

NORTHERN TERRITORY ANTI-DISCRIMINATION COMMISSION

LOCATION: ALICE SPRINGS

TRIBUNAL: PHILIP TIMNEY
HEARING COMMISSIONER

DATE OF HEARING: 4 FEBRUARY 2010

HEARING NUMBER: 2010/01

COMPLAINANT: JOHN BENNETT

RESPONDENT: ALICE SPRINGS TOWN COUNCIL

APPEARANCES: MR JOHN BENNETT IN PERSON
MR CRAIG CATCHLOVE FOR THE
RESPONDENT

BASIS OF COMPLAINT: FAILURE TO ACCOMMODATE A SPECIAL
NEED DUE TO AN IMPAIRMENT -
SECTION 24(1)

DATE OF DECISION: WRITTEN DECISION GIVEN 30 AUGUST 2010

REASONS FOR DECISION

1. SUMMARY OF COMPLAINT:

- 1.1 The complainant is Mr John Bennett, a former employee of the Alice Springs Town Council.
- 1.2 The respondent is the Alice Springs Town Council (ASTC).
- 1.3 Mr Bennett's original complaint alleges that the ASTC:
- Discriminated against him in an area of work on the basis of an impairment;
 - failed to accommodate his special needs in his area of work and that those special needs arose due to impairments suffered by Mr Bennett; and
 - failed to accommodate his special needs in his area of work where those special needs arose due to impairments suffered by Mr Bennett's wife.
- 1.4 Following her investigation the Commissioner's Delegate, Ms Rachael Dunn, dismissed the allegation of discrimination in the work place and referred the allegations of failure to accommodate a special need to the Commissioner for hearing.
- 1.5 At a Directions Hearing convened via telephone on 18 January 2010, the parties agreed that the complaint regarding the alleged failure to accommodate a special need arising from Mrs Bennett's impairment would not proceed to hearing.
- 1.6 As a result, the only matter remaining for determination at the hearing was the alleged failure by ASTC to accommodate the special needs of Mr Bennett himself in the work place. The alleged impairments giving rise to the special needs include a heart attack suffered by Mr Bennett in March 2008 and Ménière's Disease. Classic symptoms of Ménière's Disease include vertigo, nausea and/or vomiting, fluctuating hearing loss, tinnitus and a feeling of pressure or fullness in the ear.

1.7 Section 24 of the *Anti-Discrimination Act* (the Act) provides that a person shall not fail or refuse to accommodate a special need that another person has because of an attribute. Section 19 of the Act provides that an "impairment" is an attribute for which a person shall not discriminate against another person.

2. BACKGROUND:

2.1 Mr Bennett commenced employment with the ASTC as a Senior Ranger within the Ranger's Unit of in 2006. He remained in that position until his resignation on 1 September 2008. In March 2008 Mr Bennett suffered a heart attack. Following a period of leave he returned to duty with ASTC.

2.2 In early August 2008 Mr Bennett met with Mr Kevin Everett. Mr Everett has been employed by ASTC since July 2001 and has been engaged as the Manager of the Rangers' Department since August 2005. In that capacity Mr Everett was, at the relevant time, Mr Bennett's immediate supervisor.

2.3 At that meeting a discussion took place as to Mr Bennett's duties in his role as a Senior Ranger. The parties are in dispute as to the nature and purpose of the meeting and of what precisely was said by Mr Everett and Mr Bennett. Mr Everett says the meeting was to discuss the amount of time Mr Bennett spent in the office and to direct him to "spend more time in the field" rather than in the office. Mr Bennett viewed the discussion and Mr Everett's instructions to be an effective demotion to a Ranger position.

2.4 Following the August meeting with Mr Everett, Mr Bennett by letter dated 25 August 2008 lodged a grievance complaint with ASTC.

2.5 By letter dated 27 August 2008, the Chief Executive Officer of ASTC, Mr Rex Mooney made an offer of severance of employment to Mr Bennett on the terms and conditions set out in that letter.

2.6 By letter dated 29 August 2008 Mr Bennett agreed to the terms and conditions of the ASTC's severance offer.

3. EVIDENCE PRESENTED AT HEARING

3.1 The Hearing into Mr Bennett's complaint was conducted in the Alice Springs Court House on Thursday 4 February 2010.

3.2 At the outset the Hearing Commissioner advised the parties that he had received a copy of the Section 77 Report provided under the Act. With the consent of the parties the report was received into evidence and marked as Exhibit 1.

Exhibit #1 Report under Section 77 of the Anti-Discrimination Act dated 15/07/2009.

4. OPENING SUBMISSIONS

4.1 **Mr Bennett:** Mr Bennett submitted that his case revolved around information provided to Mr Kevin Everett regarding his heart attack and his suffering from Ménière's Disease. He referred to a letter to the Alice Springs Town Council dated Monday, 25 August 2008, addressed to the Mayor, the CEO, Mr Craig Catchlove, the Manager of the Rangers Unit and also the Manager of Human Resources. Mr Bennett confirmed that the letter concerned an Occupational Health & Safety issue and requested that he continue with his previous senior duties until the grievance dispute was settled.

Exhibit #2 Letter from Mr Bennett to Alice Springs Town Council dated 25/08/2008.

4.2 Mr Bennett stated that he and Mr Everett had a very good friendship over a nine year period and that they had enjoyed each other's company at numerous social events. He continued that he had expected Mr Everett to report his medical conditions to senior management however at the time he ceased employment with ASTC he remained unaware as to whether the advice was in fact passed on to any executive staff at ASTC.

4.3 Mr Bennett confirmed that the failure of ASTC to take account of his medical conditions in the allocation of his work duties was the basis of his complaint.

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- 4.4** In response to a question from the Hearing Commissioner, Mr Bennett confirmed that no medical evidence, such as a doctor's certificate, was obtained by him or presented to ASTC. Nor was any such evidence included in the materials submitted to the Anti-Discrimination Commission or the hearing brief.
- 4.5** At this point, Mr Catchlove confirmed that ASTC was not taking issue whether or not Mr Bennett suffered from the aftermath of a heart attack or the symptoms of Ménière's Disease. The central issue from ASTC's view was whether Mr Bennett had advised ASTC of those conditions and of any special needs affecting the performance of his duties arising as a result of those medical conditions.
- 4.6** Again in response to a question from the Hearing Commissioner, Mr Bennett submitted that the special needs arising from his medical conditions at the relevant time were an inability to perform strenuous work, such as parking inspections, outdoors in the heat. He added that a symptoms of Ménière's Disease included vertigo and that the constant bending down and getting up from marking tyres would set this off. When the vertigo occurred he would break out into a sweat and become nauseous.
- 4.7 Mr Catchlove:** Mr Catchlove referred to the letter from the Commission dated 20 January 2010 confirming that the matters for determination in the course of this hearing are confined to:
- determining whether Mr Bennett had a special need or special needs because of an attribute;
 - if so, whether council had knowledge of the special need or needs; and
 - whether council refused or failed to accommodate the special need in contravention of section 24 of the Anti-Discrimination Act.

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- 4.8 He submitted that the only impairments of relevance for the purpose of the hearing are Mr Bennett's alleged Ménière's Disease and his heart condition. Mr Catchlove stated that ASTC would seek to show that, until the investigation by the Delegate of the Commissioner was underway, ASTC had no corporate knowledge that Mr Bennett suffered from Ménière's Disease.
- 4.9 Mr Catchlove informed the Commission that Mr Kevin Everett, would present evidence that Ménière's Disease was never mentioned to him by Mr Bennett and, in relation to Mr Bennett's heart attack, Mr Everett would present evidence that he returned to work without any medical restriction and did not request any special accommodation.
- 4.10 Mr Catchlove advised the Commission that Mr Tony Jennison, Human Resources Manager with ASTC, would give evidence that during the time of Mr Bennett's employment as senior ranger, he was not aware of any health or occupational issues that were connected with Mr Bennett's performance of his duties, including his suffering Ménière's Disease or his heart condition. Mr Catchlove added that he personally would give the same evidence to the hearing if required.
- 4.11 Mr Catchlove submitted that ASTC was never in a position where it could refuse to or fail to accommodate a special need of Mr Bennett because of an impairment as ASTC had no knowledge of any special needs and Mr Bennett had never requested any accommodation of a special need.

5 MR BENNETT – EVIDENCE IN CHIEF

- 5.1 Mr Bennett stated that in his letter dated 25 August 2008 he did make representation to the ASTC under the *Workplace Agreement Act* and asked that matters related to changes to his duties be put on hold. He also referred the Hearing Commissioner to performance appraisals that has been signed off by the CEO, his direct manager, and the manager of human resources of the ASTC.

Exhibit #3 Performance Appraisal Forms relating to Mr Bennett.

5.2 Mr Bennett submitted that he had given information about his impairments to Mr Everett and expected him to pass that information on to management at ASTC. In hindsight, he did not believe the information had been actually been passed on. He regarded Mr Everett, in his capacity as Manager of the Ranger Unit, as an agent of ASTC with the result ASTC should have been well aware of his concerns and the situation with his health.

5.3 Mr Bennett stated that he had never had a formal meeting with anyone at ASTC, other than Mr Everett, in respect of his health conditions and that he had never been called to a meeting with the Mr Jennison, the Human Resources Manager nor any of his staff in relation to that issue.

5.4 Mr Bennett was subsequently sworn and made available for cross examination by Mr Catchlove.

6 CROSS-EXAMINATION BY MR CATCHLOVE

6.1 Mr Bennett agreed that his letter to ASTC of 25 August 2008 did not make reference to any special condition that would prevent him from undertaking additional field work. He stated that he had discussed that issue directly with Mr Everett on two separate occasions.

6.2 In response to a question from Mr Catchlove as to whether he had discussed his medical condition with anyone from Human Resources, Mr Bennett gave evidence that his heart condition and Ménière's Disease were mentioned in the presence of Mr Jennison at a card game at Mr Everett's residence.

6.3 Mr Catchlove concluded his cross examination and the witness withdrew.

7. EVIDENCE IN CHIEF ON BEHALF OF ASTC

7.1 MR KEVIN EVERETT: Mr Catchlove called Mr Kevin Everett who was sworn and stated that he was currently employed as the Manager of the Ranger Unit for ASTC.

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- 7.2** Mr Everett stated that he had known Mr Bennett since he first commenced duty with the Ranger Unit in 2001. He and Mr Bennett had a very good working relationship and became close friends. Mr Bennett left ASTC for a short period and subsequently returned some years later to the position of senior ranger. The good relationship continued and the two worked well together. Outside work, Mr Everett and Mr Bennett socialised together as friends.
- 7.3** In response to a question from Mr Catchlove, Mr Everett stated that, in the time he had known Mr Bennett he had never mentioned that he suffers from Ménière's Disease nor had he observed him to exhibit symptoms such as vertigo or dizziness. Mr Everett also gave evidence that Ménière's Disease was not raised at the meeting in August 2008 with Mr Bennett at which the level of fieldwork performed by Mr Bennett's was discussed. Mr Everett stated further that Ménière's Disease was not raised by Mr Bennett at a subsequent meeting at the Red Dog Café nor was it discussed at a later meeting at Mr Bennett's home.
- 7.4** Mr Everett gave evidence that, during the conversation with Mr Bennett at his home, he did not request that Mr Everett speak to the CEO regarding his health conditions.
- 7.5** Mr Everett stated in evidence that he first became aware of Ménière's Disease at the meeting with Mr Catchlove and a member of the HR team following receipt of the complaint from the Anti-Discrimination Commission. He stated that, up until that stage he was unaware of Ménière's Disease.
- 7.6** Mr Everett gave evidence that he first became aware that Mr Bennett had suffered a heart attack in March 2008 when Mr Bennett phoned him from hospital, following which he drove to hospital to support him.
- 7.7** Mr Everett stated that, following his return to work, Mr Bennett did not communicate to him any restrictions in performing his duties. Mr Everett said that when he asked Mr Bennett if he was right to go he responded to

the effect he wanted to get back into things. He stated that, if Mr Bennett was under a restriction as to the work he could perform after the heart attack, he would have expected him to produce a medical certificate or similar document.

8 CROSS-EXAMINATION BY MR BENNETT

- 8.1** In response to direct questions from Mr Bennett regarding discussions about Ménière's Disease, Mr Everett stated that he recalled conversation about Mr Bennett suffering from gout but did not recall any discussion relating to Ménière's Disease.
- 8.2** Mr Bennett referred Mr Everett to two conversations between the two, one of which was during a meeting at the Red Dog Café and the other at Mr Bennett's home. He suggested that he told Mr Bennett that he would be unable to do the strenuous parking inspection work because of his heart attack, excess weight, smoking and Ménière's Disease. Referring to the meeting at the Café, Mr Everett gave evidence that the conversation revolved around the health of Mrs Bennett and that he had no recollection whatsoever of Ménière's Disease being discussed.
- 8.3** In respect of the meeting at Mr Bennett's residence, Mr Everett stated that he delivered a letter from the CEO in a sealed envelope and they spoke about the letter and discussed what would happen next, depending on Mr Bennett's response to the letter.
- 8.4** Mr Bennett gave evidence that if Mr Bennett had mentioned at any time that he was not well enough to perform his duties he would have recommended that he obtain a medical certificate. He reiterated his earlier evidence that such a conversation did not occur.
- 8.5** Mr Everett stated that the senior ranger role was under review at that stage with a view to the senior ranger spending more time in the field than in the office and that did not necessarily mean strenuous duties or a change to the duty statement for the position. Mr Everett stated further that the revised break up of office and filed work under consideration

would not necessarily include performing parking inspection duties for prolonged periods. He added that one of the aims of the revised duties was to have Mr Bennett in the field more often to mentor junior ranger staff.

9 RE-EXAMINATION BY MR CATCHLOVE

9.1 Mr Everett confirmed that Mr Bennett did not communicate any special requirement to him with regards to any impairment on his return to work after his heart attack. Had he done so Mr Everett would have expected a doctor's certificate saying he should be on light duties or the like. Mr Everett stated that if Mr Bennett had produced such a certificate at the time of his return to work probably things would have been different.

9.2 Mr Catchlove tendered into evidence a letter from the ASTC to Mr Bennett in response to his letter of 25 August 2008 together with an affidavit of Mr Everett sworn on 22 December 2009.

Exhibit #4 Letter from Alice Springs Town Council to Mr John Bennett dated 27/08/2008.

Exhibit #5 Affidavit of Kevin Paul Everett.

9.3 Mr ANTHONY JENNISON: Mr Catchlove called Mr Anthony Jennison and, with the consent of Mr Bennett, tendered an affidavit sworn by Mr Jennison on 18 December 2009.

Exhibit #6 Affidavit of Mr Anthony Jennison sworn 18 December 2009.

10. EXAMINATION-IN-CHIEF BY MR CATCHLOVE

10.1 Mr Jennison advised that he held the position of Human Resources Manager for the ASTC. He stated that, in that capacity, he had no knowledge, from either Mr Bennett talking to him directly or from information provided by any of his staff, that Mr Bennett suffered from an impairment that required special consideration.

10.2 Mr Jennison denied that he ever had any discussions with Mr Bennett regarding Ménière's Disease, either in the work place or in a social context. He stated that the first he became aware of that disease at all was when he read the term in the Delegate's Findings and that he had to look the term up on the internet.

10.3 Mr Jennison stated that he was aware that Mr Bennett had had a heart attack but had not been advised by Mr Bennett himself or by any of his staff that there were any special requirements in respect of the performance of his duties.

11. CROSS-EXAMINATION BY MR BENNETT

11.1 Mr Jennison confirmed that he had received a copy of Mr Bennett's letter of 25 August 2008 regarding a grievance dispute. He denied that the letter contained any information regarding any special requirements in respect of Mr Bennett's performance of his duties.

11.2 Mr Jennison was afforded the opportunity to re-read Mr Bennett's letter to refresh his memory. In response to a question from the Hearing Commissioner, Mr Bennett confirmed that he had resigned from ASTC on 29 August 2008.

11.3 In response to a question from Mr Bennett whether ASTC did anything about the matters raised in the letter, Mr Jennison recalled that the timeframe between receipt of the letter and Mr Bennett's resignation was tight and there was very little time to respond. In addition he noted there was nothing specifically mentioned in this letter about Mr Bennett's heart condition preventing him from doing the work of a senior ranger or being limited in the duties he could perform.

11.4 Mr Jennison stated that he had a clear recollection of a discussion with Mr Everett regarding Mr Bennett's heart attack and whether that fact would present any restrictions on the performance of his duties. He gave evidence that he clearly recalls being advised that there were no restrictions. He added that if there were restrictions on the duties

Mr Bennett could perform after the heart attack then a medical certificate would have been provided to ASTC. On further cross examination by Mr Bennett, Mr Jennison was adamant that HR staff had spoken to Mr Bennett on his return from sick leave and that no issue of a requirement for restricted duties was raised.

11.5 In response to a question from the Hearing Commissioner, Mr Jennison confirmed that the considerations by ASTC for an employee returning from a heart attack would be different if the person was required to perform strenuous duties compared to being engaged in an office job. He added that the duties required to be performed by Mr Bennett following his return to duty were not outside the duties specified in his job description. He conceded that Mr Bennett was requested to spend more time in the field but that had always been a part of his role.

12 EVIDENCE OF MR CRAIG CATCHLOVE

12.1 Mr Catchlove advised the Commission that he did not intend to give any oral evidence on behalf of ASTC however he did wish to tender an affidavit sworn by him on 22 December 2009.

Exhibit #7 Affidavit sworn by Craig Catchlove, dated 22/12/2009.

12.2 Mr Catchlove took the affirmation and made himself available for cross examination by Mr Bennett.

13 CROSS-EXAMINATION BY MR BENNETT

13.1 In response to a direct question, Mr Catchlove stated that he had never had a meeting with Mr Everett during which Mr Bennett's medical conditions were discussed and that in none of his meetings with Mr Everett was the issue of any special requirement or consideration because of Mr Bennett's illness brought up.

13.2 In response to a question regarding any action taken in response to Mr Bennett's letter of 25 August 2008, Mr Catchlove noted that the letter

stated that Mr Bennett was amenable to a redundancy package, an offer that was accepted by ASTC.

13.3 Mr Catchlove gave evidence that ASTC did not regard the proposed changes to Mr Bennett's duties as a demotion and that the severance package offered at the time was reasonable but not excessive.

13.4 Following questioning regarding the duties of the senior ranger a copy of the duty statement for the position was tendered into evidence.

Exhibit #8 Duty Statement for Senior Ranger.

13.5 With the consent of the parties, the statutory declaration sworn by Mr Bennett on 20 December 2009 was tendered into evidence.

Exhibit #9 Statutory Declaration of Mr Bennett, sworn 20 December 2009, together with attachments.

14 DECISION:

14.1 The issues for determination in this matter were succinctly and accurately summarised by Mr Catchlove in this opening submissions. Namely:

- at the relevant time, did Mr Bennett have a special need or special needs arising because of an attribute;
- if the answer to that question is yes, did the ASTC have knowledge of the special need or needs; and
- if the answer to question 2 above is yes, did ASTC refuse or fail to accommodate the special need(s) in contravention of section 24 of the *Anti-Discrimination Act*.

14.2 At various points during the conduct of the hearing issues were raised that that fell outside the bounds of those 3 questions. For example, the grievance complaint, a real or constructive demotion of Mr Bennett and an allegation of direct discrimination. Those matters all fall outside the

boundaries of this hearing and are not considered or taken into account for the purpose of reaching a decision.

- 14.3** In respect of the first question – did Mr Bennett have a special need or needs as a result of an attribute I make the following observations and findings. No medical evidence was tendered by Mr Bennett as to any special needs arising from either his heart attack nor from him suffering from Ménière's Disease. Mr Bennett himself gave evidence that either or both ailments prevented him from carrying out strenuous work, particularly in hot weather conditions. It is common knowledge that a heart attack has the very real potential of restricting the work activity of the person who suffers a heart attack. Mr Jennison conceded as much in his evidence when he stated he would expect there to be different consideration for a person returning from a heart attack to a physically strenuous job as distinct from an office position.
- 14.4** So far as Ménière's Disease is concerned, Mr Bennett gave evidence that this condition caused vertigo which was exacerbated by bending and straightening during the process of marking tyres during parking inspections. Classic symptoms of Ménière's disease include vertigo.
- 14.5** However, Mr Bennett did not tender any medical evidence in support of his claims that he was either suffering from Ménière's disease or work related restrictions arising from his heart attack at the hearing. Nor was any such material provided to ASTC when Mr Bennett returned to duty around March/April 2008 following the heart attack. It is open to me to conclude that no such medical evidence exists.
- 14.6** Mr Catchlove, quite properly in my opinion, did not refute that Mr Bennett suffered a heart attack. That fact was clear on the evidence and known to several employees of ASTC, including Mr Everett and Mr Jennison. Similarly, Mr Catchlove did not deny that Mr Bennett suffered from Ménière's Disease despite the fact there was no medical evidence to support Mr Bennett's claim in that regard. To do so in an appropriate manner Mr Catchlove would have been required to have Mr Bennett

independently examined and to then tender medical evidence on behalf of ASTC refuting Mr Bennett's claims. No such medical evidence was available to ASTC and Mr Catchlove did not attempt to make any submission, as a non-medical person, to that effect that Mr Bennett did not suffer from the medical conditions alleged. Without such medical evidence that was the proper course for him and ASTC to adopt.

14.7 For the purposes of this decision, and taking account of the concession made by Mr Catchlove in his submissions, it follows that it is open to me to accept that Mr Bennett suffered from a heart attack some time around March 2008 and that he suffered from Ménière's Disease at the relevant time. I do so on the basis that no evidence was presented to the hearing by ASTC, for the proper reasons set out above, to refute Mr Bennett's claims in that regard. However, that does not resolve the issue as to whether those medical conditions resulted in any special needs in terms of Mr Bennett's duties as a senior ranger with ASTC.

14.8 Without medical evidence it is not possible for me to determine what, if any, special needs Mr Bennett had in terms of the performance of his duties as a senior ranger as a result of those medical conditions. For reasons that will become obvious later in this decision, it is not necessary for me to make that determination for the purpose of reaching an ultimate decision as to whether ASTC has breached section 19 of the Act.

14.9 I was greatly assisted in respect of the determination as to any special needs Mr Bennett may have had at the relevant time by the concession made by Mr Catchlove in his opening address to the hearing. In response to my query whether the ASTC required the production of medical certificates or reports detailing any special needs Mr Catchlove responded that ASTC would:

"certainly not be delving into any questions as to whether or not Mr Bennett either has a heart disease or Ménière's Disease".

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- 14.10** Allowing for that concession I move to the second question required to be answered for the purpose of resolving Mr Bennett's complaint. Namely: did the ASTC have knowledge of the special need or needs on the part of Mr Bennett.
- 14.11** In asserting that ASTC was aware of his special needs Mr Bennett relies significantly on various discussions said to have taken place between himself and Mr Everett and, to a lesser extent, Mr Jennison. Mr Bennett gave evidence that a number of those discussions took place in a social context and not in the work environment. It became obvious from the submissions and evidence presented at the hearing that Mr Bennett and Mr Everett were close friends outside the work environment who regularly participated in family and social activities together. Mr Jennison also participated in social activities with Mr Bennett and Mr Everett.
- 14.12** In his affidavit (*Exhibit #5*) Mr Everett states that at the time of his meeting with Mr Bennett in early August 2008 he was certainly aware that he had suffered a heart attack some 4 to 5 months earlier. Mr Jennison confirmed this in his oral evidence at the hearing and stated that he visited Mr Bennett when he first heard he had suffered a heart attack.
- 14.13** In his affidavit Mr Everett states further that at no stage in his discussions with Mr Bennett was his heart condition mentioned as a barrier to him performing his duties as a senior ranger or to performing more field work that he was at the time. Mr Everett stated further that, on his return to work after the heart attack Mr Bennett did not advise him of any conditions or limitations affecting his return to duty nor did he raise the effects of the heart attack as a factor that might impact on his work performance or the carrying out of his duties.
- 14.14** In respect of Ménière's Disease, Mr Everett stated in his affidavit that Mr Bennett had never mentioned that condition to him, either in a social or work context. In addition, in his affidavit Mr Everett stated that the first he heard of Ménière's Disease was when he was presented with a copy of the Delegate's Findings during a meeting with Mr Catchlove, Mr Jennison

and Mr Alan Riley. He stated that, at the time, one of the group “Googled” the phrase as no-one present knew what Ménière’s Disease entailed.

14.15 Statements made by Mr Everett during the giving of his evidence before the hearing were entirely consistent with the statements made in his affidavit. I found Mr Everett to be an honest and reliable witness who provided consistent evidence to the best of his recollection. I have no reason to doubt the veracity of his affidavit or oral evidence.

14.16 Mr Bennett, in submitting that he had in fact advised ASTC of his special needs, relied heavily on the assertion that he had assumed that Mr Everett would advise ASTC management of those special needs. That assertion cannot be maintained given Mr Everett’s clear and unequivocal evidence that at no stage did Mr Bennett advise him of any special needs that would affect his work performance.

14.17 Similarly, Mr Jennison in his affidavit (*Exhibit #6*) states that at no time during the course of Mr Bennett’s employment with ASTC was he made aware of any Occupational Health and Safety issues pertaining to Mr Bennett’s employment as a senior ranger, including any special needs arising from his heart attack or from him suffering Ménière’s Disease. He gave evidence that whilst he was aware that Mr Bennett had suffered a heart attack at no stage was he advised that this placed any restriction on the performance of his duties as a senior ranger. Mr Jennison stated further that he first became aware of Ménière’s Disease when he read the term in the Delegate’s Findings. That evidence was again consistent with the oral evidence Mr Jennison presented at the hearing.

14.18 I found Mr Jennison to be an honest and conscientious witness who made his best attempts to recount incidents that occurred some significant time ago. I do not accept Mr Bennett’s assertion that Mr Jennison was aware of any special needs in respect of the performance of his duties prior to the receipt of Mr Bennett’s letter of 25 August 2008 (*Exhibit #2*). For reasons set out immediately below, I am not convinced that Mr Jennison was aware of any special needs pertaining to Mr Bennett even following the

receipt of that letter however that point is moot as Mr Jennison did not see the letter until after Mr Bennett had ceased employment with the ASTC.

14.19 In his affidavit of 22 December 2009 (*Exhibit 7*), Mr Catchlove also attests that at no time prior to August 2009 did Mr Bennett, or any other employee of ASTC, advise him of any special need arising from a medical condition suffered by Mr Bennett.

14.20 On the basis of the above findings I am not satisfied that ASTC, through the agency of Mr Everett, Mr Jennison or Mr Catchlove, was aware of any special needs of Mr Bennett arising from his heart attack at any time prior to Mr Bennett ceasing his employment with ASTC.

14.21 In his evidence Mr Bennett submitted that his letter of 25 August 2008 (*Exhibit #2*) provided advice to ASTC as to his health issues and special needs arising from those issues. That assertion cannot be maintained when the content of the letter is considered carefully. The letter concerns Mr Bennett's complaint regarding the perceived downgrading of his position and "demotion". The letter requests that ASTC invoke the "Grievance Dispute Avoidance and Settlement Procedures" under the ASTC Workplace Partnership Agreement 2007. The letter deals almost exclusively with what Mr Bennett perceived as a downgrading of his duties and a constructive demotion. I advised at various times during the hearing, those complaints are not matters that are before the Commission for determination.

14.22 Nowhere in Exhibit #2 does Mr Bennett raise his health issues or the requirement to accommodate any special needs consequential to those health issues. I find that Mr Bennett's letter of 25 August 2008 is of no assistance or probative value in terms of the determination of this proceeding as it makes no reference whatsoever to the matters to be determined in respect of the anti-discrimination complaint.

14.23 To the contrary, a number of Performance Appraisal Form in respect of Mr Bennett were tendered into evidence (*Exhibit #3*). One of the forms

refers to an appraisal of Mr Bennett's performance that was completed on 18 April 2008, that is shortly after his return to work following him suffering a heart attack.

14.24 On the page marked folio 52 a section marked "Barriers to Performance" appears. That section states:

"Employees are encouraged to identify any perceived barriers that they feel may be inhibiting their performance, if so please note in the space provided below".

Below those words are the hand written annotation:

"N/A. none."

Mr Bennett's signature appears directly below the annotation. In response to a direct question from the Hearing Commissioner, Mr Bennett acknowledged that the annotation was made by him when he was completing the performance appraisal form.

14.25 Taken in conjunction with the evidence of Mr Everett and Mr Jennison, I find the performance appraisal form, completed under Mr Bennett's own hand, to be highly persuasive evidence that Mr Bennett himself did not consider that his medical conditions, as at 18 April 2008, gave rise to any special needs in terms of the performance of his duties as a senior ranger.

14.26 I should add that I also found Mr Bennett to be an honest witness who did his best to recount accurately the details of events surrounding his employment with the ASTC. That task was obviously difficult given his close personal association with Mr Everett and, to a lesser extent, Mr Jennison.

14.27 I do however make the following observations in respect of Mr Bennett's evidence. I am not satisfied that he advised anyone at ASTC regarding him suffering from Ménière's Disease. The evidence of Mr Everett and Mr Jennison was consistent in that neither of those witnesses recalled hearing that term until receipt of the Delegate's Findings, at which stage

Mr Jennison used the internet to find out what the term meant. Mr Everett and Mr Jennison were both aware that Mr Bennett suffered a heart attack. However I am not satisfied that Mr Bennett raised with either of them any special needs that would require consideration on his return to work. I accept the evidence of Mr Everett and Mr Jennison that, if there were special needs that required accommodating, Mr Bennett would have produced a medical certificate to that effect.

14.28 When questioned as to why he wrote "N/A. none" in respect of "Barriers to Performance" on the performance appraisal form signed on 18 April 2008, Mr Bennett's response was unhelpful and somewhat evasive. At the time of completing the performance appraisal Mr Bennett had a real opportunity to formally advise ASTC that his heart attack had resulted in a special need in terms of his return to duty. The fact that he did not do so provides a clear indication that, at least at that stage, Mr Bennett himself was not aware of any special needs arising from the heart attack nor from Ménière's Disease. It follows logically that Mr Bennett would not have advised either Mr Everett or Mr Jennison of any special need as he himself did not believe any special need existed.

14.29 During the course of the hearing Mr Bennett suggested that, even if the senior managers of ASTC were not aware of his special needs, those managers should have been more proactive in finding out whether or not any such special needs existed when Mr Bennett returned to duty after suffering a heart attack. Whilst that is a reasonable suggestion in certain circumstances I do not accept that there was any such requirement in this instance.

14.30 In his evidence Mr Everett stated that when Mr Bennett returned to duty he did ask him "if he was right to go" to which Mr Bennett responded "Yes, ... that he wanted to get back into things". On the Performance Appraisal Form completed on 18 April 2008 Mr Bennett wrote "N/A. none" in response to the question as to whether there were any barriers to the performance of his duties. In those circumstances I do not accept there

was any further obligation on ASTC to make further or continuous enquiries as to whether any special needs existed in terms of Mr Bennett's capacity to perform his duties in the absence of any clear indicators to the contrary.

14.31 On the basis of the matters set out above, Mr Bennett's claim that he raised the issue of special needs with Mr Everett and with Mr Jennison cannot be maintained. Following from that I conclude that at no time prior to his resignation was ASTC aware of or advised of any special need on the part of Mr Bennett in the performance of his duties as a senior ranger.

14.32 Having reached that conclusion it is not necessary for me to determine whether or ASTC refused or failed to accommodate any special need(s) in contravention of section 24 of the Anti-Discrimination Act.

14.33 On the basis of the above findings, Mr Bennett's complaint against ASTC is dismissed in accordance with section 88(4) of the Act.

14.34 I make no order as to costs.

PHILIP TIMNEY
Hearing Commissioner
30 August 2010

