

NORTHERN TERRITORY ANTI-DISCRIMINATION COMMISSION

LOCATION: DARWIN

TRIBUNAL: SIMON RICE
HEARING COMMISSIONER

DATE OF HEARING: on the papers

HEARING NO: C20100027-02

COMPLAINANTS: PEREIRA

RESPONDENT: COMMISSIONER OF POLICE

REPRESENTATIVES: no appearance for Complainant
Ms Milligan, Solicitor, for Respondent

DATE OF DECISION: Written Decision given on 8 November 2012

REASONS FOR DECISION

1. DECISION:

- 1.1. For the reasons set out below, I have decided that the Police Commissioner is entitled to a limited order for costs thrown away, but otherwise each party shall pay their own costs.

2. BACKGROUND

- 2.1. On 15 August 2012 I published decision in which I found that the complaint was not substantiated. I dismissed the complaint. At the time I noted the presumption in s 96(1) *Anti-Discrimination Act* ('AD Act') that each party shall pay their own costs, and the discussion in *Berice Anning v Batchelor Institute of Indigenous Tertiary Education (costs)* [2007] NTADComm 2, paragraphs 3-15 ('*Berice*'), of the nature of the costs discretion in s 96(2) *AD Act*.
- 2.2. Because of the discretion I have under s 96(2) I gave the Police Commissioner leave to apply for a costs order, any such application to be filed and served within 14 days of the decision. I gave Mr Pereira leave to file and serve a reply within a further 14 days. The Police Commissioner did apply for a costs order and, although served with the application, Mr Pereira did not file a reply.

3. APPLICATION

- 3.1. The Police Commissioner seeks costs following the event or, in the alternative, costs thrown away. He alleges that it was apparent that the complaint lacked substance and merit from the outset, and that Mr Pereira should have realised this and should not have proceeded with the complaint.
- 3.2. It is the case that at the conclusion of a full hearing the complaint was found to be not substantiated. The complaint had, however, survived the Police Commissioner's earlier application to have the matter discontinued: I decided then that the complaint could not at that stage be said to be misconceived, lacking in substance, or

failing to disclose any prohibited conduct. I do not accept, therefore, that the complaint lacked substance and merit from the outset, and that Mr Pereira should have realised this and not proceeded with the complaint.

4. FACTORS RELIED ON BY THE POLICE COMMISSIONER

- 4.1. The Police Commissioner relies on the approach to the costs discretion described by Hearing Commissioner Lissing in *Berice*, and I agree that it is appropriate to do so.
- 4.2. Of the factors set out in *Berice* that weigh in favour of a costs order, the Police Commissioner relies on two: that Mr Pereira's conduct of the proceedings was unreasonable, and that his conduct of the proceedings was not in good faith. The conduct relied on is as follows.
- 4.3. The Police Commissioner relies first on the vacation of hearing dates. On 19 October 2011 the dates for the final hearing were fixed as 6, 7 and 8 February 2012. On 12 January 2012 the Registrar of the Anti-Discrimination Commission conveyed to the legal representatives for the Police Commissioner confirmation from Mr Pereira's solicitor 'that the above matter will be ready to proceed on the dates set'. On 30 January 2012 Mr Pereira, then represented by counsel, applied to vacate the hearing dates. The dates were vacated and new dates were set for 30 April and 1 and 2 May.
- 4.4. The Police Commissioner respectfully submits that the need to vacate the dates was due to Mr Pereira's legal representatives' having 'failed to prepare the complainant's case properly'. The Police Commissioner does not offer any particulars of this claim, although there is a reasonably available inference to this effect from the circumstances of the application to vacate. When on 12 January 2012 the Registrar of the Anti-Discrimination Commission conveyed information from Mr Pereira's solicitor to the legal representatives for the Police Commissioner, the possibility of Mr Pereira's briefing

counsel was mentioned. On 30 January counsel did in fact appear for Mr Pereira. Only at that stage was an effort made to obtain additional evidence for Mr Pereira, as Mr Pereira's counsel was concerned that the proposed evidence (evidence of 'comparators', discussed below) could be essential to Mr Pereira's case. I am satisfied that at least to the extent of having to obtain that further evidence, Mr Pereira's case was not ready for hearing, on a date a week before the hearing was due to commence, and almost three weeks after Mr Pereira's solicitor had advised that the matter would be ready to proceed.

- 4.5. The Police Commissioner says that, as a result of this late vacation of dates, costs were thrown away. Specifically, he says that counsel who had been briefed was unavailable for the listed dates of 6, 7 and 8 February and that, on confirmation that the hearing would proceed on those dates, he 'was forced to change counsel'. He says that had Mr Pereira 'advis[ed] ... of the possible pending application to vacate', then he 'would have been able to retain the original counsel briefed ... and the rescheduling conflict would have been a non-issue'.
- 4.6. I accept that changing counsel was, at least, an inconvenience that could have been avoided had Mr Pereira given notice of the need to vacate the listed dates, and had his solicitor not earlier confirmed that the matter would be ready to proceed on the listed dates. The Police Commissioner does not specify how he incurred any additional costs in changing from one counsel to another, but to the extent that changing from one counsel to another – because of the understanding that hearing would proceed on 6, 7 and 8 February 2012 – led to additional reasonable costs, then I agree that they were costs thrown away. The Police Commissioner does not specify or claim other costs thrown away in these circumstances.
- 4.7. Secondly, the Police Commissioner relies on the manner of Mr Pereira's compliance with directions. First, he relies on the inadequacy of the preparation of the hearing, which I have addressed

above. Further, he correctly says that on 19 October Mr Pereira was directed to file an affidavit on or before 21 November but that he did not do so until 8 December. The Police Commissioner does not say whether or how this caused him to incur additional costs, or how it is conduct that was either unreasonable or not in good faith such that it warrants the sanction of a costs order. The delay was not significant and did not cause any apparent prejudice to the Police Commissioner's preparation. I am not satisfied that, in the circumstances, this delay in filing warrants the making of a costs order in its own right or in conjunction with other conduct.

4.8. The Police Commissioner further relies on Mr Pereira's late filing of Dr McLaren's medical evidence. Dr McLaren's evidence was filed by Mr Pereira when he had obtained it under order from the Commission, and after Dr McLaren retrieved his records from flood-bound carriage between Darwin and Brisbane after his relocation to Brisbane. The Police Commissioner does not say whether or how this late filing caused him to incur additional costs, or how it is conduct that was either unreasonable or not in good faith such that it warrants the sanction of a costs order. The delay was explicable by reference to circumstances known to the Police Commissioner at the time. I am not satisfied that, in the circumstances, this delay in filing warrants the making of a costs order in its own right or in conjunction with other conduct.

4.9. The Police Commissioner further relies on Mr Pereira's 'late application for the production of documents' relating to named members of the Northern Territory Police as possible comparators. He does so firstly as an example of the failure of Mr Pereira's legal representatives to prepare the complainant's case properly, which I have addressed above. He also relies on it as conduct that caused him to incur unnecessary costs, on the basis that Mr Pereira's seeking documents led to 'significant arguments on the issue of

production’, ‘were not relied upon during the hearing of in the decision of the Hearing Commissioner’, and were not relevant.

- 4.10. The lateness of Mr Pereira’s seeking the documents has been dealt with above. He was otherwise entitled to seek them – as the Police Commissioner was entitled to object to their production – and to decide whether or not to use them. Mr Pereira, through his legal representatives, did not rely on the documents at the hearing, a forensic decision he was entitled to make.
- 4.11. I am not satisfied that, in the circumstances, Mr Pereira’s seeking the documents warrants the making of a costs order in its own right or in conjunction with other conduct.
- 4.12. The Police Commissioner’s submission is that ‘Overall the conduct of the Complainant was unreasonable and not in good faith’. In support of this submission the Police Commissioner says only that Mr Pereira ‘provided no explanation ... as to why the production of documents relating to [the comparators] had not been pursued earlier’, and provided no explanation ‘as to why the evidence in chief was not prepared in accordance with the Directions ... on 19 October’.
- 4.13. I agree that the production of documents relating to [the comparators] could and should reasonably have been sought earlier, and I have addressed that issue above. There is no evidence that Mr Pereira’s failure to seek the documents sooner was an act of bad faith, nor does the Police Commissioner make any argument in support of that allegation. As to Mr Pereira’s failure to prepare his evidence in accordance with the Directions, the Police Commissioner specifies only the fact of a two and a half week delay in serving his affidavit, which I have addressed above.


5. DECISION

- 5.1. In exercising my discretion, I must have regard not only to the matters relied on by the Police Commissioner, but also to the general

rule that each party must bear their own costs; to the need for exceptional circumstances to depart from that rule; to the beneficial, and what is said to be the non-adversarial, nature of the jurisdiction; and to the risk that complainants may be deterred from making their complaints if costs orders are made in other than exceptional circumstances.

5.2. For the reasons above I am satisfied that Mr Pereira, through his legal representatives, acted unreasonably in confirming his readiness to proceed with the listed dates 6, 7 and 8 February 2012 and then applying to vacate those dates. The Police Commissioner is entitled to any costs directly attributable to his having to brief alternative counsel because of his reasonable belief that the matter would proceed on the listed dates 6, 7 and 8 February 2012. These costs should be as agreed, or taxed by a person agreed to by the parties.

5.3. Otherwise, each party shall pay their own costs.



Simon Rice
Hearing Commissioner