

AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

CITATION: COOLEY AND AUSTRALIAN NATIONAL UNIVERSITY [2007]
ACTDT 2 (14 FEBRUARY 2007)

DT05/547

Catchwords: Discrimination in education – whether complainant subjected to detriment by threat and intimidation because of disability – imposition of condition with effect of disadvantage because of disability – awareness of disability.

Discrimination Act 1991, ss 7, 8, 18, 68, 72, 87, 102

ACT Department of Education & Training v Prendergast [2000] ACTDT (29 December 2000)

Briginshaw v Briginshaw (1938) 60 CLR 336)

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

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

Ellis v Mount Scopus Memorial College [1996] VADT 16 (29 March 1996)

Jamal v Secretary, Department of Health & Anor (1988) EOC ¶92-234

Re Prezzi and Discrimination Commissioner & Ors (1996) 39 ALD 729

Shaikh v Commissioner, NSW Fire Brigades (1996) EOC ¶92-808

Sivananthan v Commissioner of Police [2001] NSW ADT 44

Tribunal: Mr M H Peedom, Deputy President

Date: 14 February 2007

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT05/547

RE: **CHRISTOPHER COOLEY**
Complainant

AND: **AUSTRALIAN NATIONAL
UNIVERSITY**
Respondent

ORDER

Tribunal : Mr M H Peedom, Deputy President

Date : 14 February 2007

Order :

The Tribunal is not satisfied, after completing a hearing, that the complainant's complaint has been substantiated.

THE TRIBUNAL ORDERS, pursuant to section 102(2)(a)(ii) of the Discrimination Act 1991, that the complaint be dismissed.

.....
Deputy President

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT05/547

RE: **CHRISTOPHER COOLEY**
Complainant

AND: **AUSTRALIAN NATIONAL
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Respondent

REASONS

14 February 2007

Mr M H Peedom, Deputy President

The complaint

The complainant in this case is an undergraduate student in Law and Arts at the Australian National University ("**the university**"). He first enrolled as a student in January 2000. Due to a number of health problems affecting him he withdrew from his studies for part of 2002 and the whole of 2003. He resumed his studies in 2004 but with a reduced workload.

2. In May 2005 the complainant attended a meeting with the co-ordinator of a unit of study in which he was involved to discuss his non-attendance at lectures and tutorials. He claims that he was treated unfavourably by the co-ordinator at the meeting and in the way that the course was conducted by the co-ordinator because of the disabilities from which he suffered. He also claims that, after making a complaint of discrimination to the Discrimination Commissioner, he was dealt with in a way that constituted victimisation.

3. Specifically, in a complaint lodged with the Discrimination Commissioner on 17 June 2005 pursuant to section 72 of the Discrimination Act 1991 ("**the Discrimination Act**"), the complainant alleged:

- (i) that on 20 May 2005, Professor Colin Tatz, an employee of the university unlawfully discriminated against him in the area of education by threatening and intimidating him because of his disabilities, contrary to section 18(2)(c) of the Discrimination Act; and
- (ii) that in around January 2005 Professor Tatz unlawfully discriminated against him in the area of education by imposing a condition for enrolment in a course of study that had, or was likely to have, the effect of disadvantaging him because of his disability, contrary to section 18(1)(b) or, alternatively, section 18(2)(c) of the Discrimination Act.

4. The material lodged by the complainant contained the additional complaint of victimisation which alleged that comments made about him in a letter dated 10 July 2005

from a solicitor employed by the university to the Discrimination Commissioner responding to the complainant's complaint subjected him to a detriment contrary to section 68(1) of the Discrimination Act. This complaint was not included in the complaint lodged with the Discrimination Commissioner, was not considered by her and was not part of the complaint referred to the Tribunal pursuant to section 87 of the Discrimination Act. The Tribunal therefore declined to consider this complaint (see ACT Department of Education & Training v Prendergast [2000] ACTDT (29 December 2000)).

The complainant's evidence

5. In an affidavit dated 24 February 2006 admitted in evidence at the hearing of the complaint, the complainant gave evidence of the following matters.

6. Since the age of 6 he had suffered from hearing impairment. Since his late teenage years he had suffered depressive illness. Since 1998 he had suffered diabetes mellitus type 2. He suffers a variety of side effects as a result of medication prescribed by his medical practitioners for treatment of some of those conditions, including drowsiness, nausea, gastro-intestinal upset, insomnia, anxiety, apathy, and confusion.

7. He withdrew from his studies at the university in the second semester of 2002 and took extended leave of absence from his course for the whole of 2003 due to increasing anxiety, depression and sub-optimal diabetic control. He resumed his studies in semester 1 of 2004 but reduced his study load from 4 units per semester to 3 units per semester when it became apparent to him that he was unable to maintain the greater workload due to the effects of his depressive illness and diabetes.

8. When his hearing aids became unserviceable he arranged a meeting with Mr Paul Robertson, an adviser with the university's disability services unit ("**the DSU**"). The meeting, held on 31 March 2005, was also attended by his partner, Ms Janet Hume. In response to the matters that were discussed, Mr Robertson undertook to organise note-takers for the units of study in which he was enrolled and to obtain information on where he may get his hearing aids fixed. Mr Robertson also offered to contact his lecturers.

9. At the beginning of 2005 his hearing aids became unusable and he was unable to afford the cost necessary to repair them. During semester 1 of 2005 and for a period of approximately three weeks in late April to mid-May he suffered a lingering respiratory infection which he was unable to treat by medication due to his financial state.

10. In 2005 he enrolled in POLS 2096 Genocide Studies ("**the unit**"), a unit of study within the faculty of Arts. A document outlining details of the unit was provided by the university to the complainant. It identified the course presenter as Professor Colin Tatz. It provided details of the times and dates scheduled for lectures and tutorials. It also contained a statement by Professor Tatz that "(m)y general rule is that attendance is compulsory: I attend, you attend. The lecture and tutorial material bear directly on each of your three assignments".

11. He did not enrol for tutorials in the unit because he anticipated a clash with the time scheduled for one of his law degree units. Professor Tatz contacted him by email about his absence from tutorials. In March 2005, however, he withdrew from the law degree unit and arranged to attend tutorials for the unit. He then became unable to attend the tutorials due to his hearing problems, depression and a respiratory infection that lingered for close to two months.

12. Following a telephone conversation between Ms Hume and Professor Tatz in early May 2005, he attended a meeting with Professor Tatz on 20 May 2005. He took with him to the meeting an essay and a tutorial paper that had not been submitted on time. He gave Professor Tatz a letter dated 1 April 2005 signed by Mr Robertson which stated that the complainant was registered for disability services and had provided medical documentation verifying that he had debilitating medical conditions which, among other things, resulted in him experiencing very low energy levels and fatigue. The letter also stated that he had recently reduced his course load down to a level that was normally considered to be two-thirds of a full-time load and his decision to do so was a direct result of his medical conditions but that the university regarded him as a full-time student. He also gave to Professor Tatz a medical certificate and a medical report both issued by a doctor at the university's health service. The medical certificate, dated 31 March 2005, stated that the complainant had attended for treatment on 31 March 2005 and was unfit for work/study from 31 March 2005 until 14 April 2005. It noted that the complainant stated that he could not work/study from 7 March 2005 to 14 April 2005. The medical report, dated 3 June 2005, stated that the complainant had been prescribed anti-depressant medication on 10 January 2005; had been seen regarding a chest infection on 22 March 2005; had been seen on 31 March 2005 regarding a chest infection and broken hearing aids; and had been prescribed further medication on 3 May 2005 and had discussions about the medication.

13. The complainant said that after looking at the documents, Professor Tatz said to him that he had asked people to leave the course who had had far less absences than him and he asked why shouldn't he do the same with the complainant. He said that he became anxious and felt threatened and intimidated. He reiterated that each of his absences was medically certified as were his disabilities and that removing him from the unit would be unreasonable. Professor Tatz asked why the complainant had not informed him of his disabilities before. The complainant replied that he didn't think that he had to as he had relied on Mr Robertson to have done so. He also said that Ms Hume had advised Professor Tatz of his disability during the telephone conversation she had had with him prior to 20 May 2005. Professor Tatz stated he had not received any communication from the DSU and the complainant accepted that this was the case. He said that Professor Tatz then asked him more questions about his disabilities and this made him feel uncomfortable. Professor Tatz then demanded that he write a letter outlining his situation to the Head of School asking for "special consideration" by 4.30pm that day. It was approximately midday when the meeting finished. Professor Tatz accepted his essay and a mutually agreeable date was confirmed for the submission of the remaining assessment tasks both of which had been submitted on the agreed date. He said that he left the

meeting with Professor Tatz feeling severely shaken and physically trembling. He delivered the letter to the Head of School requested by Professor Tatz on time. He had to seek tranquillisers to control his anxiety levels which had become severe.

14. The complainant submitted in evidence the chart showing the results of an audiogram test undertaken on 31 May 2001. He also submitted in evidence an audiometric report dated 9 November 2005. It stated that the complainant had poor tone thresholds which indicated mild to moderate sensor neural hearing loss in the right ear from 750Hz to 8kHz and a mild to moderate-to-severe sensor neural hearing loss in the left ear from 250Hz to 8kHz.

15. The complainant was cross-examined by the respondent's counsel, Ms K Eastman. In answer to questions asked by her he stated that he had attended lectures in the unit on 22 February 2005, 1 March 2005, 8 March 2005 and 5 April 2005. He had arrived at the lecture on 22 February 2005 approximately 15 minutes after its scheduled commencement time. He did not attend any tutorial for the unit during the first semester.

16. The complainant agreed that, in response to an email he had received from Professor Tatz, he had sent to him an email message on 14 March 2005 in which he explained his absence from tutorials as due to a clash with other commitments and asked to discuss the matter at the lecture on 15 March 2005. He apologised "for this stuffing about". He agreed that he made no reference in the email about any medical or other condition that might affect his ability to attend tutorials. He could not remember whether he attended a lecture on 15 March 2005 but thought he had spoken to Professor Tatz about the matter at some point. He could not remember when he had done so or whether the communication was by email message or telephone or other means. He accepted that he had made no reference in his affidavit to any such communication.

17. The complainant said that at the meeting with Mr Robertson on 31 March 2005 he had not asked Mr Robertson to contact his lecturers but that Mr Robertson had offered to do so. He agreed that he had not given evidence of such an offer in his affidavit. He had had no further contact with Mr Robertson.

18. He agreed that by 26 April 2005 a note-taker had attended lectures in the units for him but that he had taken no action to obtain the notes.

19. The complainant agreed that he had not submitted an assignment that was due on 10 May 2005 on time. He said that he had attempted to contact Professor Tatz by phone about the matter but there was no answer. It did not occur to him to contact Mr Robertson or attempt by some other means to contact Professor Tatz. The complainant agreed that the first time he provided Professor Tatz with information about his disabilities was at the meeting on 20 May 2005. He disagreed that he had been treated favourably by Professor Tatz by being allowed to continue in the course despite his absences from lectures and tutorials. He had only been allowed to continue in the course after he had argued that he should be permitted to continue and Professor Tatz did not

even both looking at the medical reports. He just took them and put them down and made the comment to which the complainant took exception.

20. He agreed that he had removed medical records of the university relating to him without its permission. He said he did so because of the conduct of an officer of the university.

21. When asked to clarify which documents he had shown to Professor Tatz, he said that he had given him medical certificates to cover all of his absences from lectures and tutorials. He had not attached the certificates to his affidavit and he should have done so but they were contained in a plastic folder which he had with him at the Tribunal. When asked to produce the certificates, he examined the contents of the folder and said that he did not have them.

22. The complainant also produced in evidence a medical report from Dr DS McKay dated 8 November 1998 stating that the complainant was under his care for non-insulin dependent diabetes and major depressive illness.

23. In an affidavit dated 21 February 2006 Ms Hume said that she had known the complainant for about 8 years and had been his partner for the last 2 years. She said that on 31 March 2005 she went with the complainant to the university's medical centre to see a doctor and they then met with Mr Robertson at the DSU who, she said, assured the complainant that he would organise note-takers for lectures and inform the lecturers of the complainant's difficulties.

24. In around April 2005 Ms Hume received a telephone call from Professor Tatz who asked to speak to the complainant. She told him that the complainant was sleeping and he asked that the complainant return his call. He asked her why the complainant was communicating with him by email instead of by phone. She explained that the complainant's hearing aids were broken and that he had difficulty hearing on the phone. She also mentioned that the disability officer was organising note-takers for lectures.

25. She said that, following the meeting with Professor Tatz in 2005, the complainant continued to feel negative and suffered debilitating effects including severe anxiety, sleeplessness and an increase in his depression. He had had to resume taking tranquillisers which he had discontinued taking for a period of 12 months prior to the meeting.

26. In cross-examination, Ms Hume said that she had no recollection of any reference at the meeting with Mr Robertson to the complainant's HECS census or any discussion with Mr Robertson about the preparation of a letter to be sent to Centrelink and she only had a vague recollection about a discussion relating to the complainant's possible withdrawal from some of his courses.

The university's evidence

27. In a written statement dated 27 April 2006 Mr Robertson said that he commenced working in the DSU in about July 2003. He first met the complainant on 31 March 2005. By that date he had not received the complainant's tax file number which was necessary for the complainant to provide to avoid liability to pay the HECS fee for his course immediately. It was also the last day for students to withdraw from courses without academic or financial penalties. Prior to the meeting Ms Hume had contacted him and advised that the complainant wished to obtain assistance to obtain a disability support pension and getting his hearing aids repaired. He also wanted to discuss the effect of his ill health on his studies.

28. At the meeting Mr Robertson advised the complainant that he would be better assisted with obtaining a disability support pension by speaking with the university welfare officer. He advised him to immediately provide his tax file number to the student administration staff to avoid liability to immediately pay the HECS fee and suggested that he should reduce his study load by withdrawing from two units of study. He offered to prepare a letter for the complainant with a view to him continuing to receive AUSTUDY support despite the reduction of his study load below the level normally necessary to be maintained to be eligible for such support. He prepared the letter and gave it to the complainant to take to Centrelink. He recorded details relating to the complainant to enable him to provide further assistance should the need arise. He undertook an internet search to identify organisations which might provide free or low cost assistance with appliances for people with disabilities. Mr Robertson ascertained from inquiries that he had made that lecture notes for the units of study being undertaken by the complainant were not being posted on webCT and he then made arrangements for note-taking for both units.

29. In cross-examination the complainant put to Mr Robertson that at the meeting he had with the complainant and Ms Hume on 31 March 2005, he had undertaken to contact his lecturers. He agreed that he had undertaken to contact them to inquire whether note-takers could be used in their lectures. He said that he would not reveal the name of a student who he was assisting to a lecturer. He said that he did not offer to provide the complainant with a disability card because it was the practice of the DSU to only issue them when a student was required to negotiate course arrangements with a lecturer. At the meeting on 31 March he had not been made aware of any such requirement.

30. In a written statement dated 26 April 2006 Professor Tatz said that the course outline of the unit was prepared by him and sent to students enrolled in the course approximately three weeks before it began. He kept a record of attendance of students by requiring them to sign a sheet which was circulated in the lecture room. If students did not attend consecutive lectures, he arranged for an email to be sent to them.

31. In 2005 the unit had 124 enrolled students. The course commenced on 22 February 2005 and ran for 13 two-hour lecture sessions over 16 calendar weeks. At the start of the

semester he arranged for lists of the tutorial times to be posted on a notice board and invited students to find a place for themselves in the 7 class times available.

32. According to Professor Tatz's register the complainant attended 3 lectures in person on 1 March, 8 March and 5 April and a note-taker was present on his behalf at 5 lectures on 26 April, 3 May, 10 May, 17 May and 24 May. There was no recorded attendance by the complainant or the note-taker on his behalf on 22 February, 15 March, 22 March, 29 March and 31 May. There was no attendance by the complainant or anyone on his behalf at any of the 12 tutorial sessions.

33. Professor Tatz sent an email to the complainant in the third week of the course, that is, early in the second week of March 2005. He asked the complainant why he had not enrolled in any tutorials and advised him which sessions were not full. In an emailed response dated 14 March 2005, the complainant stated that he had not been able to determine which tutorial would not clash with his other commitments and that, due to confusion as to when the tutorial program for his core law unit would be open for enrolment, he held off determining which tutorial would fit with a tutorial for the unit. The end result was that time had slipped and he had not enrolled in a tutorial. He asked to discuss the matter with Professor Tatz at a lecture on the following day and stated "please accept my apologies for this stuffing about".

34. On 18 May 2005 Professor Tatz telephoned the complainant's home. By that date the time for submitting an essay worth 50% of the course evaluation had expired 8 days earlier. He said that a woman answered the phone and explained that the complainant was still asleep. He told her not to wake him but to ask him to phone him back. She inquired about the purpose of the call and he told her that it concerned the complainant's course of study at the university and his attendance at classes.

35. When the complainant returned the phone call he requested Professor Tatz to use email to contact him in the future and said that he would come to see him. Professor Tatz asked him to visit in his office on 20 May 2005.

36. At the meeting on 20 May 2005 Professor Tatz stated that he needed to talk with the complainant about his absences from lectures and tutorials. The complainant said that he had various disabilities including a hearing impairment, that he was in poor financial circumstances and could not afford to have his hearing aids repaired. Professor Tatz suggested that a public health facility might be able to make the repairs and the complainant said that he was attending to that. Professor Tatz asked the complainant if he had seen anyone at the university's DSU and the complainant replied that he had and produced a certificate from the DSU and some medical certificates. He asked the complainant why he had waited until 20 May 2005 to inform him of his health issues and to present the certificates. The complainant replied that he did not know that he had to inform Professor Tatz of his history and that he assumed that the DSU staff had informed him. He said that he listened sympathetically to the complainant's explanation about his illnesses and told him that he did not want to intrude on his private life or go through the agony of repeating painful topics. Professor Tatz asked the complainant if he wished to

continue with his studies in the unit and he replied that he was working on his assignments. Professor Tatz advised the complainant to write a letter to the head of social sciences school to advise him of the circumstances so as to ensure that at assessment time the complainant would be given special consideration, that is, that there would either be mitigation of, or exemption from, the penalties that would normally be imposed for late essays and non-attendance.

37. Professor Tatz said that he allowed the complainant to submit his essays when he was ready and exempted him from attending the tutorials which he had already missed and from attending further tutorials. He allowed him to submit late essays on topics which were not relevant or were not on the set topics. He graded two of his essays on their merits and his tutor graded another of his essays. He granted the complainant exemption from giving a tutorial presentation, allowing him to submit a written tutorial paper only, thereby giving him the benefit of half of the assignment value of 15%. For the whole course, the complainant was given a credit pass.

38. In answer to questions asked by the complainant, Professor Tatz said that he was not advised by the woman who answered the phone when he had phoned the complainant's home on 18 April 2005 that the complainant had hearing aids or that he had a problem with them. He said that at the meeting with the complainant on 20 May 2005 the complainant had shown him a medical report which related to his diabetes and they had some discussion about that condition from which they both suffered.

The law to be applied

39. The complainant relies upon section 18(2)(c) of the Discrimination Act as making unlawful the conduct of Professor Tatz of which he complains at the meeting of 20 May 2005. In addition to section 18(2)(c), section 18(1)(b) is also arguably relevant to the complaint made by him about the condition of enrolment of students in the unit that made attendance at lectures compulsory. Section 18 relevantly provides:

18 Education

- (1) *It is unlawful for an educational authority to discriminate against a person—*

 (b) *in the terms or conditions on which it is prepared to admit the person as a student.*
- (2) *It is unlawful for an educational authority to discriminate against a student—*
 - (a) *by denying the student access, or limiting the student's access, to any benefit provided by the authority; or*

- (b) *by expelling the student; or*
- (c) *by subjecting the student to any other detriment.*

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

41. The university did not dispute that the complainant's diabetes, depression and hearing impairment were disabilities and, hence, an attribute within section 7 of the Discrimination Act.

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

Reasons for decision

43. The significant issue to be resolved by the Tribunal, having regard to the evidence presented and submissions made on behalf of the parties, is whether the respondent treated the complainant unfavourably by subjecting him to a detriment because of a disability from which he suffered.

44. A detriment involves some loss, damage or injury (see Shaikh v Commissioner, NSW Fire Brigades (1996) EOC ¶92-808 and Sivananthan v Commissioner of Police [2001] NSW ADT 44 at 41) and is broad enough to cover any disadvantage, as long as it is real and not illusory. Whether a detriment has been suffered is to be determined objectively and not by the subjective perceptions of either the complainant or the respondent (see Ellis v Mount Scopus Memorial College [1996] VADT 16 (29 March 1996)).

45. The detriment to which the complainant alleges he was subjected was the intimidatory conduct of Professor Tatz (referred to in paragraph 13 above) which caused him to be shaken, to feel threatened and resulted in increased anxiety levels. The respondent's case, based on Professor Tatz's evidence, is that the conduct of which the complainant complains did not occur and he was, therefore, not subjected to it.

46. In order for the complaint to be substantiated it is necessary, as observed above, for the Tribunal to be satisfied to a comfortable degree that the complainant's version of his

discussion with Professor Tatz on 20 May 2005 is sufficiently robust to justify its acceptance.

47. There are a number of impediments to accepting the complainant's evidence. His evidence regarding the documents he claimed were shown to Professor Tatz at the meeting on 20 May 2005 was conflicting. In his affidavit he said that the intimidatory comment made by Professor Tatz occurred after he had shown Professor Tatz his medical reports. He relied in his submissions on this, and other evidence, as showing that the comment made by Professor Tatz was made with knowledge of his disabilities. In his oral evidence to the Tribunal, on the other hand, he said that Professor Tatz did not look at the reports. He insisted in cross-examination that he had shown Professor Tatz medical reports to cover all of his absences from lectures and tutorials. When asked to explain the fact that such reports were not included with his affidavit, he said that he had omitted to do so but had kept the reports in a folder which he was able to produce. When given an opportunity to produce them from the folder which he said he had brought to the Tribunal, he was unable to find any such report. One of the medical reports which he said he gave to Professor Tatz at the meeting was dated 3 June 2005. Clearly, it would not have been one of the documents available to him at the 20 May 2005 meeting.

48. Professor Tatz's evidence was not challenged in cross-examination by the complainant on any significant aspect of the meeting on 20 May 2005. While there is a basis upon which to doubt the reliability of the complainant's evidence, there is no basis to not accept the evidence of Professor Tatz. In the circumstances, the Tribunal should not prefer the complainant's evidence to the conflicting version of Professor Tatz. In that event, it should find that the complainant has not discharged the onus of establishing that he was subjected to the conduct of which he complains and the complaint should be dismissed as not having been substantiated.

49. There is a further basis, in my view, upon which to conclude that the complainant's complaint has not been substantiated.

50. In order to substantiate the complaint it is necessary for the complainant to establish that there is a causative link between any unfavourable treatment alleged and the complainant's disabilities (see Edgely v Federal Capital Press of Australia Pty Ltd [1999] ACTSC 95). While there is no requirement to establish an intention of the alleged discriminator to intend to cause unfavourable treatment to the complainant, the act must be advertent and with knowledge of the complainant's disabilities or its characteristics (see Jamal v Secretary, Department of Health & Anor (1988) EOC ¶92-234 and Re Prezzi and Discrimination Commissioner & Ors (1996) 39 ALD 729). If there is no evidence on the face of the act complained of, apart from the subjective view of the complainant that there is a connection, there is no basis for a complaint of discrimination under the Discrimination Act to be sustained.

51. The complainant submitted that Professor Tatz was aware of his disabilities prior to any request that he explain his failure to attend lectures and tutorials in the unit. In this regard he relied upon the assurance he said he was given by Mr Robertson that Mr

Robertson would contact his lecturers; the telephone conversation Ms Hume had with Professor Tatz on 18 May 2005; the fact that a note-taker attended some of the lectures in the unit on his behalf and the medical reports he had shown to Professor Tatz at the meeting on 20 May 2005 prior to him making the comment complained of.

52. Mr Robertson gave evidence that the only contact he undertook to make with the complainant's lecturers was to ascertain whether lecture notes for the units involved could be accessed on a website and whether the use of a note-taker would be permitted. He said that he would not divulge the name of a student on whose behalf he was making an inquiry to a lecturer. That evidence is consistent with the DSU published policy that information obtained by it from students be kept confidential in the absence of a release signed by the student. There was no evidence of the existence of such a release. Mr Robertson also recorded the detail of his discussion in a contemporaneous file note which supports his version of the discussion. Ms Hume's version of the conversation is different. But when tested by cross-examination, her recollection of matters discussed did not accord with matters that both Mr Robertson and the complainant recalled. Although the complainant gave evidence that Mr Robertson undertook to contact his lecturers he did not give evidence as to the purpose of such contact. Further, he accepted that it was possible that there may have been some miscommunication between Mr Robertson and Professor Tatz.

53. I consider that the Tribunal should accept Mr Robertson's version of the conversation on 31 March 2005 and find that Professor Tatz was not advised of any disability from which the complainant suffered by Mr Robertson.

54. In respect of the telephone conversation between Ms Hume and Professor Tatz I see no basis upon which to prefer Ms Hume's evidence to that of Professor Tatz. Even assuming some reference had been made in April 2005 by Ms Hume to a problem with the complainant's hearing aids I see no reason, in the absence of some communication as requested by Professor Tatz from the complainant to provide information about his non-attendance at lectures and tutorials, to find that he should be taken to have been on notice of the complainant's disabilities at the meeting on 20 May 2005.

55. By itself, the fact that Professor Tatz may have been on notice that a note-taker attended some of the complainant's lectures on his behalf does not enable any conclusion to be drawn that Professor Tatz did or ought to have known that the complainant had any particular kind of disability or at all.

56. I have set out above the Tribunal's reasons for not preferring the evidence of the complainant to that of Professor Tatz in relation to their discussion at the meeting on 20 May 2005. Further to those reasons, I would also note that, in his email response of 14 March 2005 to Professor Tatz's request for an explanation for his failure to enrol in tutorials for the unit, he made no reference to any disability, including the malfunction of his hearing aids which he said became unusable at the beginning of 2005. Nor was there any suggestion of a difficulty in communication during the telephone conversation between Professor Tatz and the complainant on 18 May 2005.

57. In the circumstances, I am not satisfied by the evidence before the Tribunal that Professor Tatz knew of the complainant's disabilities before the making of the comment alleged by the complainant, even if the Tribunal were to accept that such a comment was made. If made without that knowledge such a comment, by itself, could not amount to unfavourable treatment of the complainant. At most, it could be regarded as a legitimate inquiry for some explanation from the complainant as to the reasons for a prolonged failure to attend the lectures and tutorials in accordance with a general requirement for compulsory attendance.

58. In relation to the complainant's complaint that he was discriminated against by the imposition of the condition that made attendance at lectures and tutorials compulsory, I note that the condition was expressed to operate as a general rule. By its terms it did not exclude non-compliance in special cases. It is clear from the evidence that the university's course requirements were subject to modification where cause for special consideration was shown. It is also clear that the complainant's request for special consideration was accepted and that the course requirements were adapted to accommodate his disabilities.

**AUSTRALIAN CAPITAL TERRITORY
DISCRIMINATION TRIBUNAL**

APPEARANCE DETAILS

To be completed by Member's Staff

FILE NO: DT05/547

COMPLAINANT: CHRISTOPHER COOLEY
RESPONDENT: AUSTRALIAN NATIONAL UNIVERSITY

COUNSEL APPEARING: **COMPLAINANT:**
RESPONDENT: MS K EASTMAN

SOLICITORS: **COMPLAINANT:**
RESPONDENT: MINTER ELLISON

OTHER: **COMPLAINANT:** SELF
RESPONDENT:

TRIBUNAL MEMBER: MR M H PEEDOM, DEPUTY PRESIDENT

DATE OF HEARING: 1 & 2 FEBRUARY 2007 **PLACE:** CANBERRA

DATE OF DECISION: 14 FEBRUARY 2007 **PLACE:** CANBERRA

COMMENT:
