

**NORTHERN TERRITORY ANTI-DISCRIMINATION COMMISSION**

**LOCATION:** DARWIN

**TRIBUNAL:** SIMON RICE  
HEARING COMMISSIONER

**DATE OF HEARING:** ON THE PAPERS

**HEARING NO:** C20100027-02 of 2011

**COMPLAINANTS:** PEREIRA

**RESPONDENT:** COMMISSIONER OF POLICE

**REPRESENTATIVES:** The Complainant in person  
Mr Kelvin Currie, Solicitor, for Respondent

**DATE OF DECISION:** Written Decision given on

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## REASONS FOR DECISION

### 1. DECISION:

- 1.1. For the reasons I give below, I decline to discontinue the complaint at this stage of proceedings.

### 2. FACTUAL BACKGROUND

- 2.1. For purposes of this application I set out a brief summary of the facts as alleged and agreed.
- 2.2. Mr Pereira was detained without charge in East Timor in 2002. He says that he was detained for about 30 days, and was released on representations being made to the East Timorese Attorney General.
- 2.3. In 2007 Mr Pereira was employed by the Police Commissioner as a trainee constable. He commenced training in Feb 2008. He completed the trainee course on 7 August 2008 but his employment was terminated effective that date. The Police Commissioner has since said, in these proceedings, that the decision was made because Mr Pereira was dishonest in failing to disclose information concerning his detention in East Timor in 2002, although that was not the reason given in the notice of termination.
- 2.4. Mr Pereira agrees that he failed to disclose that information, but says that the occasions on which he could have disclosed it are fewer than claimed by the Police Commissioner. Mr Pereira has set out what he says are the reasons for his having failed to disclose the information. He says that the Police Commissioner's decision to terminate his employment was made, at least in part, because of what happened to him in East Timor. Mr Pereira says that what happened to him in East Timor falls under the definition of 'irrelevant criminal record' in the Northern Territory *Anti-Discrimination Act* (the Act).

### 3. PROCEDURAL BACKGROUND

- 3.1. Mr Pereira had made a complaint to the Australian Human Rights Commission (AHRC) of discrimination on the basis of criminal record. The

AHRC received documents from Mr Pereira in support of his complaint, and a submission and documents from the Police Commissioner in response. Mr Pereira then withdrew his complaint from the AHRC and made a complaint to the Northern Territory Anti-Discrimination Commissioner (AD Commissioner).

- 3.2. Mr Pereira's complaint is that the Police Commissioner subjected him to prohibited conduct, discrimination, by a distinction, restriction, exclusion or preference, made on the basis of an attribute (irrelevant criminal record), that had the effect of nullifying or impairing equality of opportunity in the area of work (ss 4, 19, 20, 31). At a hearing, Mr Pereira would have to prove, on the balance of probabilities, the prohibited conduct he alleges.
- 3.3. The AD Commissioner accepted Mr Pereira's complaint on 15 September 2009 under s 66 of the Act, and carried out an investigation of it as required by s 74. The investigation was carried out by a delegate of the AD Commissioner and there is no dispute as to the delegation.
- 3.4. The delegate was required to 'make a thorough examination of all matters relevant to the investigation'; and (if considered appropriate), to 'ensure that each party to the investigation is given a reasonable opportunity to present their case' (s 75(3)). It has not been suggested that the delegate did not comply with that requirement.
- 3.5. The delegate had before her the documents that the AHRC had received from Mr Pereira and the Police Commissioner, as well as further written representations made by both parties. On completing the investigation the delegate was satisfied that there was prima facie evidence to substantiate the allegation of prohibited conduct in the complaint. Accordingly, the delegate determined that Mr Pereira's complaint was to proceed to conciliation (s 76(1)(b)).
- 3.6. The conciliation took place but did not succeed in resolving the complaint. Accordingly, in January 2010, the complaint was referred to a hearing (s 83(b)).
- 3.7. During 2010 the parties took steps to prepare the matter for hearing. The Police Commissioner filed a 'Statement of Facts, Issues, Areas of Disagreement and List of Documents', and filed the copies of the listed

documents. The Police Commissioner has not yet filed any witness statements. This is unsurprising as the Commissioner has not yet seen any witness statements from Mr Pereira, on whom the burden of proof lies (s 91(1)).

3.8. Mr Pereira's initial complaint was supported by a bundle of documents. In response to the Police Commissioner's Statement and filed documents, Mr Pereira filed a Reply, and his own Statement of Facts supported by annexures. Mr Pereira has not yet filed any witness statements. Mr Pereira is seeking documents from the Commissioner in order to fully prepare his case for hearing, and has not yet obtained those documents.

3.9. The Police Commissioner then requested the AD Commissioner, under s102, to discontinue the proceedings. I have been appointed to conduct the hearing of the complaint (s85(1A)), and so must make a decision under s102.

3.10. Under s 102(1) I may discontinue the proceedings 'at any stage' if I reasonably believe that the complaint (a) is frivolous or vexatious, (b) is trivial, (c) is misconceived or lacking in substance, or (d) fails to disclose any prohibited conduct. I have disregarded the mistaken syntax where the word 'is' precedes the word 'fails' when reading s 102(10(d)).

3.11. For purposes of the application under s102, I accept the facts as alleged by Mr Pereira, taking them at their highest – that is, without qualification. When in this decision I refer to the facts alleged by Mr Pereira, or the conduct he alleges or complains of, I am referring to the allegations which I have set out above.

#### **4. THE TIMING OF A S.102 APPLICATION**

4.1. I note that the delegate was satisfied, on the basis of material then available, that there was prima facie evidence to substantiate the allegation of prohibited conduct in the complaint. While the exercise under s 76 is different from that under s 102, both are concerned with evaluating the evidence that supports a complaint. That evaluation must occur at an early stage of the proceedings under s 76, while it can occur at a much later stage under s 102. In these proceedings, that later stage is not much later. In elapsed time, the application under s102 was made a year after the delegate's decision, but the

only additional material I have available to me is further documentation I describe above at [3.7] and [3.8]. The Police Commissioner is aware that Mr Pereira is seeking, and intends to rely on, additional material at a hearing.

- 4.2. Although a significant number of documents have been filed, and the parties respective statement of facts have been filed, there is still evidence to be filed. If the matter proceeds to a hearing, the documents filed to date suggest to me that relevant evidence could be given by, at least, Mr Pereira, Ms da Costa, the Police Commissioner, Deputy Police Commissioner Wernham, Assistant Police Commissioner Payne, Commander Vanderlaan, Commander Gwynne, Officer Budge, Sergeant Palmer and Senior Sergeant Smith, and Acting Superintendent James. At this stage it can be inferred generally what the evidence of those people might be, but I do not know what they will say or in what terms. None of the documentary material that has been filed has been the subject of comment or explanation by any witness.
- 4.3. The stage at which the Police Commissioner has applied to have the proceedings discontinued is an early one. I am being asked to say that, at this stage, the complaint fails to disclose any prohibited conduct. Arising as it does at this early stage of the proceedings, the Police Commissioner's application under s102 is, in effect, an application for summary dismissal.
- 4.4. It is preferable in a jurisdiction such as this, where the difficulty of proof of the reason for another's conduct is notoriously difficult, that what is in effect an application for summary dismissal be made no earlier than at the conclusion of the complainant's case (see *Margan v University of Technology, Sydney* [2003] NSWADTAP 65, [15]).

## **5. THE POLICE COMMISSIONER'S APPLICATION**

- 5.1. The Police Commissioner does not argue that Mr Pereira does not have the protected attribute that he relies on, an irrelevant criminal record as defined in ss 4 and 19. Nor does the Police Commissioner argue that the conduct Mr Pereira complains of – termination of his employment – did not occur in the area of work. I do not therefore make any findings on these matters, although I note that I see nothing in the material to suggest any basis for an argument in relation to the area of work.

- 5.2. In relation to the protected attribute, it is not necessary for me to decide whether Mr Pereira had that attribute at the relevant time; the Police Commissioner does not put it in issue, because the Police Commissioner says that there was a different, sole, reason for the termination. If the complaint proceeds to a hearing there may be question as to whether Mr Pereira's criminal record was a 'relevant' or 'irrelevant' criminal record. It is unusual, perhaps unique, that a discrimination statute protects an attribute which a person may or may not have depending on the conduct complained of; an explanation is that the drafting incorporates the defence found in other legislation of 'inherent requirements of a job' (see Australian Human rights Commission, *Discrimination in Employment on the basis of Criminal Record: Discussion Paper 2004*, 17). Whether a criminal record was relevant or irrelevant is a question of fact, to be decided in light of evidence about, for example, the nature of the work to be done (as would be the case if what was relied on was the inherent requirements of a job: *X v Commonwealth* (1999) 200 CLR 177). Had the Police Commissioner said that he did take account of Mr Pereira's criminal record, but that it was a relevant criminal record and so not an attribute protected by the Act, I would have said that that issue could not be decided without a full hearing of the evidence.
- 5.3. The only part of Mr Pereira's complaint that the Police Commissioner contests at this stage is whether the conduct complained of was 'on the basis' of the attribute. The question is 'Why did the Police Commissioner act as he did?' (*Purvis v New South Wales* [2003] HCA 62; 217 CLR 92); it is a question of whether there was a causal nexus between the conduct and the attribute. I note that 'for discrimination to take place, it is not necessary that the attribute is the sole or dominant ground' (s 20 (3)(a)).
- 5.4. The Police Commissioner argues that the sole reason for his terminating Mr Pereira's employment was Mr Pereira's alleged dishonesty, that is, his 'failure to disclose'. The Commissioner says that Mr Pereira's failure to disclose was evident in a number of things that Mr Pereira did. The Police Commissioner says that Mr Pereira's criminal history, 'relevant or irrelevant', was not a reason.

## 6. MISCONCEIVED

- 6.1. The Police Commissioner says that Mr Pereira's complaint is misconceived (s 102(1)(c)) because the AD Commission has no jurisdiction to review the Police Commissioner's assessment of Mr Pereira's integrity, and because 'what happened in East Timor' was not relevant to his decision while 'what happened in the Northern Territory' was.
- 6.2. A complaint is misconceived if it misunderstands a legal principle such that the complaint fails to disclose a cause of action (*State Electricity Commission of Victoria v Rabel and Others* [1996] VSC 78, per Ormiston J at [14]).
- 6.3. The Police Commissioner is correct to say that the AD Commission does not have jurisdiction to decide whether, by some industrial or employment law considerations for example, the termination was unfair. Some of Mr Pereira's arguments in correspondence with the AHRC and the AD Commissioner seem to raise such issues – his complaint about the timing of the decision, for example, and his grievance that the Police Commissioner has not taken account of his reasons for failing to disclose.
- 6.4. To that extent, Mr Pereira may misconceive what findings or remedies are available from the AD Commission. But it is clear from the terms of his complaint, from the documents in support of the complaint, and from what he says in submissions, that Mr Pereira's complaint alleges conduct that engages the Act; he goes as far as to identify possible comparators for purposes of establishing less favourable treatment.
- 6.5. The complaint discloses a cause of action and is not misconceived.

## **7. LACKING IN SUBSTANCE**

- 7.1. The Police Commissioner says that Mr Pereira's complaint is lacking in substance (s 102(1)(c)), and that it fails to disclose any prohibited conduct prohibited conduct (s 102(1)(d)). However, he says so almost in passing. After a number of paragraphs arguing that the complaint is misconceived, the Police Commissioner says only 'Not only is it misconceived but there is simply no substance to the complaint and no evidence of prohibited conduct'. Nothing is said in support of this submission.
- 7.2. A complaint is lacking in substance if there is an 'insufficiency or ... absence of merit of the factual basis for the allegations made in the complaint'

(*Langley v Niland* [1981] 2 NSWLR 104, per Hunt J at 107). The expression is 'synonymous with, and in no real sense different from, the expressions used to describe those claims which are vexatious or are otherwise such as should be peremptorily terminated' (*State Electricity Commission of Victoria v Rabel and Others* [1996] VSC 78, per Ormiston J at [17]).

- 7.3. There is material filed in these proceedings that provides prima facie support for a complaint of discrimination. The material suggests that the Police Commissioner did not have any concerns about Mr Pereira's employment until the question of his having a criminal record arose, that the Police Commissioner questioned Mr Pereira about his criminal record and investigated the circumstances of that criminal record, and that termination of employment followed very soon afterwards.
- 7.4. Mr Pereira does not have direct evidence that his criminal record was a reason for his termination, and is currently attempting to obtain documents that may provide such evidence. Such evidence is notoriously difficult to obtain in discrimination matters (see the discussion in N Rees, K Lindsay and S Rice *Australian Anti-discrimination Law*, Federation Press, 2008, Chapter 4.4). In some matters the evidence may only be obtained through a respondent's documents or concessions made by witnesses in cross-examination. At this stage of these proceedings, however, the available evidence does provide prima facie support for a complaint of discrimination, if only to support an inference.
- 7.5. In assessing whether I have reasonable belief that the complaint is lacking in substance, at this early stage of the proceedings, before all the evidence has been filed let alone tested, I must proceed with caution:

'In the absence of a proper hearing at which the complainant has an opportunity to call all relevant evidence there can be no satisfactory way of determining that a complaint should be dismissed at a preliminary stage, unless it can be demonstrated, either from the materials by which the complainant has instituted the claim or by reference to facts which would undoubtedly deny the complainant relief, that the complaint is so hopeless that it should be summarily brought to an end. For this purpose

I cannot accept that Parliament intended a lesser test than has been imposed by the courts, nor can I accept that the power to dismiss should be exercised upon the basis that the claim "presents no more than a remote possibility of merit", if that expression means anything other than that the complainant has no reasonable prospect of success. At a preliminary stage there is simply no argument that some lesser form of insubstantiality can be relied upon to terminate a complaint. With respect, some form of "curate's egg" test cannot be considered acceptable, if it is to be applied before a hearing gets under way. The complaint is either wholly bad, that is undoubtedly shown to be hopeless, or it must be allowed to proceed to an ordinary tribunal hearing. Whatever test may be acceptable at other stages of the administrative process or during the conduct of an ordinary tribunal hearing, a complaint cannot be dismissed under [the equivalent of s 102] unless it is clear beyond doubt that the complaint is lacking in substance, that is, that the complainant has no arguable case which should be allowed to be resolved at a full hearing' (*State Electricity Commission of Victoria v Rabel and Others* [1996] VSC 78, per Ormiston J at [18]).

7.6. Also:

At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or "so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument"; "so to speak apparent at a glance".

... some of these expressions occur in cases in which the inherent jurisdiction was invoked and others in cases founded on statutory rules of court but although the material available to the court in either type of case may be different the need for exceptional caution in exercising the power whether it be inherent or under statutory rules is the same. Dixon J. (as he then was) sums up a number of authorities in *Dey v. Victorian Railways Commissioners* [1949] HCA 1; (1949) 78 CLR 62 VOL CXII-9 where he says (1949) 78 CLR, at p 91 : "A case must be very clear indeed to justify the summary intervention of the court to prevent a

plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process." Although I can agree with Latham C.J. in the same case when he said that the defendant should be saved from the vexation of the continuance of useless and futile proceedings (1949) 78 CLR, at p 84, in my opinion great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal (*General Steel Industries Inc v Commissioner for Railways* (NSW) [1964] HCA 69 [9]-[10]; (1964) 112 CLR 125, 129-130).

7.7. It is not clear to me that Mr Pereira's complaint is lacking in substance, that is, that he has no arguable case which should be allowed to be resolved at a full hearing. To the contrary, it is clear to me that he has an arguable case.

7.8. The complaint is not lacking in substance.

## **8. FAILURE TO DISCLOSE ANY PROHIBITED CONDUCT**

8.1. The Act prescribes failure to disclose any prohibited conduct as a reason for discontinuing proceedings (s 102(1)(d)) and, as I note above, the Police Commissioner relies on this, but in passing. The structure of s 102(1) suggests that there is a difference between circumstances where a complaint is lacking in substance, and circumstances where a complaint fails to disclose any prohibited conduct.

8.2. The difference in meaning seems to be that the latter identifies a complaint which is not lacking in substance, but which does not disclose any prohibited conduct because of the operation of a defence, an exception or exemption. A similar provision in ss 102 and 92(1)(a)(ii) of the *Anti-Discrimination Act* (NSW) 1977 allows dismissal of a complaint when 'the conduct alleged ... if

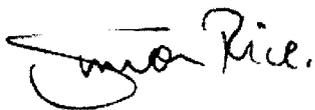
proven, would not disclose [a] contravention'. In *Langley v Niland*, noted above, Hunt J at 107 gives as an example a complaint that falls within an exception.

8.3. I give (s 102(1)(d)) that meaning. The Police Commissioner does not argue at all why Mr Pereira's complaint does not disclose any prohibited conduct. In my view there is no relevant defence, exception or exemption as a result of which Mr Pereira's complaint fails to disclose any prohibited conduct.

8.4. Within the meaning of s 102(1)(d), the complaint does not fail to disclose any prohibited conduct.

## 9. CONCLUSION

9.1. For the reasons I have given I do not believe that at this stage of the proceedings the complaint is misconceived or lacking in substance; or that it fails to disclose any prohibited conduct. I therefore decline to discontinue the proceedings, and I dismiss the Police Commissioner's application. I will request the Registrar to convene a directions hearing to prepare the matter for a full hearing.



Simon Rice  
Hearing Commissioner  
29 August 2011