Northern Territory Anti-Discrimination Commission

NORTHERN TERRITORY ANTI-DISCRIMINATION COMMISSION

LOCATION:	**ALICE SPRINGS**
TRIBUNAL:	**PROFESSOR SIMON RICE, OAM HEARING COMMISSIONER**
DATE OF HEARING:	**25, 26, 27, 28 AUGUST 2015**
HEARING NO:	**H2015001~01**
COMPLAINANT:	**FRANCES NEWCHURCH**
FIRST RESPONDENT:	**CENTREPRISE RESOURCE GROUP PTY LTD**
SECOND RESPONDENT:	**GRAHAM RIDE**
THIRD RESPONDENT:	**SARAH RIDE**
HEARING NO:	**H2015002~01**
COMPLAINANT:	**FRANCES NEWCHURCH**
RESPONDENT:	**CENTREPRISE RESOURCE GROUP PTY LTD**
REPRESENTATIVES:	**Mr Jonathan McCarthy, solicitor, for Complainant**
	No appearance for First Respondent
	Second Respondent in person
	Ms Michelle Ride, with leave, for Third Respondent
	Ms Bronwyn Haack, barrister, Counsel Assisting
DATE OF DECISION:	**5 January 2016**

REASONS FOR DECISION

1. DECISION:

1.1. For the reasons I set out below, Ms Frances Newchurch is successful in her discrimination claims against Mr Graham Ride and Ms Sarah Ride, for which Centreprise Resource Group Pty Ltd shares liability vicariously, but Ms Frances Newchurch is not successful in her victimisation complaint against Centreprise Resource Group Pty Ltd.

2. BACKGROUND:

2.1. Ms Newchurch commenced employment at Centreprise Resource Group Pty Ltd ('Centreprise') on Tuesday 3 December 2013 as a technical support and administration officer, a position for which Centreprise received incentives under the Indigenous Wage Subsidy Program. She was employed at Centreprise until 30 June 2014 when her employment was terminated due to a downturn in business. Mr Graham Ride, the General Manager of Centreprise, was Ms Newchurch's supervisor. Ms Sarah Ride was a fellow employee, employed as a 'technical assistant'. Mr Ride is Ms Ride's grandfather.

2.2. Ms Newchurch makes allegations of discrimination against both Mr Ride and Ms Ride, and holds Centreprise vicariously liable for their conduct. Ms Newchurch makes allegations of victimisation against Centreprise.

2.3. I accept the following account that Ms Newchurch gave of herself at the hearing. Ms Newchurch is a Ngarrindjeri and Kaurna, Narrunga woman who grew up in South Australia, between Adelaide and her father's country, in Kaurna at Point Pearce Mission on the Yorke Peninsula and her mother's mission, Raukkan, also known as Point McLeay. She completed primary school at Largs Bay Primary School and completed year 10 at West Croydon High School. She started working after school as a teacher's aide when she was 17 years old and strongly identifies as an Aboriginal person; her family were actively involved in promoting the recognition of Aboriginal issues. Ms Newchurch has worked consistently when not caring for her two children. She completed further studies in Melbourne at the Aboriginal Health Workers College, Thambi Community College, Koorie College and Batchelor College, and has received certificates in health work, IT and

administration. Ms Newchurch has maintained her strong connection and cultural knowledge of the Ngarrindjeri people and has spent a significant part of her life living on her traditional lands and sharing her cultural knowledge through delivering school programs as part of the Aboriginal Education Unit in Adelaide, educating young people about the traditions and dreaming stories of the Ngarrindjeri people. Ms Newchurch established and chaired a consultative committee in conjunction with the Aboriginal Education Unit, promoting the involvement of parents in their children's education. In Alice Springs Ms Newchurch worked with the Aboriginal Hostels Limited as a corporate administrative assistant before commencing employment with Centreprise.

2.4. I accept the following account that Mr Ride gave of himself at the hearing. Mr Ride is a civil engineer who has worked as a hydrogeologist, project and natural resource manager in Central and Northern Australia for 50 years. He has worked on pastoral properties, parks and reserves in the Northern Territory, and with aboriginal communities in central Australia, towns and smaller communities. He has been strongly involved in community activities in Alice Springs, particularly for youth and young people. Mr Ride has successfully completed a large number of projects on aboriginal land in the Northern Territory. He has worked with many traditional owners, and many of his staff, colleagues, friends, neighbours and acquaintances have been Aboriginal. As a hydrogeologist, project and natural resource manager Mr Ride is aware of significant groundwater resources with potential development opportunities below Aboriginal land in outback and northern Australia. He is a strong supporter of job and wealth creation on Aboriginal land. As Principal Consultant to Centreprise he established an Aboriginal Engineering Consultancy to support projects on Aboriginal land and provide an income for job and wealth creation.

3. COMPLAINTS AND HEARING:

3.1. Ms Newchurch's complaints were received by the NT Anti-Discrimination Commission ('the Commission') on 20 February 2014, and a delegate of the Commission conducted an investigation under s 77 of the Act. On 14 November 2014 the Commission decided that the complaints were unlikely to be resolved by conciliation and on 8 December 2014 they were referred for hearing. I conducted a directions hearing by telephone on 6 August 2015, and the hearing took place at

Alice Springs on 25, 26, 27 and 28 August 2015. Final submissions were filed by 28 September 2015.

3.2. Before the hearing, Ms Ride said she would not attend the hearing as it would jeopardise her employment in Melbourne. To avoid the hearing going ahead in her absence I formally excused her from attending, on the understanding that she would be represented at the hearing and that she would give evidence by video link.

3.3. At the hearing Ms Newchurch was represented by Mr Jonathan McCarthy, solicitor, of Central Australian Aboriginal Legal Aid. Mr Ride represented himself. With leave, Ms Ride was represented by her mother, Mrs Michelle Ride. Ms Bronwyn Haack, barrister, was counsel assisting the Commission.

3.4. The first respondent to the complaint of race discrimination, and the only respondent to the victimisation complaint, is Centreprise Resource Group Pty Ltd. At the directions hearing Mr Randle Walker, Company Secretary to Centreprise, told me that the company would not take part in the hearing. Mr Walker was in fact present on the first day of the hearing, but only, he said, because a change in his personal circumstances meant that he "came along". On the first day of the hearing Mr Walker, from the bar table and not under oath, responded to my questions and said that he was not present to represent the interests of Centreprise but only with a "watching brief". He agreed that the company should be formally recorded as not present, participating or represented in the proceedings. Mr Walker did not attend the hearing after the first day.

3.5. Mr Walker advised that Centreprise was currently registered "because of this matter", that it was not otherwise operating, and that it is a wholly owned subsidiary of Centrefarm Aboriginal Horticulture Limited which has "zero employees and zero assets and liabilities". In an unattributed document Centreprise provided to the Commission in its investigation, titled 'Statement of Facts, Issues and Areas of Disagreement' and dated 2 March 2015, it is stated that Centreprise "is no longer a trading entity. As of 14 July 2014 the company has no employees". I asked the Anti-Discrimination Commission registry to obtain for me ASIC Company extracts for Centrefarm Aboriginal Horticulture Limited and Centreprise Resource Group Pty Ltd, and those extracts, in evidence, confirmed

the relationship between the companies and that they were registered at the time of the hearing.

3.6. An issue in this matter is the use of the terms ‘Indigenous’ and ‘Aboriginal’. Mr Ride uses both terms although, as he described, with particular meaning for each. Ms Newchurch identifies as “an Aboriginal person”. For consistency, and without an implied comment on whether and which term is preferable, I use the term ‘Aboriginal’ in these reasons.

4. EVIDENCE:

4.1. In the course of the hearing I heard evidence from Ms Newchurch, Ms Lisa Erlandson, Mr Ride, and Ms Ride. To manage the timing of video access, Ms Ride’s evidence was interposed during Ms Newchurch’s evidence. A written transcript of the hearing was available to the parties.

4.2. I admitted the following documents into evidence, subject to redactions for admissibility:

C1	Ms Newchurch’s Statutory Declaration and Annexures A and B
C2	Ms Newchurch’s Timeline
C3	The NT Anti-Discrimination Commission ‘s77 Report’
C4	Centreprise’s ‘Statement of Facts’
C5	Ms Newchurch’s Reply to Centreprise’s ‘Statement of Facts’
C6	Ms Erlandson’s 2015 Statutory Declaration
C7	Ms Erlandson’s 2014 Statement
RC1	ASIC Company extracts: Centrefarm Aboriginal Horticulture Limited; Centreprise Resource Group Pty Ltd
RG1	Mr Ride’s ‘Statement of Facts’
RG2	Mr Ride’s Timeline
RG3	Mr Ride’s Statement
RS1	Ms Ride’s Statutory Declaration and letter of employment
RS2	Ms Ride’s ‘Statement of Facts’

In coming to the following findings I took account of this oral and documentary evidence, and of the parties' written submissions.

5. THE LAW:

5.1. The NT *Anti-Discrimination Act* that was in force at the time of the events that are the subject of this inquiry has been amended. References in this decision are to the provisions of the NT *Anti-Discrimination Act* as it was in force at the relevant time.

5.2. Ms Newchurch complains she was discriminated against in the area of work. The onus is on Ms Newchurch to prove, on the balance of probabilities, the prohibited conduct she alleges (s 91(1)).

5.3. Under the NT *Anti-Discrimination Act* "discrimination includes any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity; and harassment on the basis of an attribute" (s 20(1)). As well, "discrimination takes place if a person treats or proposes to treat another person who has … an attribute … less favourably than a person who has not, or is believed not to have, such an attribute" (s 20(2)). Although on the strict wording of this provision no proof of race as a causal factor is required, the Act has been interpreted as requiring proof that the impugned conduct was "based on race" (*Anning v Batchelor Institute of Indigenous Tertiary Education* [2007] NTADComm 1, [5.9]-[5.11]).

5.4. Ms Newchurch submits that the conduct she complains of amounts to discrimination in both these senses: nullification or impairment of equality of opportunity, and less favourable treatment.

6. DISCRIMINATION COMPLAINT AGAINST GRAHAM RIDE:

6.1. In her complaint to the Commission Ms Newchurch made general allegations concerning Mr Ride's conduct in the workplace. She stated "Every time when Graham has called a meeting … I have been embarrassed by Graham's personal opinion due to past experiences relating to Indigenous workers … His comments seemed inappropriate and showed a lack of respect for both and me and Lisa as Indigenous employees". In her statutory declaration dated 17 July 2015, Ms Erlandson made the general allegation that "During meetings, Graham Ride would make derogatory comments and voice his personal opinion about Indigenous

being lazy, and relying on government handouts and the welfare system". There is evidence of particular comments that Mr Ride is alleged to have made on particular occasions, and I make findings in relation to these below. There is, however, no other evidence about – and I do not make any findings in relation to – allegations of Mr Ride's generally making derogatory comments and voicing his personal opinion about Aboriginal people.

'blacks'

6.2. Some of the allegations against Mr Ride include an allegation that he used the word 'black' or 'blacks' to refer to Aboriginal people. Mr Ride denies that he ever used the term 'black' or 'blacks' on those occasions, and that he used the word 'Indigenous'.

6.3. In his evidence Mr Ride said that he has "used the word blackfellow a lot through my career because that's what I'm used to when I'm talking with traditional Aboriginals. They call me a white fellow and it's just an interchange". He says that he finds "talking about Aboriginals as blacks" offensive. He says "In the Aboriginal context it's meaningless because skin colour is not an issue. It's – it's – you're a traditional". In a statement dated 15 February 2015 he said "I used the word blackfellows in respect to the bush aboriginals (traditional aboriginals) and they normally describe me as a whitefellow". In that statement Mr Ride said "I don't use the term blacks in respect to any people but I have described some overseas and overseas people as black".

6.4. Mr Ride's statements and evidence are confusing as to what terms he uses and when. He does use the term 'blackfellow' when talking to – and possibly about – "bush" or "traditional" aboriginals. He has used the term 'black' to described some "overseas" people. He is emphatic that he does not refer to Aboriginal people as black. It is the evidence of Ms Newchurch and Ms Erlandson that Mr Ride did use the term 'black' or 'blacks' in their presence to refer to Aboriginal people.

6.5. As Mr Ride implies when he talks about the word 'blackfellow' in particular circumstances, the acceptable use of a term such as 'black' is contextual. Clearly it is distinction based on race. Whether it is offensive in general terms, or impairs equal opportunity for purposes of the NT *Anti-Discrimination Act*, depends on, for example, who is using the term, to whom, for what purpose, in what tone, and so

on. That can make using the word 'black' a difficult or daunting exercise, although that is the point of laws such as NT *Anti-Discrimination Act* which are intended to alert us to, and cause us to reflect on, the hurt and harm that race-based language can cause. Intention and motive are not relevant to establish discriminatory conduct, and a finding of discriminatory conduct does not necessarily imply any malice. Race-based language can be used without malice, and perhaps even with good intent, but in the wrong context it can nevertheless nullify or limit equal opportunity, or be less favourable treatment.

6.6. I cannot decide if Mr Ride used the term 'black' or 'blacks' when it is alleged he did. But it is not the precise term that matters. What matters under the NT *Anti-Discrimination Act* is whether Mr Ride made any distinction on the basis of race. The words 'black', 'blackfellow', 'Indigenous' and 'Aboriginal' all make a distinction on the basis of race, and that is unremarkable. The problem arises, under the NT *Anti-Discrimination Act*, when making the distinction nullifies or limits equal opportunity or is less favourable treatment.

'handouts and the welfare system'

6.7. Ms Newchurch, Ms Erlandson and Mr Ride gave evidence about what was said at a staff meeting on 24 December 2013. It is the evidence of Ms Newchurch that Mr Ride said "blacks rely too much on welfare and Government handouts"; she says that he did not use the word 'lazy'. It is Ms Erlandson's evidence that Mr Ride "made comments about blacks being lazy and they do not know how to work for their money and they rely on the welfare system".

6.8. Ms Newchurch's evidence is that comments such as this were "a conversation piece for him [Mr Ride]". In her statutory declaration Ms Erlandson said that "[d]uring meetings, Graham Ride would make derogatory comments and voice his personal opinion about Indigenous being lazy, and relying on government handouts and the welfare system". No evidence was given in the hearing of other specific occasions when Mr Ride made statements such as this. I am not able to conclude that Mr Ride made statements such as this on any occasion other than the one about which Ms Newchurch and Ms Erlandson give specific evidence.

6.9. In his written submissions Mr Ride denies having said what is alleged against him. In his oral evidence his denials were not definitive and at times seemed not to respond to the question. For example (transcript 28 August):

> Q: Mr Ride, I put to you that you did make comments about Indigenous people being lazy and relying on Government handouts and on the welfare system. Do you agree or disagree?
> A: I disagree in that context. No. I disagree.
>
> Q: Mr Ride, can you elaborate on that context?
> A: Could you just read out the question?
>
> Q: It was put to you, Mr Ride, that you did make comments about Indigenous people being lazy and relying on Government handouts and the welfare system. Your answer was that you disagree in a - with a reference to context in ... ?
> A: Yes. I disagree – see, I disagree that Aboriginal are lazy, but – and it's – but that's – that's just not my observation.

6.10. **I am satisfied** that Mr Ride did, on 24 December, make an observation in the presence and hearing of Ms Newchurch to the effect that people who are Aboriginal (or some other distinguishing race-based term) "rely too much on welfare and Government handouts".

'Aboriginal/Indigenous distinction'

6.11. Ms Newchurch alleges that in a meeting in the office Mr Ride called "one group Aboriginal people because they were westernised and the other group Indigenous for traditional people out bush". In fact, as Mr Ride later clarified, his characterisation is the reverse. In the hearing Mr Ride asked Ms Newchurch if she agreed "that what I actually said, I differentiate between urban indigenous, and another group I call Aboriginals, or a traditional people out bush". Mr Ride made the point to Ms Newchurch that he had made this distinction in the context of the business: "at the meetings, staff meetings, and in meetings that I had with you, do you recall that I said that we were about – we had a focus on job and wealth creation for the Aboriginals in the bush?". Mr Ride was later asked " … you've admitted to calling one group Aboriginal because they're westernised or urban and the other group Indigenous for traditional people out bush. However, do

you agree or disagree that you've clarified for the Commission that this is, in fact – it's the other way around, Aboriginals refers to people leaving out bush or in remote communities and Indigenous means people in urban living environments? Is that correct?", to which he replied "Yes. Yes. In context". Although Mr Ride repeatedly agrees having made this statement, in his final submissions he records the allegations against him and says "I have denied each of these claims in my written and oral evidence".

6.12. **I am satisfied**, on his own evidence, that Mr Ride made a comment that distinguished between 'Indigenous' people who are westernised or urban, and 'Aboriginal' people who are traditional people out bush.

'taking liberties'

6.13. Ms Newchurch alleges that in a staff meeting Mr Ride said that Aboriginal people were "taking liberties and stretching out the hours to get more money" and that "they need to understand that this not the welfare system". In a statement made on 16 January 2014 Ms Newchurch said that "This statement is made a lot, by Graham, whether in the meetings or standing in the Administration area". In her evidence Ms Newchurch was asked "how many times [Mr Ride] made this statement" and she replied "I know he … I can't remember the … I know it was when Brody and Lorenzo were in there at the time and … so I'm not sure exactly what date that was then". She was asked "But it's just in one of the meetings that you were …?" and she replied "Yes. It was, sort of … this was in a staff meeting". In her statement of 24 January 2014 Ms Erlandson says that she recalls an occasion when Mr Ride said "the problem with indigenous people is they rely too much on the welfare system and do not know how to budget their money". In light of the evidence I am not able to conclude that Mr Ride made statements such as this on any occasion other than the occasion about which there is specific evidence. Ms Newchurch says that on this occasion Mr Ride "elaborated on it" and "made an example" of one of the Aboriginal workers. In her statement of 24 January 2014 Ms Erlandson says that she recalls Mr Ride "speaking about an indigenous worker, Rex" in this context.

6.14. Mr Ride agrees that "I did say at times that some of our staff and some people take liberties, no question about that." He says that was "concerned generally

with people who were taking liberties", and he denies having identified the people he was speaking about as 'blacks', or having identified any one person.

6.15. On whether Mr Ride identified any one person, Ms Erlandson says only that Mr Ride was "speaking about" Rex, and she did not elaborate on this in her oral evidence. In his evidence Mr Ride was not challenged when he said that Rex was "very hard working". In my view it is as likely as not that Mr Ride, if he referred to Rex on the occasion in question, did so as an example of an indigenous worker who was hard working and did not take liberties.

6.16. Mr Ride denies that he was making a distinction based on race when he said that at times "some of our staff and some people take liberties, no question about that"; both Ms Newchurch and Ms Erlandson say that he explicitly made such a distinction. Mr Ride did give evidence of concerns he had had about claims and timesheets submitted by Aboriginal workers; he says that that is the reason why he employed Ms Newchurch: "[a mature] Aboriginal lady would cut through a lot of those issues". Mr Ride did have concerns about the conduct of Aboriginal workers in particular, **and I am satisfied** that it is more likely than not that when Mr Ride observed on staff taking liberties he did make a distinction on the basis of race.

'back in the day'

6.17. In a statement made on 16 January 2014 Ms Newchurch alleges that "Other times while in a meeting [Mr Ride] has said that 'back in the day, a black person would never think of stealing from an employer but these days they are used to lying and cheating the system to get money without wanting to work an honest day in their life'". In her evidence Ms Newchurch was asked about Mr Ride's saying this and she said "That was mentioned in the meeting as well", and agreed that it "happened in a meeting of operational staff". Apart from Ms Newchurch's earlier statement, there is no evidence that suggests that, if Mr Ride said this at all, he said it on more than one occasion.

6.18. Mr Ride denies having said this. On each occasion that he has denied it, in evidence and in his submissions, he denies having said ""back in the day, a black person would never think … (etc)". It is not clear to me from the evidence whether Mr Ride's denial relates to use of the term 'black' to describe an Aboriginal person, which he consistently denies, or to making the statement at all.

6.19. In my view, a comment such as this is consistent with the concern that Mr Ride had about the conduct of Aboriginal workers relating to claims and timesheets. **I am satisfied** that it is more likely than not that Mr Ride did make a statement to the effect that "back in the day an Aboriginal person would never think of stealing from an employer but these days they are used to lying and cheating the system to get money without wanting to work an honest day in their life".

Loud manner

6.20. Ms Newchurch alleges that Mr Ride treated her less favourably, because she is Aboriginal, by speaking to her "in a loud, abrupt, confrontational and intimidating manner". It is her evidence that Mr Ride "was a whole lot louder than me and I was intimidated". In his evidence, Mr Ride agreed that he does "talk loud". His evidence is that "I understand that … some people would find it confrontational, intimidating, particularly in the early stages of … when they are not used to people".

6.21. Ms Newchurch says that Mr Ride was often "angry, red and spitting" when talking to her. Mr Ride admits that he was "very angry on one occasion about one issue regarding travelling allowance". More generally, it was Ms Newchurch's impression that Mr Ride "was uncomfortable, even communicating with us on different staff. Like, he would come in and look above our heads and when he was giving directions about what he wanted done he would put it on the desk and he was walking away as he was saying it. So, yes, I felt like he was really uncomfortable with us in the office as an Aboriginal person, as an Aboriginal employee".

6.22. In my view it is as likely that Mr Ride spoke and dealt with Ms Newchurch in this manner because it is his habitual manner, as it is that he did so because Ms Newchurch is aboriginal. **I am not satisfied** that, as has been submitted for Ms Newchurch, "a causal nexus exists between the conduct complained of and racial discrimination". I understand that Ms Newchurch "felt like he [Mr Ride] was really uncomfortable with us in the office as an aboriginal person", but her perception is not enough to establish that it was her aboriginality that caused Mr Ride to speak the way that he did.

Unfriendly greeting

6.23. Similarly, Ms Newchurch complains that Mr Ride treated her less favourably, because she is Aboriginal, because he would often not acknowledge or greet her in a friendly manner. Her evidence is that "I didn't feel like I was an equal. We heard him laughing and talking to the operations groups … we felt like outsiders".

6.24. Mr Ride was rarely in the office during the period of Ms Newchurch's employment. His own evidence, and that of Ms Ride, Ms Newchurch and Ms Erlandson, satisfies me that Mr Ride managed the office poorly during the time that he and Ms Newchurch were both employed. I cannot say whether this was due to pressure of work, lack of resources, inability, or some combination, but it is clear that Mr Ride gave only limited attention to the daily running of the office and the needs of its staff.

6.25. I do not doubt that Ms Newchurch was made to feel an outsider, but **I am not satisfied** that it was her aboriginality that caused Mr Ride to behave as he did.

Support and training

6.26. Ms Newchurch complains that Mr Ride treated her less favourably, because she is Aboriginal, by failing to provide support and training. Ms Newchurch "felt [she] was being set up to fail" by the lack of support and training she received to do duties outside her job description.

6.27. Ms Newchurch was significantly under-supported on her arrival in the office. Mr Ride was absent and Ms Newchurch was left to work things out for herself, while coping with Ms Ride's race-based comments. Ms Newchurch felt that Ms Ride's unfriendly attitude to her was due in part to her – Ms Newchurch –having replaced Ms Ride in performing administrative tasks, but in fact Ms Ride was not performing those tasks. Ms Newchurch's misunderstanding is indicative of the absence, from Mr Ride, of sufficient oversight and support.

6.28. As I said above, Mr Ride managed the office poorly during the time that he and Ms Newchurch were both employed. It is quite understandable that Ms Newchurch felt uncomfortable and excluded, but **I am not satisfied** that Mr Ride's lack of support and training for her was because Ms Newchurch is aboriginal.

Engaging extra administrative support

6.29. Ms Newchurch alleges that Mr Ride treated her less favourably, because she is Aboriginal, by "informing her on 16 January 2014 she would be replaced because it was too hard for her to carry out her duties".

6.30. In circumstances where Ms Newchurch was made to feel uncomfortable, an outsider and unsupported, and subject to race-based comments, she felt insecure and not valued. It is understandable that she would see her interactions with Mr Ride in a negative and threatening light. When Mr Ride told her on 16 January that he was engaging additional administrative support, Ms Newchurch saw this as her being "replaced because I was not able to perform my duties". What Mr Ride saw as "the work is too hard for you" was in fact Ms Newchurch's struggling to make sense of a new job without training or support in an environment that was affected by the race-based comments made by Mr Ride and Ms Ride. When Mr Ride said "you've been allowing Lisa to do your tasks", he misunderstood that Ms Newchurch was in fact doing what she was asked to do, and training Ms Erlandson.

6.31. **I am not satisfied** that Mr Ride did in fact intend to replace Ms Newchurch, or that steps he proposed taking in relation to her duties were proposed or taken because Ms Newchurch is aboriginal. It is at least as likely that Mr Ride's conduct was a management decision that was poorly communicated, and it is certainly the case that Ms Newchurch's perception of it was coloured by the understandable insecurity she felt.

Resignation

6.32. Ms Newchurch alleges that Mr Ride treated her less favourably, because she is Aboriginal, by "resigning and working from home, thereby avoiding resolution of the issues between them, and compromising Ms Newchurch's security for ongoing employment".

6.33. Aspects of Ms Newchurch's evidence, and of questions asked of Mr Ride on Ms Newchurch's behalf, suggest that Ms Newchurch saw Mr Ride's resignation as an act of victimisation: when asked about Mr Ride's resignation, Ms Newchurch replied "I felt like he took offence to the complaint being made", and it was put to Mr Ride for Ms Newchurch that "your resignation meant that this matter was

unable to be resolved at a much earlier stage", which he denied. However, no victimisation complaint was made against Mr Ride, and I have no jurisdiction to inquire into any allegation against him of victimisation. I do not suggest that any such complaint would have been successful, only that the phrasing of Ms Newchurch's evidence suggests that one of her allegations could be characterised in that way.

6.34. There appear to be two parts to Ms Newchurch's claim concerning Mr Ride's resignation. The first is that, by resigning, Mr Ride compromised the security of Ms Newchurch's ongoing employment and did so because she is Aboriginal. It is Ms Newchurch's evidence that she believes that Mr Ride left his job in order to "get rid" of her, that his resignation was intended to adversely affect her employment. When asked how she came to believe that, Ms Newchurch said "Because of his reaction in the office after the meetings, and his – he was, like, avoiding me … Because, like he mentioned before, they brought the funds – he brought the funds in, and, if he wasn't there, then we didn't – we couldn't get a position … Because he was professional enough to be able to start another business". Ms Newchurch understood from the company CEO, Vin Lange, that it was Mr Ride who was "bringing in funds that paid the employees". In cross-examination, when asked by Mr Ride "why do you blame me you've lost your jobs … why was it me?", Ms Newchurch replied "the discussions we had with [Vin] brought us to that belief because of what he said and the fact that you did resign".

6.35. The second part to this claim is that, by resigning, Mr Ride was deliberately avoiding resolution of the issues between him and Ms Newchurch and that he did so because she is Aboriginal. It is Ms Newchurch's evidence that "we came out of the meeting [on 16 January] … and I could tell that he was angry with me, because he carried on a conversation about the meeting … I could hear them arguing in the office over that time … and I heard [Mr Ride] make a snide remark about my emotional state and he was discussing the incident and he was discussing the details of the meeting with [Brody]". Ms Newchurch's evidence is that "he didn't speak to me again after that, not one word was said to me after that meeting although I did send him an email".

6.36. In his statement of 7 April 2015 Mr Ride said of his resignation: "The actions of the company and [Ms Newchurch] following the meetings with [Ms Newchurch] on the

16th and 17th February placed me in an impossible position and I resigned as an employee of the company". In his evidence, in answer to my question "Could you tell me why, in light of your passion for Centrefarm and its business and the strategic plan and the growth plan, why did you leave?" Mr Ride said

> … because I became emotionally stressed out of the – from the matter and I took sick leave. And in that period of reflection I – it allowed me to look – look more clearly about what was happening and what I had recognised then was Centrefarm was failing. It was never ever going to – to be successful with the current management. And it – it was supposed to provide me when I was working for Centrefarm, and Centreprise later, with one major horticultural project per year. It didn't do that in the five years I was there. So the first project was actually –wasn't – was something that was organised before the current chief executive. So I recognised that the board and the – the chief – the management – the senior management were – were going to fail – fail. Centreprise was going to fail as well".

I then asked Mr Ride "Do you accept that its success depended on you, that if you left it would fail?" to which he replied:

> No, well, I reflected on that at that time. I thought, well, the issue is Mr [Vic] Lange – we had had quite a few heavy discussions about this matter of the directions and I – I was aware – I had identified other – other hydrogeologists because at times I was unable to assist him with all his work, so he would – he would have to employ one for some work and I believed, and still believe, that the – the company didn't need to fail. I had set it up so it could succeed.

I asked "So you weren't irreplaceable?" and he answered "I certainly wasn't irreplaceable".

6.37. I am inclined to agree with Mr Ride's submission that "To say that I resigned and treated [Ms Newchurch] less favourably as an Aboriginal person because I resigned lacks logic". It is difficult to characterise Mr Ride's resignation as 'treatment' of Ms Newchurch, and there is no evidence of a causal link between Ms Newchurch's aboriginality and Mr Ride's resignation, although it is understandable that that is the inference that Ms Newchurch drew from the circumstances. **I am not satisfied** that Mr Ride's resignation was because Ms Newchurch is aboriginal.

Unlawful conduct

6.38. Mr Ride describes himself as “loud [and] outspoken”. I have found that Mr Ride managed the office poorly during the time that he and Ms Newchurch were employed. As I have said above, there are occasions when this explains Mr Ride’s conduct, and there are occasions when his conduct is because of Ms Newchurch’s aboriginality. The former are, possibly, industrial matters to do with the employment relationship and I have no jurisdiction to deal with them; the latter are to do with the employment relationship but engage the NT *Anti-Discrimination Act* for which I have jurisdiction.

6.39. As I said above, some of Mr Ride’s comments – on handouts and the welfare system; on an ‘Aboriginal/Indigenous distinction’; on taking liberties’; and about ‘back in the day’ – made a distinction on the basis of aboriginality, impairing Ms Newchurch’s equality of opportunity (NT *Anti-Discrimination Act* s 20(1)(a)). That provision of the Act is in terms similar to s 9 of the federal *Racial Discrimination Act*. Differences in the terms could be insignificant, or significant in some circumstances. For example, in this case, there is no effective difference in meaning and operation between “any distinction … made on the basis of an attribute” (NT Act) and “any act involving a distinction … based on race” (federal Act). However, there may be a difference in meaning and operation between “that has the effect of nullifying or impairing” (NT Act) and “which has the purpose or effect of nullifying or impairing:” (federal Act), as the former does not cover an act’s purpose, only its effect.

6.40. There is a clear difference between the two Acts as to what cannot be nullified or impaired: “equality of opportunity” (NT Act), and “the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life” (federal Act).

6.41. In *Qantas Airways Ltd v Gama* ((2008) 167 FCR 537) Justices French and Jacobsen dealt with a complaint under s 9 of the *Racial Discrimination Act*. Speaking about an ‘act involving a distinction’, they said at [76]:

> The making of a remark is an act. It may be that the remark involves a distinction because it is made to a particular person and not to others. The remark may convey no express or implicit reference to the person’s race,

> colour, descent or national or ethnic origin. Nevertheless, a linkage may be drawn between the distinction effected by the remark and the person's race or other relevant characteristic by reason of the circumstances in which the remark was made or the fact that it was part of a pattern of remarks directed to that person and not to others of a different race or relevant characteristic. Where the remark, critical of one person in a group but not others, expressly or by implication links the criticism or denigration to that person's race then that linkage establishes both the distinction and its basis upon race.

What their Honours said of an "act involving a distinction" in s 9 of the *Racial Discrimination Act* can be said of "any distinction" in s 20 of the NT *Anti-Discrimination Act*.

6.42. Speaking about what cannot be nullified or impaired, their Honours said:

> The second attribute of an unlawful act under s 9(1) is that it have the purpose or effect of nullifying or impairing a person's recognition, enjoyment or exercise on an equal footing of any "human right or fundamental freedom …". The denigration of an employee on the grounds of that person's race or other relevant attribute can properly be found to have the effect of impairing that person's enjoyment of his or her right to work or to just and favourable conditions of work. The question then is whether two or three racist remarks over a period of time can have such a purpose or effect. That is a matter of fact dependent upon the nature and circumstances of the remarks.

6.43. Differently under the NT *Anti-Discrimination Act*, the 'second attribute of an unlawful act' under s 20(1) is that the act must have the effect of nullifying or impairing "equality of opportunity".

6.44. Ms Newchurch in her evidence was asked "is it fair to say that you had an expectation within your workplace that you would be protected to a large extent from less favourable treatment or racist comments or things along those lines?", and she replied:

> Yes. I was happy – I was happy when I got this job. I was, like – and it wasn't until after I started, because the network – job network told me this guy hires, you know, Aboriginal peoples – people and I was really happy about it and got there, and then it wasn't till, you know, like, later on that week that I

realised it was Aboriginal owned, you know. I didn't even realise that CLC and – you know, and OHSI were owners of the company until after I had started working there, but it was a good feeling to know that we were in a place - and I did expect to be more comfortable in the place because it was an Aboriginal organisation. It was you know, both me and Lisa after she started we were so happy … we – you know, we felt like our joy was taken away from us over those weeks and, you know, the happiness, you know, being independent and making, you know, at least three times more than what you get on, you know, you know, Newstart and things like that. So I was really looking forward to doing the best that I can. I knew I – I was comfortable in that position as well. Yes.

6.45. Mr Ride's comments made distinctions on the basis of race, and the effect was to impair Ms Newchurch's equality of opportunity to enjoy just and favourable conditions in a comfortable, inclusive and supported work environment where she felt secure and valued. **I find**, therefore, that Mr Ride discriminated against Ms Newchurch on the ground of her race in the area of work. I expect that Mr Ride will be upset at this finding. He told the hearing of his extensive work with and for Aboriginal people, and I accept that, as he told the hearing, "it was a great shock … to be accused of racial discrimination". As I noted above in relation to the term 'black', discriminatory conduct does not necessarily import malice or even intent. Mr Ride, in his comments, made distinctions based on race, and it is the effect of his doing so in the circumstances that renders those comments unlawful.

Damage

6.46. I have the power under s 88 of the NT *Anti-Discrimination Act* to order Mr Ride to pay to Ms Newchurch an amount that I consider "appropriate as compensation for loss or damage caused by the prohibited conduct". The term "damage" is defined to include "offence, embarrassment, humiliation, and intimidation'(s 88(3)).

6.47. No evidence was led specifically on the issue of the nature and extent of loss and damage caused to Ms Newchurch by Mr Ride's conduct. There is no evidence of psychological injury or of economic loss. Submissions for Ms Newchurch address the question of the amount of damages, but do not describe the nature and extent

of any damage she suffered. I have gleaned evidence of the effect on Ms Newchurch of Mr Ride's conduct from evidence given by Ms Newchurch.

6.48. Mr Ride's conduct caused damage to Ms Newchurch. In particular, Ms Newchurch says that Mr Ride's comments on handouts and the welfare system shocked and embarrassed her, and made her feel that she "had to try to prove [herself] … and work above and beyond her means".

6.49. Mr Ride agreed that the distinction he made between 'Indigenous' people and 'Aboriginal' people could be hurtful to an Aboriginal person, and that his comments could make Ms Newchurch feel that she is "less Aboriginal than people who live out bush". Ms Newchurch says that she was insulted by the distinction that Mr Ride made:

> I couldn't understand why he would do that because that's not how it is for me ... it was insulting and … to me it seemed as though it lessened how I saw myself as an Aboriginal person … I fully identify as Aboriginal person and in our groups we don't look at people's colour. If they identify as Aboriginal, then, that's their right ... I have my traditions, I have my cultural beliefs and I do speak two different Aboriginal dialects … I find it offensive to be called half-caste or, you know, like, telling me I have this much percentage of Aboriginal in me because that's not how it works in our community. We're Aboriginal. Even if we have a non-Aboriginal parent, we're Aboriginal and that's how we identify and that's what's on my birth certificate.

6.50. Ms Newchurch says that when Mr Ride commented on aboriginal workers' taking liberties:

> I just felt like he [Mr Ride] had a low tolerance of Aboriginal people and he – you know, that's when we started really feeling self-conscious and started, you know, worrying for our positions. You know, like, we thought that our jobs were being held over our heads, and I do feel like the things that he was saying he felt he could say it because we were Aboriginal people and he didn't expect us to speak up. That's the way he – it came across to me and, you know, it was really offensive … I felt like we didn't have the right to actually speak up.

6.51. It is submitted for Ms Newchurch, relying on *Eatock v Bolt* [2011] FCA 1103, [167] that "the nature and extent of any offence" caused by race-based comments is a function of "the extent to which [a person's racial identification] is generally accepted, and thus, the extent to which the person … has a legitimate expectation that their identity will be respected." This observation was qualified: it was made "[i]n the context of a challenge made to the legitimacy of a person's racial identification". While that accurately describes what happened in that case, which was a complaint of vilification, the question raised by the submission is whether it can, as well, describe what happened in a discrimination case such as this. I think that depends on the particular conduct, and in this case the discriminatory conduct, which made distinctions on the basis of race and impaired Ms Newchurch's equality of opportunity, can properly be said to have challenged the legitimacy of Ms Newchurch's racial identification.

6.52. This is true most particularly of the distinction that was made by Mr Ride between 'Indigenous' people and 'Aboriginal' people. Submissions for Ms Newchurch draw attention to *Eatock v Bolt* [2011] FCA 1103, [171] where it was said that

> No area of research and commentary by non-Aboriginal people has such potential to cause offence as does that which attempts to define 'Aboriginality'. This determination of non-Aboriginal people to categorise and divide Aboriginal people is resented for many reasons, but principally, I suspect, because the worst experiences of assimilation policies and the most long term emotional scars of those policies relate directly to non-Aboriginal efforts to define 'Aboriginality' and to deny to those found not to fit the definition, the nurture of family, kin and culture. To Aboriginal people there appears to be a continuing aggression evident in such practices.

6.53. These observations were made in circumstances where the court had to decide if certain comments were reasonably likely to offend aboriginal people. Their relevance to an assessment of damages here is that they help explain the serious nature of the offence felt by Ms Newchurch. Ms Newchurch herself made the point in her evidence, when she was asked about how Mr Ride's Aboriginal/Indigenous distinction made her feel:

I didn't understand why he would make that distinction when here I know myself, coming in as an outsider, that they refer to their groups, their different communities, like, Alcurung - Ali Curung mob or, you know, Walpiri mob and well, I know Yuendumu is, you know, where they're from and that, but I even go onto Batchelor in Darwin. I come across all the different communities and we never said, you know, from – made distinctions by saying, "Well, that - you know, that mob over there, traditional mob or anything". It was, like, from their homeland that we knew. So saying Aboriginal and Indigenous to me is just titles given by people to describe us as, you know, not being mainstream. So it is offensive and I disagree with those distinctions.

It just – it felt like it was being, you know, like, directed at me because I'm light and, you know – you know, it's just when you go – as an Aboriginal person coming out of my house I experience these, sort of, racist views on – whenever I leave my house till I get back home. So, you know, like, it's just little things but it's, like, more than one person and to have my boss making these comments was the most horrible feeling and it just, like, severed any kind of bond that we could have made with him over the time, if he took that time to, you know, get to know us rather than, you know, look at us like we're Aboriginal employees working in the workplace. It would have been better to see me in my role rather than by my race and make those – to make those comments in a staff meeting, and that makes you feel less than a person, you know, when you're – when you're born into this group, and I don't see Aboriginal people as, you know, like, out, you know, in the bush or, you know, westernised. I just – you know, because they do live amongst people. They don't just live out there all the time. You know, they do come in and they move into suburbs and from the country to a city. So, you know, like, that's just not right, those distinctions.

6.54. It is submitted for Ms Newchurch that the assessment of compensation for damages ought take into account the fact that Ms Newchurch has not received an apology from Mr Ride. The authorities relied on, *Haider v Hawaiiam Punch Pty Ltd* [2015] FCA 37 and, through it, *Creek v Cairns Post Pty Ltd* [2001] FCA 1007, take into account "the withholding of an apology". I do not think that that fairly describes what has happened here. Mr Ride has not withheld an apology

any more than has a person who exercises their right to deny liability; it would be reasonable for Mr Ride to think he has had no cause to apologise before now for discriminatory conduct.

6.55. It is submitted for Ms Newchurch that the assessment of compensation for damages ought take account of "aggravating factors". Aggravated damages "are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing". I do not think that the circumstances and manner of Mr Ride's conduct warrant an award of aggravated damages. His conduct was not, for example, any of "high handed, malicious or oppressive [or] calculated to increase the hurt suffered" by Ms Newchurch (*Spencer v Dowling* [1997] 2 VR 127 at 144-145).

6.56. In assessing an amount of compensation due to Ms Newchurch for damage caused by the prohibited conduct, I note the absence of evidence of psychological or continuing injury, and that I am not satisfied that the conduct occurred other than on the occasions I have made findings on above. I take account of the relatively short period of time that Mr Ride and Ms Newchurch worked together, and the occasional occurrences of the conduct. I take account of what Ms Newchurch says was the effect on her of Mr Ride's conduct, and of the serious nature of the offence felt by Ms Newchurch, noted above. On that point, I take account of the comments of Kenny J in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 [102] – in the context of sexual harassment but of broad application – that "awards of damages today place a significant value on the loss of enjoyment of life and the experience of pain and suffering".

6.57. **I assess** the amount of compensation due to Ms Newchurch for damage caused by Mr Ride's conduct at $8,000.

6.58. I find below that Centreprise is vicariously liable for Mr Ride's conduct, and I am obliged to consider apportioning liability for payment of that amount. I do so below.

Apology

6.59. It is submitted for Ms Newchurch that I exercise the power I have under s 89 of the NT *Anti-Discrimination Act* and order Mr Ride to apologise to Ms Newchurch. I am

mindful that Mr Ride and Ms Newchurch shared a workplace and live in the same town; they knew each other as work colleagues and may have interactions, personal or professional, in future. This is different from, say, the circumstances in *Burns v Radio 2UE Sydney (No2)* [2005] NSWADT 24, where a public apology was ordered for unlawful conduct that was done by public figures in a public forum. In the circumstances **I decline** to order that an apology be made; it is a matter for Mr Ride as to whether and in what terms he wishes to acknowledge to Ms Newchurch the nature and effect of his conduct.

7. DISCRIMINATION COMPLAINT AGAINST SARAH RIDE:

Context

7.1. Formally, Ms Ride's role did not involve administrative duties such as filing and invoicing, although she did do some filing from time to time, and did show Ms Lisa Erlandson a few things on her arrival to prepare her for working with Mr Ride. Ms Ride did not understand that it was her responsibility to introduce a new employee – such as Ms Newchurch and later Ms Erlandson – around the office.

7.2. Ms Newchurch was not sure of people's roles and duties and this was not made clear to her, perhaps because Mr Ride was away from the office soon after her arrival and for long periods. Ms Newchurch believed that there was some overlap between her duties and Ms Ride's. Ms Newchurch and Ms Ride did not establish a working rapport and Ms Newchurch felt that Ms Ride resented her presence. In fact Ms Ride was aggrieved that she found herself having to help Ms Newchurch in her duties and complained to Mr Ride about it. This general state of confusion and misunderstanding was attributable to an unfortunate combination of Mr Ride's absences from the office, Mr Ride's failure to adequately oversee and support either Ms Ride or Ms Newchurch in their duties, Ms Ride's inexperience and immaturity, and Ms Newchurch's uncertainty in new role and the unwelcoming environment created by Ms Ride's language and comments.

7.3. In her evidence, Ms Ride acknowledges that her comments may be seen as "offensive and disrespectful and highly inappropriate in a work environment", and that people may find her language "offensively rude". Her position is, however, that her comments "were not racially motivated". Rather, she submits, her language "can be considered rude and offensive but has become common place".

She submits that her use of language "is no different to other young people" and "is language that she uses with all manner of people, including family"; her own evidence is that she speaks to everyone like that, including her mother. She gave evidence that she has Aboriginal family and friends, and that she does not treat her aboriginal friends differently: "I treat everyone the same". Ms Ride submits that "she treated the complainant no differently to any other person with whom she may have contact and in particular was not treating the complainant less favourably or in a discriminatory way". As she points out, Ms Erlandson's evidence is that she, Ms Ride, is "straight talking, saying it like it is". On her own admission, Ms Ride referred to aboriginality generally, and to Ms Newchurch's aboriginality, when speaking to Ms Newchurch. This, combined with Ms Ride's admitted propensity for rude and offensive 'straight talking', satisfies me that on the occasions when there is dispute, it is likely that Ms Ride's comments did refer to or were made on the basis of Ms Newchurch's race.

7.4. In her complaint to the Commission dated 20 February 2014, Ms Newchurch made the general allegation that "We were continually harassed, ridiculed, belittled, insulted and shocked by negative and offensive comments/statements made against us due to our race from Sarah Ride and she would always swear at us". There was evidence of particular comments that Ms Ride is alleged to have made on particular occasions, and I make findings in relation to these below. There is no other evidence concerning – and I do not make any findings in relation to – allegations of Ms Ride's generally making derogatory comments.

'blacks/people out there'

7.5. Ms Newchurch and Ms Ride both gave evidence about a conversation that took place on Ms Newchurch's first day of work. In general conversation, Ms Newchurch said that she didn't smoke, drink or drink coffee. It is Ms Newchurch's evidence that Ms Ride replied "you're better than the blacks out there"; differently, it is Ms Ride's evidence that she replied "that's [or 'you're] a lot better than the people out there". Ms Ride acknowledges that in other discussions with Ms Newchurch she made direct reference to Ms Newchurch's race.

7.6. Because of the view I have formed as to Ms Ride and her evidence, **I am satisfied** that Ms Ride replied as Ms Newchurch says she did.

‘black music’

7.7. Ms Newchurch, Ms Ride and Ms Erlandson gave evidence about an occasion when Ms Ride gave Ms Newchurch and Ms Erlandson a lift to the bank. When the car radio came on some music was playing. Ms Ride says it was a rap song and Ms Newchurch says it was “an aboriginal group singing in language”. However the music is described, Ms Ride said something about it. It is Ms Newchurch’s evidence that Ms Ride said “I hate that fucking black people shit”. In a statement to the Commission dated 24 January 2015 Ms Erlandson said that Ms Ride had said “I don’t want to listen to this fucking shit black people music”. In a statutory declaration dated 17 July 2015 Ms Erlandson said that Ms Ride had said “I can’t stand this fucking black people shit”. Ms Ride’s evidence on this is inconsistent. In a submission to the Commission dated 20 February 2014 Ms Ride “accepted” the allegation that she had said “I can’t stand this fucking black people shit”. In a statement to the Commission dated 23 February 2015, and again in a statutory declaration dated 7 April 2015, Ms Ride said that she had said “I hate this black style music”. In her oral evidence Ms Ride says “I would not have said "black people shit", and “Probably I would have said ‘black style shit’”.

7.8. Because of the view I have formed as to Ms Ride and her evidence, **I am satisfied** that Ms Ride is likely to have referred to “fucking black people shit”.

‘hurry up’

7.9. On the same occasion, when they arrived at the bank, Ms Ride said words to the effect of “Hurry up. Get the fuck out. You’re holding me up. Piss off. Get out already”. It is not alleged that on this occasion Ms Ride made specific reference to Ms Newchurch’s race. Ms Ride agrees that that language was offensively rude but she denies that she used that language to Ms Newchurch and Ms Erlandson because they are Aboriginal.

7.10. Although it is possible that Ms Ride used that language because Ms Newchurch and Ms Erlandson are aboriginal, on the available evidence it is at least as likely that Ms Ride used that language because she is habitually rude to people. I am, therefore, **not satisfied** that Ms Ride said the words alleged because of Ms Newchurch’s race.

‘in connection with work’

7.11. Ms Ride says that the conduct in the car is not covered by the NT *Anti-Discrimination Act* because it took place not at work but during a lunch break and in her car, although there is dispute as to whether, on this particular occasion, Ms Ride was driving her car or a work car. Even if it was her car, those bare facts are not enough to establish that the conduct is not covered by the NT *Anti-Discrimination Act*. Under the NT *Anti-Discrimination Act*, conduct is covered if it is less favourable treatment ‘in any way in connection with work’ (s 31(2)(d)). The phrase ‘in connection with’ is a ‘broad one of practical application’ (*South Pacific Resort Hotels Pty Ltd Braille voting Trainor* (2005) 144 FCR 402, 410), and in the NT *Anti-Discrimination Act* its scope is extended by the words ‘in any way’. Whether the conduct is ‘in any way in connection with work’ is a question of fact in the circumstances. In these circumstances the conduct occurred between people whose only relationship was as work colleagues, during a lunch break before which and after which they were together in the workplace. **I am satisfied** that the conduct was in some way in connection with work.

‘black/black’

7.12. On one occasion Ms Ride and Ms Newchurch were in the office discussing family heritage. Ms Newchurch said that one of her grandparents was of European descent, and Ms Ride commented that Ms Newchurch is not “black black”. Ms Ride’s evidence is that when she says a person is not “black black”, the person “is not a full-blood Aboriginal where your entire family is from Aboriginal descendants”. She says that she did not “mean that as an insult” but that “it was just a comment”. She does not agree that making such distinctions among aboriginal people could be insulting or offensive.

7.13. **I am satisfied**, on her own evidence, that Ms Ride made the comment “black black” to Ms Newchurch.

‘crazy’

7.14. Ms Ride, Ms Newchurch and Ms Erlandson gave evidence about an occasion when they were conversing in the office. Ms Newchurch had said that her son and had been bullied and beaten. In response Ms Ride had said that she had been beaten by a fellow female student at school who also attempted to stab Ms

Ride, and that she "understand[s] where Frances [Newchurch] was coming from". Ms Ride asked Ms Erlandson if she knew that female student and Ms Erlandson said she did. In the course of the conversation Ms Newchurch further said that she had threatened retribution against the person who bullied and beat her son, to which Ms Ride responded that she, Ms Newchurch, was "fucking crazy" for having done so; it may be that she said, instead or as well, "fucking psycho" (evidence of Ms Erlandson) or "fucking psycho bitch" (evidence of Ms Newchurch). Ms Ride denied a suggestion to her that she, Ms Ride, had told her story of bullying "in particular because it was about an aboriginal person" sharing it with "Ms Newchurch as an aboriginal person". She denied that she views aboriginal people as "being more or less violent than other people". Ms Ride's evidence is that she "described [Ms Newchurch] as crazy because of what she said in the story", and that "It doesn't bother me … if she was aboriginal or European or whatever she was". It was submitted for Ms Newchurch that "Ms Newchurch felt that she was being referenced to other Aboriginal people in that she was also called 'fucking crazy' or 'fucking psycho bitch' in that same conversation with reference to the Indigenous woman in Sarah Ride's story".

7.15. I accept that Ms Newchurch may have felt that she was being referenced to other Aboriginal people, but **I am not satisfied** that Ms Ride's calling Ms Newchurch 'fucking crazy' or similar words was, in that context, because of Ms Newchurch's race or a reference to her race. The discussion concerned people who shared aboriginal racial identity, but it was just as much concerned with reactions to bullying behaviour by people of different races who shared experience of bullying.

Jeans and shoes

7.16. Evidence was given by Ms Newchurch, Ms Ride and Ms Erlandson about an occasion when Ms Ride asked Ms Erlandson about her shoes and jeans. I do not deal any further with that occasion because the evidence does not concern any conduct directed towards Ms Newchurch, and – appropriately – that occasion was not relied on as evidence that could support Ms Newchurch's complaint against Ms Ride.

Unlawful conduct

7.17. As I describe above, Ms Ride's position is that she was as "straight talking", rude and offensive when speaking to Ms Newchurch as she is when speaking to anyone else, and so she did not treat Ms Newchurch differently from the way she treats anyone else. There are different ways of speaking 'straight', and while Ms Ride might speak rudely and offensively to many people, including her family, the NT *Anti-Discrimination Act* makes it unlawful to do so because of race if it is less favourable treatment or nullifies or impairs equality of opportunity.

7.18. I accept what Ms Ride says, that with comments such as 'black black' she did not intend to discriminate, and that her comments were not racially motivated. But as I said above in relation to Mr Ride, intention and motive in making race-based comments are not relevant (eg s 20(4) of the Act), and discriminatory conduct does not necessarily import malice or even intent. What matters in anti-discrimination law is whether conduct, on the basis of race was less favourable treatment, or nullified or impaired equality of opportunity.

7.19. There was no evidence that Ms Ride, when speaking to other people, refers to or makes disparaging comments about their race, while there is clear evidence that Ms Ride, when speaking to Ms Newchurch, referred to and made disparaging comments about her race. **I am satisfied** that those statements were less favourable treatment of Ms Newchurch on the basis of her race.

7.20. Ms Ride's comments made distinctions on the basis of race. I refer to my observations above about the meaning of s 20(1)(a) of the NT *Anti-Discrimination Act* in light of the similar terms to s 9 of the federal *Racial Discrimination Act* and what was said by Justices French and Jacobsen in *Qantas Airways Ltd* v *Gama* ((2008) 167 FCR 537) and **I am satisfied** that Ms Ride's comments impaired Ms Newchurch's equality of opportunity to enjoy just and favourable conditions in a comfortable, inclusive and supported work environment where she felt secure and valued. I note the evidence, recorded above, that Ms Newchurch gave in answer to the question "is it fair to say that you had an expectation within your workplace that you would be protected to a large extent from less favourable treatment or racist comments or things along those lines?", and I note that, further, she was asked "So you felt safe?", and she replied:

> Yes … even when, you know, like, after, you know, Sarah said that I, sort of, like, put it aside because she was young and, you know, I just thought that she just probably needed – was a little bit, you know, immature in her way of thinking and that but, you know – like, I've come across so many people that speak like that. But in a workplace to me was – like, it was in a confined space that felt like I couldn't escape it at all because of Graham's attitude towards us, and then Sarah, I just felt like I couldn't – the only choice I felt like I had was to leave rather than go to Graham …

7.21. **I find**, therefore, that Ms Ride discriminated against Ms Newchurch on the ground of her race in the area of work.

Damage

7.22. I have the power under s 88 of the NT *Anti-Discrimination Act* to order Ms Ride to pay to Ms Newchurch an amount that I consider "appropriate as compensation for loss or damage caused by the prohibited conduct". The term "damage" is defined to include "offence, embarrassment, humiliation, and intimidation'(s 88(3)).

7.23. No evidence was led specifically on the issue of the nature and extent of loss and damage caused to Ms Newchurch by Ms Ride's conduct. There is no evidence of psychological injury or of economic loss. Submissions for Ms Newchurch address the question of the amount of damages, but do not describe the nature and extent of any damage she suffered. I have gleaned evidence of the effect on Ms Newchurch of Ms Ride's conduct from evidence given by Ms Newchurch.

7.24. Ms Ride's conduct caused damage to Ms Newchurch, although it is Ms Newchurch's evidence that she "put [the conduct] aside because [Sarah] was young and … immature in her way of thinking". Specifically in relation to Ms Ride's saying "you're better than the blacks out there", Ms Newchurch's evidence is that she was shocked, but that she "thought … she's just immature and … I can ignore this". Commenting on Ms Ride's saying "hurry up, get the fuck out … piss off" Ms Newchurch says that "It was offensive … to have a teenager swearing at me like that was not right"; she says "It made me feel horrible … it was like disrespectful and I felt … insulted that a young girl could talk to me like that". Ms Newchurch's evidence is that when Ms Ride referred to "fucking black people shit"

she made no comment in response “because if she [Ms Ride] didn’t like CAAMA radio that was her choice”.

7.25. The same submissions based on *Eatock* v *Bolt* that were made for Ms Newchurch in relation to Mr Ride’s conduct are made for Ms Newchurch in relation to Ms Ride’s conduct. I rely here on the same observations I made above about the serious nature of the offence felt by Ms Newchurch.

7.26. As is the case for the complaint against Mr Ride, it is submitted for Ms Newchurch that the assessment of compensation for damages ought reflect the fact that Ms Newchurch has not received an apology from Ms Ride. For the same reasons I gave above in relation to Mr Ride, I do not consider that that is a relevant consideration.

7.27. As is the case for the complaint against Mr Ride, it is submitted for Ms Newchurch that the assessment of compensation for damages in the complaint against Ms Ride ought take account of “aggravating factors”. For the same reasons I gave above in relation to Mr Ride, I do not think that the circumstances and manner of Ms Ride’s conduct warrant an award of aggravated damages.

7.28. In assessing an amount of compensation due to Ms Newchurch for damage caused by the conduct of Ms Ride, I note the absence of evidence of psychological or continuing injury, and that I am not satisfied that the conduct occurred other than on the occasions I have made findings on above. I take account of the relatively short period of time that Ms Ride and Ms Newchurch worked together, and the occasional occurrences of the conduct. I take account of what Ms Newchurch says was the effect on her of Ms Ride’s conduct, and of the serious nature of the offence felt by Ms Newchurch, noted above. On that point, I take account of the comments of Kenny J in *Richardson* v *Oracle Corporation Australia* that I noted above.

7.29. Ms Newchurch was able to manage and excuse Ms Ride’s conduct to a degree that she was not with Mr Ride’s conduct, because of the very different status Mr Ride and Ms Ride had in the workplace and in relation to Ms Newchurch. Ms Ride’s conduct was no less serious in its nature than that of Mr Ride, but in the circumstances a lesser level of compensation is due to Ms Newchurch for the

damage she suffered. **I assess** the amount of compensation due to Ms Newchurch for damage caused by Ms Ride's conduct at $4,000.

7.30. I find below that Centreprise is vicariously liable for Ms Ride's conduct, and I am obliged to consider apportioning liability for payment of that amount. I do so below.

Mitigation

7.31. It is submitted for Ms Ride that Ms Newchurch ought have complained about Ms Ride's language and thereby avoided its recurrence. This may be, in effect, a submission that Ms Newchurch had a duty to mitigate her loss. The NT *Anti-Discrimination Act* does not impose a duty to mitigate. It is not clear whether or in what way the common law duty to mitigate is applicable to the assessment of damages under anti-discrimination legislation generally (see N Rees, S Rice and D Allen, Australian Anti-Discrimination Law, The Federation Press, 2nd ed, 2014 at [13.4.10]). But I am not sure that what is claimed by Ms Ride is in fact a duty to mitigate loss. Rather, it could be a claim that Ms Newchurch had a duty to take steps to prevent Ms Ride repeating the conduct that she, Ms Newchurch, was complaining of. It may be that the two issues amount to the same thing: mitigating loss, and mitigating the possibility that conduct causing loss would recur.

7.32. In any event, Ms Newchurch says that she "didn't feel like that [complaining] was the best step to take", because "Sarah was immature in her approach", because of Ms Ride's "behaviour and conduct towards me, and her relationship to Graham Ride and him being the general manager", and because she "was concerned about my job". To the extent that Ms Newchurch was under any duty to mitigate, **I am not satisfied** that Ms Newchurch could reasonably have acted in a way that would have mitigated the feelings generated in her by Ms Ride's conduct, nor that would have made the recurrence of the conduct less likely.

Apology

7.33. As is the case for the complaint against Mr Ride, it is submitted for Ms Newchurch that I exercise the power I have under s 89 of the NT *Anti-Discrimination Act* and order Ms Ride to apologise to Ms Newchurch. For the same reasons I gave above in relation to Mr Ride, **I decline** to order that an apology be made; it is a

matter for Ms Ride as to whether and in what terms she wishes to acknowledge to Ms Newchurch the nature and effect of her conduct.

8. VICARIOUS LIABILITY OF CENTREPRISE:

8.1. If a worker does an act in connection with his or her work that is unlawful under the NT *Anti-Discrimination Act* then the Act applies to the employer "as if the [employer] had also done the act" unless the employer "took all reasonable steps to prevent the [worker] from doing the act" (s 105).

8.2. Mr Ride and Ms Ride's employer, Centreprise, must establish that it took 'all reasonable steps' (emphasis added). That is clearly a more onerous requirement than one to take 'reasonable steps' and places an obligation on Centreprise to show what it did to prevent the occurrence of discriminatory conduct, and that what it did can be said to have been 'all reasonable steps'. In determining whether Centreprise took all reasonable steps I am obliged by the NT *Anti-Discrimination Act* to consider the following conduct of Centreprise: its provision of anti-discrimination training, its development and implementation of an equal employment opportunity management plan, its publication of an anti-discrimination policy, its financial circumstances, and the number of its workers and agents (s 105(3)).

8.3. Centreprise took the deliberate step of not appearing at or submitting evidence to the hearing. The only evidence to suggest that it took any steps to prevent Ms Ride or Mr Ride acting as they did is the unattributed document titled 'Statement of Facts, Issues and Areas of Disagreement'. The document was admitted into evidence on the tender of Ms Newchurch. The document "draw[s] attention to the evidence … in support of the company's actions in response to the Complaint of discrimination in the workplace made by [Ms Newchurch]". Relevantly to Centreprise's responsibility to take 'all reasonable steps' to prevent discrimination, the document refers to Centreprise's 'Policies and Procedures Manual', and to the terms of Centreprise's contract of employment which obliged employees to 'represent the organisation in a professional and respectful manner at all times', and 'to conform to Centreprise OH&S policies and Procedures'; I note that reference is made to such contracts with Ms Newchurch and Ms Ride, but not to one with Mr Ride.

8.4. The mere existence of policies is insufficient: 'the employer has a duty to ensure that its policies are communicated effectively to its executive officers, and that they accept the responsibility for promulgating the policies and for advising of the remedial action when breached' (*Hopper v Mount Isa Mines Ltd and others* [1997] QADT 3). In *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102 (confirmed on appeal) the court considered whether an employer's training package met the test of 'all reasonable steps', and found that it did not clearly state that certain conduct (in that case, sexual harassment) was unlawful, did not identify the source of the relevant legal standard, and did not say that an employer might also be vicariously liable. The Court said that 'the omission of these important and easily included aspects from [the employer's] statements of its own policies is a sufficient indication that [the employer] had not … taken all reasonable steps'.

8.5. I have no evidence before me of whether and how Centreprise communicated its policies effectively to executive officers, and whether those officers accepted responsibility for promulgating the policies and for advising of the remedial action when breached. I have no evidence before me of any provision of anti-discrimination training, any development and implementation of an equal employment opportunity management plan, any publication of an anti-discrimination policy, or the number of its workers and agents.

8.6. As to Centreprise's financial circumstances, on the first day of the hearing Mr Randle Walker, Company Secretary to Centreprise, from the bar table and not under oath, advised that Centreprise was at that time registered "because of this matter", that it was not otherwise operating, and that it is a wholly owned subsidiary of Centrefarm Aboriginal Horticulture Limited which has "zero employees and zero assets and liabilities". I have no evidence before me of what Centreprise's financial circumstances were at the time of the conduct complained of, which is the time at which the issue is relevant.

8.7. The reliance by Centreprise on it Policies and Procedures Manual and the terms of its contract of employment is inadequate to show that it took 'all reasonable steps' to prevent the discriminatory conduct. Mr Ride and Ms Ride's discriminatory conduct was in connection with their work. **I am satisfied** that the

NT *Anti-Discrimination Act* operates in these circumstances to make Centreprise vicariously liable for the unlawful conduct of Ms Ride and Mr Ride.

Apportionment

8.8. Under the NT *Anti-Discrimination Act* the effect of a finding of vicarious liability is that the Act "applies in relation to the person as if the person had also done the act"(s 105(1)). I take this to mean that, as a starting position, Centreprise has the same degree of liability for the Rides' unlawful conduct as do the Rides. I would be inclined to infer that the liability is joint and several as between the Centreprise and Mr Ride, and Centreprise and Ms Ride, but there are indications that that is not intended: the Act does not explicitly impose joint and several liability on a person who is vicariously liable for a contravention of the Act (s 105); the Act does explicitly impose joint and several liability on a person who aids a contravention of the Act (s 27); and the Act anticipates an apportionment of the liability to pay damages resulting from a finding of vicarious liability (s 105(4)).

8.9. In making an order for damages flowing from the unlawful conduct I must, under the NT *Anti-Discrimination Act*, consider the extent of steps taken by Centreprise to prevent the prohibited conduct, and take those steps into consideration in determining the proportion of the amount to be paid to Ms Newchurch by Centreprise (s 105(4)). I note that, contrary to a submission made for Ms Newchurch, Centreprise's apparent insolvency is not a matter I am able to take into consideration.

8.10. Evidence of Centreprise's 'Policies and Procedures Manual' and its contract of employment is evidence of some steps that were taken although, as I said above, it does not satisfy me that all reasonable steps were taken to prevent the prohibited conduct. It does, however, relieve of Centreprise to some degree of the liability to pay damages.

8.11. I have assessed the compensation due to Ms Newchurch for damage caused by Mr Ride's conduct at $8,000, and by Ms Ride's conduct at $4,000. The effect of the NT *Anti-Discrimination Act* is that Centreprise has also engaged in that conduct. Taking account of evidence of the limited steps taken by Centreprise to prevent the prohibited conduct, **I determine** that Centreprise must pay 25% of the

amounts due to Ms Newchurch as compensation for damage caused by Mr Ride's conduct and by Ms Ride's conduct.

9. VICTIMISATION COMPLAINT AGAINST CENTREPRISE:

9.1. On 16 January 2014 Ms Newchurch said to Mr Ride "I am going to put in a complaint". Ms Newchurch alleges that a number of things that happened after that date happened because she had threatened to make a discrimination complaint. If that was the case then what happened could be victimisation under s 23 of the NT *Anti-Discrimination Act*.

9.2. Ms Newchurch makes her victimisation complaint against her employer, Centreprise. To succeed against Centreprise, Ms Newchurch must show that there is conduct that meets the definition of victimisation – being an act that subjected or threatened to subject Ms Newchurch to a detriment – and that was engaged in because she had made or had intended to make a complaint, or had alleged or had intended to allege (in good faith) a contravention of the NT *Anti-Discrimination Act*, or had done anything in relation to a person under or by reference to the Act (s 23).

9.3. It is the case that Ms Newchurch had intended to make a complaint of a contravention of the NT *Anti-Discrimination Act*. In her final submissions Ms Newchurch submits that the following were acts of victimisation:

a. The CEO and other staff making numerous comments about the impact of loss of funding, jobs and the inevitable loss of her job due to Graham Ride's resignation;

b. Ms Newchurch submits the CEO in particular victimised her by making comments in defence of Graham Ride and informing other employees of the complaint and its effect on their employment. This had the effect of turning staff members against Ms Newchurch;

c. The CEO and other staff making statements in support of Graham Ride, such as "Graham Ride grew up in an era where his attitude is normal in regards to his personal opinion and derogatory comments about Aboriginal people", and that Ms Newchurch should consider his age and that he paid the ultimate price by resigning;

d. The CEO telling other staff about the complaint and Graham Ride's resignation, which caused a breakdown in relationships between Ms Newchurch and other staff;

e. Other employees formed the view that because of the complaint, Graham Ride had to leave and that meant that the business was unable to generate profit and accordingly their jobs were under threat;

f. To Ms Newchurch's detriment, the staff members of the Respondent were informed that the amount of work (and accordingly jobs) had reduced, which could be expected to create some upset amongst employees;

g. Any failure to maintain strict confidentiality regarding the complaint, in these circumstances, was likely to cause negative consequences for the Complainant. It is submitted that this was not simply an inadvertent breach of confidentiality, but rather staff had been told about the complaint and reason for the resignation which quickly caused a breakdown in relationships;

h. As a result of this sharing of confidential information, the Complainant was faced with angry personnel who blamed her for the lack of work. The Complainant was faced daily with unfriendly attitudes from staff members. This took a toll on the Complainant, and eventually it cost her job;

i. Renewing Ms Newchurch's contract, changing her title and reducing her duties and workload below her skills and experience inconsistent with what was agreed with Lindy Andren, Human Resource Manager of the Respondent;

j. Providing the Operations Manager of the Respondent, Brody Smith, with access to her confidential personnel file without permission;

k. Stalling the complaint process and external mediation referral during which time Graham Ride resigned;

l. Telling Ms Newchurch the Respondent was seeking legal advice and not interested in protecting her rights. That the Respondent was only interested in taking action that was beneficial for it and it would probably cost Ms Newchurch her job;

m. Asking the Ms Newchurch to decide whether to keep her or her colleague, Lisa Erlandson, employed;

n. Terminating Ms Newchurch effective 30 June 2014.

9.4. Ms Newchurch does not allege that any of the conduct of Mr Ride or Ms Ride was victimising conduct. The allegations of victimising conduct concern the conduct of other employees and officers of the company. Ms Newchurch did not lead any evidence from any of those employees or officers. The only evidence in support of the allegations of victimising conduct is her own, based on her understanding and perceptions of what happened and why people behaved as they did.

9.5. Many of the allegations above lack specificity, for example: "other staff making numerous comments"; "other staff making statements"; "The CEO telling other staff"; "Other employees formed the view"; "staff members of the Respondent were informed"; "faced with angry personnel who blamed her"; "unfriendly attitudes from staff members". The evidence led by Ms Newchurch did not remedy the generality of these claims.

9.6. Some of the allegations could not meet the definition of victimisation, for example: "was likely to cause negative consequences for the Complainant"; "which could be expected to create some upset".

9.7. Some of the allegations lack the necessary causal nexus, for example: "Renewing Ms Newchurch's contract, changing her title and reducing her duties and workload below her skills and experience inconsistent with what was agreed"; "Providing the Operations Manager of the Respondent, Brody Smith, with access to her confidential personnel file without permission"; "Stalling the complaint process and external mediation referral"; "Telling Ms Newchurch the Respondent was seeking legal advice and not interested in protecting her rights"; "Asking the Ms Newchurch to decide whether to keep her or her colleague". The evidence led by Ms Newchurch did not establish a causal nexus.

9.8. Some of the allegations lack any evidence to support them, for example: "Stalling the complaint process and external mediation referral"; "only interested in taking action that was beneficial for it and it would probably cost Ms Newchurch her job".

9.9. Ms Newchurch's claim that her termination of employment effective 30 June 2014 was because of her having complained of discrimination in January 2014 faces two significant obstacles that are not addressed by the evidence or submissions: Ms Newchurch's continuing employment in that period including the renewal of her contract, and the terms of the termination letter of 2 June 2014 which attribute her termination of employment to a significant downturn in the business. It may be, as was submitted for Ms Newchurch, that Mr Ride's resignation "was in part informed by Ms Newchurch's complaint and the process that followed". I accept that, as was submitted for Ms Newchurch, she had a "genuine belief that the company could not continue its operation without Graham Ride". There is, however, no evidence that Mr Ride's resignation subjected Ms Newchurch to any detriment. It appears that Mr Ride's resignation was a factor in the decision by Ms Newchurch's employer, Centreprise, to cease trading, and that because Centreprise ceased to trade Ms Newchurch became unemployed. But the causal link is not established. It cannot be said that Mr Ride's resignation was a substantial or operative factor in Ms Newchurch's becoming unemployed.

9.10. It is possible that, in the minds, of some Centreprise staff, Ms Newchurch's complaint about Mr Ride on 16 January was linked in some way to his resigning, and that Mr Ride's resignation led to Centreprise's financial troubles, although that is not how Mr Ride sees it. I accept that Ms Newchurch did feel an "unfriendly attitude and animosity from other staff" after Mr Ride's resignation, and that her relations with other staff deteriorated. But I am unable to say that the reason any staff engaged in detrimental conduct towards Ms Newchurch, was because she had made, or threatened to make, a discrimination complaint. Accordingly, **I am not satisfied** that there was conduct that subjected or threatened to subject Ms Newchurch to a detriment or that, if there were such conduct, that it was engaged in because she had intended to make a complaint of a contravention of the NT *Anti-Discrimination Act*.

9.11. In the absence of conduct that subjected or threatened to subject Ms Newchurch to a detriment and that was engaged in because she had intended to make a complaint, it is unnecessary for me to consider Centreprise's liability for the conduct of its employees and officers and the complaint of victimisation against Centreprise must be dismissed.

10. DECISION AND ORDERS

10.1. I have found that prohibited conduct alleged in Ms Newchurch's complaint against Mr Ride is substantiated. I have found that prohibited conduct alleged in Ms Newchurch's complaint against Ms Ride is substantiated. I have found that prohibited conduct alleged in Ms Newchurch's complaint against Centreprise is not substantiated.

10.2. I have decided that Ms Newchurch is entitled to compensation of $8,000 for damage caused by Mr Ride's conduct, and to compensation of $4,000 for damage caused by Ms Ride's conduct.

10.3. I have found that Centreprise is vicariously liable for the conduct of both Mr Ride and Ms Ride. I have determined that Centreprise must pay 25% of the compensation due to Ms Newchurch as compensation for damage caused by their conduct.

10.4. Accordingly:

10.4.1. **I order** the respondent Graham Ride to pay to the complainant Ms Newchurch, within ninety (90) days of this decision, the amount of $6,000 as compensation for damage caused by his prohibited conduct;

10.4.2. **I order** the respondent Sarah Ride to pay to the complainant Ms Newchurch, within ninety (90) days of this decision, the amount of $3,000 as compensation for damage caused by his prohibited conduct;

10.4.3. **I order** the respondent Centreprise Resource Group Pty Ltd to pay to the complainant Ms Newchurch, within ninety (90) days of this decision, the amount of $3,000 as compensation for damage caused by prohibited conduct for which it is vicariously liable;

10.4.4. **I order** that the complaint against Centreprise Resource Group Pty Ltd of victimisation is dismissed.

10.4.5. **I make no order** as to costs.

Professor Simon Rice, OAM
Hearing Commissioner
5 January 2016