Northern Territory
Anti-Discrimination Commission

NORTHERN TERRITORY ANTI-DISCRIMINATION COMMISSION

LOCATION:	**DARWIN**
TRIBUNAL:	**Traci Keys** **HEARING COMMISSIONER**
DATE OF HEARING:	**On Papers**
HEARING NO:	**C20100128-04**
COMPLAINANT:	**WILLEM VOLLEBREGT**
FIRST RESPONDENT:	**REIDY INVESTMENTS PTY LTD trading as DESERT PALMS RESORT**
SECOND RESPONDENT:	**ANGELA REIDY**
COUNSEL:	**COMPLAINANTS – Self-represented** **RESPONDENTS – Mr. D. Sweet, Cridlands MB**
DATE OF DECISION:	**Written Decision given on 18 April 2013**

REASONS FOR DECISION

1. MATERIAL FACTS:

Mr. Vollebregt was the manager of the Desert Palms Resort; he had been in this role since 2006. Ms Reidy is the Director of Reidy Investments Pty Ltd which trades as Desert Palms Resort. She lives in Queensland and exercises her duties as director remotely from there.

Mr Vollebregt was injured at work in July 2008 as a result of picking up guests' luggage. It was part of his role to collect and drop off customers staying at the hotel from or to the Alice Springs Airport. He saw a chiropractor to treat this injury.

On 28 February 2009 Mr. Vollebregt further aggravated his back injury while defending the resort from a group of youths who were staying at the hotel. He had a verbal altercation with them and ultimately evicted them from the premises. He stayed in their hotel room with his 2 dogs in case they returned. He had experienced pain in one of his legs during the altercation; the pain worsened overnight requiring him to be taken by ambulance to the Alice Springs Hospital, where he stayed for the next 5 days. He was diagnosed with a disk prolapse between L4-L5 and a pinched nerve. He lodged a workers compensation claim in relation to this injury.

Upon his return from hospital he returned to full time work at the resort and continued to receive treatment, he took pain killers to manage the pain. The Resorts insurer QBE sent him to see neurosurgeons in Adelaide and Melbourne. In or around June 2009 a decision was made that he should have an operation on his back, with the view that this would release the pinched nerve.

In August 2009 he went to Melbourne for his surgery. He was in hospital for 5 days. He was required to stay in Melbourne for a further 10 days to recover. He opted, with the consent of his treating doctor, to return to the resort to recover. He says he did this so staff could ask him questions. He says no arrangements were made at this time to replace him, existing staff were utilised to cover night time check-ins.

He was required to not work for 4 weeks after his surgery, with restricted duties and hours to follow after this.

On 29 August 2009, a few days after his surgery, he received a knock on his door to say that a palm tree just outside the resort was on fire, he responded to it. One week later on 5 September 2009 he says that a large group of youths "rampaged" the resort forcing him to take action. He says he called the police but was aware that their response time would be slow, and felt he had to take action as there was a hotel full of guests. He and his partner and 2 dogs chased off the youths. On 6 September 2009 he was woken up by bottles being smashed and objects being thrown towards the reception building. He rang the police at 2.00 am; the police did not arrive until 7.30 am. He went outside to see what the problem was and saw a group of 4 people damaging things. After this incident QBE advised Ms. Reidy that a security guard should be engaged to protect the property. This occurred.

Mr. Vollebregt says that from August 2009 through to February 2010 there were no discussions with Ms. Reidy about the running of the resort. He continued to do this with assistance from his partner Lenie Smith and the assistant manager Ilse Hogendorf. Ms. Reidy asked him about the appointment of an interim manager in February 2010 and he said it was not needed. She proceeded to interview and appoints Mr. Simon Melville as an interim manager. She advised Mr. Vollebregt that an interim manager was being appointed. Mr. Vollebregt says that she did not tell him who this was or when they were starting. He found a note on the reception desk one day indicating that the "new" manager was starting on that date. A copy of this note was produced as evidence.

Mr. Vollebregt says that from this time on he was treated as unwelcome. He received a letter dated 19 February 2010 from Ms. Reidy advising that his doctor had found him unfit to return to work and asking him to leave his accommodation to accommodate the arrival of the interim manager. He was required to leave within 2 weeks. He also received a letter in the same period, undated, asking that he advise if he would be fit to return to duties. His lawyer responded to this letter advising that

this would occur upon the provision of certification from his treating practitioner confirming that he was ready to resume duties.

A 130 week vocational assessment by QBE dated 11 March 2010 states "according to Dr Ingamells, it is unlikely that Mr. Vollebregt will be able to return to this pre injury position as Resort Manager with Desert Palms Resort." A letter from QBE to Dr Ingamels dated 23 February 2013 is circled by Dr Ingamels indicating a "yes" to the phrase "Wilhelmus's return to work goal is now different job/different employer." Dr Ingamels is Mr. Vollebregt's general practitioner in Alice Springs.

On 12 March 2010 Mr. Vollebregt received a letter from Ms. Reidy advising him that his employment had been terminated.

The material facts are conceded by both parties. In issue is whether the conduct of the Respondents amounts to prohibited conduct or discrimination under the *Anti-Discrimination Act* ("Act").

2. THE COMPLAINT

Mr. Vollebregt on 5 May 2010 lodged a complaint alleging discrimination on the basis of his impairment at both work and accommodation. He further alleged prohibited conduct, being that the Respondents had failed to accommodate special needs he had in his workplace due to his back injury. Each allegation was accepted for further investigation on 16 June 2011 by the Commissioner's delegate.

The investigation of these matters was not concluded within 6 months as required by the Act and Mr. Vollebregt nominated on 8 June 2011 to refer the matter to hearing under s84(1).

I elected, with no objections from the parties, to determine this matter on the papers, as the issues raised are not the subject of factual dispute.

The onus of proving each allegation rests with the Complainant to prove each allegation on the balance of probabilities.[1]

I will address each allegation separately, I will consider:

- Section 31 – Discrimination at work;
- Section 38 – Discrimination in accommodation; and
- Section 24 – Failure to accommodate a special need.

2.1 SECTION 31 – DISCRIMINATION AT WORK

Part 4 of the Act sets out a clear legislative scheme for complaints made against discrimination that is prohibited. The relevant parts of section 31 for this matter are:

"31 Discrimination in work area

.....

(2) A person shall not discriminate:

(a) in any variation of the terms and conditions of work;..."

"..... **(c) in dismissing a worker; or**

(d) by treating a worker less favourably in any way in connection with work...."

Section 20 makes it clear that to satisfy section 31 there must be an attribute[2] and an area[3]. There is no dispute from either party that the attribute is impairment, specifically Mr. Vollebregt's back injury, and the area is work. Section 20 identifies discriminatory conduct to include "any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity" or "harassment on the basis of an attribute."

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[1] Section 91.
[2] Section 19.
[3] Section 28.

Mr. Vollebregt identifies the following discriminatory conduct:

1. Harassing conduct following the appointment of the interim manager Mr. Simon Melville.
2. Dismissal from his employment on 12 March 2010.
3. Harassing conduct following the termination on 12 March 2010.

His complaint is to be considered under sections 31(2) (a), (c) and (d).

2.1.1 Section 31(2) (a)

I note immediately that the allegations made by Mr. Vollebregt, and the pleadings of both parties cannot sustain section 31(2) (a), this relates to "any variation of the terms and conditions of work." While on both parties account of events there have been changes to the terms of Mr. Vollebregt's employment, with the exception of his dismissal, which I will discuss under section 31(2)(c), the changes were at Mr. Vollebregt's request and generally favourable. I am not satisfied that Mr. Vollebregt has substantiated section 31(2)(a).

2.1.2 Section 31(2)(d)

In regard to less favourable conduct Mr. Vollebregt alleges harassing conduct prior to and post termination. Prior to his termination he says that:

- A new not "interim" manager was appointed and that he found out via a note on the reception desk. That this meant staff believed he had been sacked, when this had not in fact occurred.
- The lock between his apartment and reception was changed without him being advised.
- The code to the safe was changed without him being notified, he says this caused staff to be suspicious that he had done something wrong.
- He was asked to vacate his accommodation due to the "interim" manager commencing. He was given 2 weeks notice to do this. He says that Ms. Reidy would have been aware what an unreasonable demand this would have been given the lack of accommodation in Alice Springs for him to go elsewhere, and the volume of belongings he had. It is also noted that his employment agreement required 8 weeks notice.

Following termination he says the following occurred:

- His mail was thrown out and returned to sender (not conceded by Respondent).
- His personal emails, including those to his lawyer, were intercepted (not conceded by Respondent).
- His phone and internet cut.
- His towels were not washed by the resort, but folded to look like they had been.
- His daughter, who worked casually at the resort, was terminated.
- He was threatened by the security guard (not conceded by Respondent).
- His car port shade cloth was removed.
- The police were sent to issue a trespass notice on him.

I note as an aside that Mr. Sweet, counsel for the Respondent, says that the conduct post termination is not a matter the Commission can entertain. I do not agree. While Mr. Vollebregt may at this time no longer have been employed by the Respondent, I am satisfied that the conduct remains "in connection with work."[4]

The behavior alleged by Mr. Vollebregt is not denied by the Respondent, with the exception of the identified above, but sought to be explained or defended. In large the submissions made by the Respondent identify the steps taken as necessary to make the transition to the new manager. I can accept that individually some of the actions taken might be necessary to set up for the change of management. However collectively, combined with the fact that there was no communication with Mr. Vollebregt about what was happening or what was expected of him, particularly post-termination, they look like behavior intended to exclude him.

I find the way Ms. Reidy and Mr. Melville (the new manager) conducted themselves during this period to be insensitive and under handed. In regard to my latter comment I particularly note the email dated 14 March 2010 between the pair regarding the dismissal of Mr. Vollebregt's daughter where Ms. Reidy says "Yes remove her from roster. Use excuse not enough work…"

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[4] Section 31(2)(d).

Mr. Vollebregt had been with the organisation since 2006, he had been in receipt of several bonuses awarded for good performance. It is clear he had been a valued employee up until he became injured. The approach employed by Ms. Reidy must have been both demoralising and humiliating for him, at a time that he was least able to manage.

The question is, is it discriminatory conduct under the Act? I am of the view that it is. While I find that the dominant reasons for the treatment was due to the relationship breakdown and Ms. Reidy's priority to change management, I am satisfied that it was also because of his injury[5]. If Mr. Vollebregt did not have an injury there would be no reason for him to be treated this way. The Respondent has clearly identified that the reason he was dismissed was because of his injury, not performance. Once it is clear Mr. Vollebregt is not going to recover from his injury he is excluded[6] from decision making and treated as redundant and a nuisance. This is discriminatory conduct.

2.1.3 Section 31(2)(c)

In regard to Mr. Vollebregt's dismissal on 12 March 2011 the Respondent concedes that they discriminated against Mr. Vollebreght. They rely on section 35(1) (b) (ii) to say that their conduct is exempt under the Act.

35 Exemptions – work

"(1)A person may discriminate against another person in the area of work:

.....

(b) if the discrimination is based:

....

(ii) on the other person's inability to adequately perform the inherent requirements of the work even where the special need of the other person has been or were to be accommodated...."

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[5] Section 20(3)(a)
[6] Section 20(1)(a)

The onus of proving this exemption rests with the Respondent. The Respondent needs to demonstrate that Mr. Vollebregt at the time he was dismissed was unable to meet the inherent requirements of the position, even if his special needs were or had been accommodated.

In a final submission from the Respondent's legal representative I was provided with a Duty Statement for this position. I note the position is extremely broadly worded and appears to contemplate an employee that can effectively do everything, from balancing the books to fixing the washing machine. I can only assume the role for the manager for many of these duties was an oversight role rather than something he was required to physically undertake. This is indirectly confirmed in Mr. Sweet's final submission indicating that he was not required to "undertake heavy lifting, running, kneeling or sitting on his knees in the normal course of his employment." It is also supported by the fact that there were other employees engaged to do some of this work such as Mr. Phil Anderson the maintenance man.

Not every duty required of an employee will be an inherent requirement – these are the critical requirements. For example if a ballet dancer were to lose their leg in a car accident, it is obvious that they could no longer continue as a ballet dancer, as being able to dance would be an inherent requirement of that position. However if they injured their finger it might mean they require assistance prior to a performance in getting into their costumes, something they may ordinarily do themselves. This would not be an inherent requirement. In Mr. Vollebregt's position many of the duties could have been delegated, his inherent requirement was to be able to oversee and direct this operation. This required him to be present at least some of the time, it also may have required some period of time standing, sitting or walking while meeting with other staff or customers. His job is one that when taken back to its critical elements requires him to deal with guests. It is not a position he could do from his bedroom.

I think it is clear from the medical evidence provided that Mr. Vollebregt could not meet the inherent requirements of the job at the time of his dismissal. This is clear

from the QBE report[7] and from comments from his own doctor.[8] It is clear from the workers compensation forms completed from Dr Ingamells commencing on 29 April 2009 up until his dismissal that he was declining in his capacity to attend work. At the time of the dismissal his doctors indicate that he could only work 5 hours.

I am also not satisfied that there is anything the Respondent could have done at this point that would have changed this. I might have been of a different view if the medical reports had not indicated a continual decline in Mr. Vollebregt's capacity. There is no evidence that suggests further time or accommodations were going to change the fate of Mr. Vollebregt's capacity to work at the 12 March 2010.

I am therefore of the view that the Respondent has satisfactorily demonstrated that section 35(1) (b) (ii) should apply.

4. SECTION 38 DISCRIMINATION IN ACCOMMODATION

Similar considerations need to be applied to section 38, as with section 31 as it is a complaint under Part 4 for discrimination that is prohibited. The live issue in this claim is whether "accommodation" is a valid "area"[9] of complaint.

I am not assisted with this issue by the submissions received from parties. References to issues relating to the accommodation appear to form part of the factual matrix for the "work" complaint, rather than being argued as a complaint about "accommodation". I am of the view that this is because it is in fact a complaint about "work" not "accommodation". It is not possible to compare Mr. Vollebregt with other residents at the accommodation as they stay there under different arrangements. It is difficult I think to find a comparator, though I note this is not essential under the Act.

The conduct alleged relates to Mr. Vollebregt as a "worker" not as a "tenant" as envisaged by the Act. This is not to say that a person employed who lives on site

[7] QBE 130 week vocational assessment report dated 11 March 2010.
[8] Letter from QBE to Dr Ingamells dated 23 February 2010.
[9] Section 28

could never have a complaint under section 38, but it is not the case here. I am therefore not satisfied that there is evidence to support a complaint under section 38.

5. SECTION 24 - FAILURE TO ACCOMMODATE A SPECIAL NEED.

Section 24 must be distinguished from sections 31 & 38 as it is prohibited conduct under Part 3 of the Act. It provides that:

"A person shall not fail or refuse to accommodate a special need that another person has because of an attribute…"

This should be distinguished from the "special needs' requirements of section 35(1) (b) (ii). The latter is an exemption; section 24 is a cause of action in its own right. Section 24 is different from sections 31 & 38 in it imposes a test of reasonableness, with some guidance from the section as to what to take into account.

I note that the submissions received from parties tend to merge these issues making it difficult to discern what the arguments are. However I feel able to apply the evidence provided to the different sections without I think any detriment to either party.

It is clear from the submissions and evidence received that the issues under section 24 relate to the adequacy or appropriateness of any accommodations made. This is not a case where no accommodations were provided.

An email from Mr. Vollebregt dated 5 November 2012 identified his special needs as " a need for reduced hours of work, flexible work hours, no heavy lifting, running, kneeling or sitting on his knees." This is accepted by the Respondent. The Respondent in fact identifies that Mr. Vollebregt is not required to undertake any of these activities within the normal range of his duties. Counsel assisting Ms. Farquhar summarises Mr. Vollebregt's special needs as:

1. The provision to the complainant of alternative suitable duties;
2. Assistance to the complainant to perform his alternative duties;

3. Time for the complainant to recover from his injuries and/or to resume his normal duties, if possible; and
4. The provision to the complainant of reasonable medical treatment in relation to these injuries.

I agree with Ms. Farquhar's submission.

The complainant's injury occurs on 28 February 2009. Following 5 days in Alice Springs Hospital he returns to his position in a full time capacity. I note that this is despite medical certificates from Dr Ingamells, his treating general practitioner, recommending restricted duties. In particular that he should:

"avoid prolonged standing/walking/sitting
Avoid squatting kneeling ladders / steps
No lifting anything heavier than 10 kg
Avoid repetitive use of body part. L leg
Avoid repetitive bending / lifting"[10]

It does not appear that anything is initiated by Ms. Reidy during this period to reduce the duties of Mr. Vollebregt. Mr. Sweet in his final submission says that they did accommodate his needs, but little details are provided for this period. In particular he notes the employment of Ms. Hogendorf as relief manager (referred to by Mr. Vollebregt as assistant manager) in April 2008. I note that this appointment predates the injury on 28 February 2009. On his own submissions it also appears that her active role in supporting Mr. Vollebregt did not occur until after his operation in August 2009. Mr. Vollebregt is given access to doctors and specialist during this period. It appears that Mr. Vollebregt during this earlier period, pre-operation manages the reducing of duties himself with the support of his partner and the assistant manager. I note in particular that Ms. Smit his partner collects and drops guests at the hotel using the resort bus and does reception work. It appears Ms. Smit was at no stage a paid employee of the Respondent.

[10] NT Workers Compensation Initial Medical Certificate dated 29 April 2009.

Following his surgery in August 2009 he requires many changes to his work arrangements to accommodate needs he had because of his back injury. Ms. Reidy accommodates time off and reduced hours during this period. She also organises a security guard at the suggestion of QBE several weeks after the surgery.

I am satisfied that evidence, following the appointment of the security guard in September 2009 that each of the accommodations identified by Ms. Farquhar are made for Mr. Vollebregt. He was given reduced duties, reduced hours, flexible work arrangements, time to recover and opportunity to attend necessary medical visits.

I am not however satisfied that this is the case prior to this time. While Mr. Vollebregt was permitted to attend medical appointments, he appears to have been permitted to work flexibly and allowed to attend Melbourne for surgery, I am not satisfied other accommodations were provided. The medical reports indicate that he required reduced duties; this does not seem to have occurred. Mr. Vollebregt was left to manage this himself. I note Mr. Vollebregt says that the failure by Ms. Reidy to accommodate his injury during this period caused the deterioration of his back, ultimately resulting in him being unable to work. The issue of whether her action or in action caused his injury and his ultimate job loss are workers compensation issues not discrimination issues. The requirement to accommodate a special need under section 24 relates to a requirement to provide equality of opportunity. So for Mr. Vollebregt this relates to what should have been done by Ms. Reidy to ensure he had the same opportunities to perform his job as someone who did not have a back injury. On the evidence available it was reasonable that she reduce his duties and possibly his hours during this period. Instead she permitted him to work full time with normal duties, against the advice of doctors. She appears to have permitted his partner to perform some of his duties, though it is unclear whether she knew this, however it matters little as it indicates she has not taken positive action in relation to Mr. Vollebregt's needs. She also permitted Mr. Vollebregt to respond to anti-social conduct on the premises while he was on sick leave following his back surgery. Arrangements should have been made prior to his surgery to ensure this responsibility had been placed somewhere else, so Mr.

Vollebregt was given time to recover and to give the surgery its best chance of working. I think these accommodations are not only reasonable but obvious.

I am therefore satisfied that the evidence demonstrates a breach of section 24 in regard to the period from 28 February 2009 up until the appointment of the security guard in September 2009. I am not satisfied that there is a breach of section 24 for the period following this.

I lastly note that Mr. Sweet in his submissions filed on 1 November 2012 argues that the Commission does not have capacity to deal with conduct that predates 13 September 2009 as it is out of time under section 65. I disagree. This complaint was accepted on 16 June 2011 and this conduct was not excluded from the conduct to be investigated. I do not intend to upset this decision. The conduct complained of by Mr. Vollebregt is a continuing course of conduct that concludes several weeks after his termination on 12 March 2010 and is therefore within the limitation period under section 65.

5. FINDINGS:

For the reasons set out above I am of the view that the claims under sections 31(2)(a) & (c), 38 and 24 as detailed in this decision should be dismissed under section 88(4) of the Act. I find under section 88(1) that there has been a breach of section 31(2)(d) and section 24 from 28 February 2009 until the engagement of the security firm in September 2009.

6. ORDERS:

The complaint is dismissed in relation to section 31(2)(a) & (c), 38 and 24 as identified within my decision under section 88(4).

I find under section 88(1) that the prohibited conduct under section 31(2) (d) and section 24 as identified in my decision substantiated.

Parties to file and serve written submissions by close of business 7 May 2013 in regard to orders I should make in regard to section 31(2) (d) and section 24 under section 88.

Hearing Commissioner
18 April 2013

88. Orders after hearing

(1) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint is substantiated, the Commissioner may make one or more of the following orders:

(a) an order requiring the respondent not to repeat or continue the prohibited conduct;

(b) an order requiring the respondent to pay to the complainant or another person, within a specified period, an amount, being an amount not more than that prescribed, that the Commissioner considers appropriate as compensation for loss or damage caused by the prohibited conduct;

(c) an order requiring the respondent to do specified things to redress loss or damage suffered by the complainant or any other person because of the prohibited conduct;

(d) an order declaring void all or part of an agreement made in connection with the prohibited conduct, either from the time the agreement was made or subsequently.

(2) In this section, the specified things a respondent may be required to do, include, but are not limited to the following:

(a) employing, reinstating or re-employing a person;

(b) promoting a person;

(c) moving a person to a specified position within a specified time.

(3) In this section, "damage", in relation to a person, includes the offence, embarrassment, humiliation, and intimidation suffered by the person.

(4) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint is not substantiated the Commissioner shall make an order dismissing the complaint.