shore had never made a racial comment to him or about him to anyone else. There was no evidence before the Tribunal that Mr Shore's treatment of the complainant was because of his race. No suggestion was made by the complainant that Mr Beardsley's treatment of him was because of his race.

73. The Tribunal, as I have observed above, took the view on the hearing of the application by the respondent to strike out the complainant's complaint that, to the extent to which the occasion for not permitting the complainant to return to work when he had been certified fit to do so was during his absence due to a disability, there was a connection between his disability and the respondent's unfavourable treatment of him. In that event, it had not been clearly established by the respondent that the complainant did not have an arguable case and should be prevented from presenting his case in the usual way at a hearing by the Tribunal.

74. Having now carefully considered the evidence presented to the Tribunal by the complainant at the hearing, I am not satisfied that he has established on the balance of probabilities that a substantial and operative factor for him not being permitted to return to work was his disability. Nor am I satisfied that the complainant has established that the reason for any treatment of him by the respondent which involved Mr Shore was his race or his disability.

75. At the time of the meeting on 12 April 2005 the complainant had been certified as fully fit to resume his normal duties. He did not then suffer a disability. Be that as it may, the evidence of both the complainant and Mr Shore showed that there was mutual hostility in their relationship. I consider that the evidence establishes that the reason for Mr Shore's unfavourable treatment of the complainant was not the disability from which he previously suffered but was attributable to what he regarded as the disruptive effect which the complainant had upon Mr Shore's capacity to properly discharge his duties as a manager in the workplace.

76. To the extent to which the complainant complained of Mr Beardsley's insistence upon him completing a leave application form, there is no evidence to suggest that Mr Beardsley did so for any reason other than that, without approval of the complainant's absence from work, his absence was unauthorised and there was no basis upon which he could be paid during the period of his unauthorised absence. Indeed, the evidence shows that the

respondent's officers were of the understanding, based on the statements made by the complainant at the meeting on 12 April 2005, that he intended to submit an application for leave for the relevant period but had failed to do so. The fact that his comments at the meeting may have given rise to such an understanding was accepted by the complainant in cross-examination.

77. In relation to the incident on 12 January 2005, which gave rise to the complainant's complaint that, at a meeting convened to discuss the possibility of him returning to work on light duties, Mr Shore had asked questions about the complainant's sexual activity and had expressed doubt as to whether the complainant's complaint of injury was genuine, there was a conflict of the evidence given by the complainant and Mr Shore. None of the other persons present at the meeting, including female representatives of APM, reported or were called to give evidence of any reference to the complainant's sexual activity or of any other inappropriate comment regarding the nature of the complainant's injury. I see no reason to prefer the evidence of the complainant to that of Mr Shore where their evidence conflicts. Mr Shore acknowledged in cross-examination that, after he looked at the complainant's medical report, he may have made the observation that the complainant's condition was suspicious and that the matter should be referred to a government doctor. If the comment was an accurate reflection of what was stated in the report, it is difficult to see how a finding that Mr Shore's comment was unfavourable treatment of the complainant is open. The medical report was not tendered in evidence. There is, therefore, no basis for a conclusion that Mr Shore's comments were unfavourable to the complainant. Nor, as I have earlier concluded, is there evidence to support a finding that any treatment of the complainant by Mr Shore was because of the respondent's race or his disability.

78. In relation to the incident on 14 January 2001, the complainant relied upon the evidence of Mr Pomale and his own evidence that he had been subjected to racial slurs by staff members of the Centre who had telephoned him from the carpark outside the Centre. Mr Pomale gave evidence that the complainant was referred to, inter alia, as a "pyramid builder". The complainant gave evidence that this expression was never used. Mr Pomale is recorded in the Centre leave records as being on leave on the date of the incident and the Centre logbook does not record him as being on duty. The complainant's reports of the incident made on the following two days make no reference to him being referred to as a "camel fucker". He explained his failure to do so as attributable to a reluctance to repeat the use of filthy language. His report of 15 December 2001 did not demonstrate the same reluctance in respect of other vulgar language, nor did he demonstrate any discomfort during the course of the hearing to recount the use of such language which he said had been directed at him.

79. I am not satisfied that the evidence relied upon by the complainant in relation to this incident is sufficiently robust to justify a conclusion that the language of which he complains was, in fact, used.

80. In relation to the complainant's complaint that he was treated unfavourably by the respondent by failing to render him greater assistance following the incident that resulted in his injury on 13 November 2004, it does not seem to me that, having regard to the nature of the complainant's injury, Mr Wesney was in a position to make an assessment of the extent of it or to offer treatment for it. It is possible that, given greater consideration by Mr Wesney of the complainant's condition, he might have offered assistance with the provision of transport for the complainant to the place to which he had decided to go for treatment. The absence, however, of evidence of any communication by the complainant to anyone of the

need for that kind of assistance makes difficult any conclusion that he was treated unfavourably. Nor is there evidence to show that the complainant's race or his injury was a substantial and operative factor for not showing the complainant greater consideration.

Conclusion

The conclusion which I have reached is that the complaint lacks substance and, pursuant to section 99(2) of the Discrimination Act must, therefore, 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 T ANDERSON

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

OTHER: **COMPLAINANT:** SELF
RESPONDENT:

TRIBUNAL MEMBER: MR M H PEEDOM, DEPUTY PRESIDENT

DATE OF HEARING: 29-30 MARCH,
21-22 JUNE &
21 AUGUST 2007 **PLACE:** CANBERRA

DATE OF DECISION: 21 SEPTEMBER 2007 **PLACE:** CANBERRA

COMMENT:
