

**NORTHERN TERRITORY ANTI-DISCRIMINATION COMMISSION**

**LOCATION: DARWIN**

**TRIBUNAL: SIMON RICE  
HEARING COMMISSIONER**

**DATE OF HEARING: 30 April, 1 May, 2012**

**HEARING NO: C20100027-02**

**COMPLAINANTS: PEREIRA**

**RESPONDENT: COMMISSIONER OF POLICE**

**REPRESENTATIVES: Mr Mahendra, Barrister, for Complainant  
Ms Eastman, Barrister, for Respondent**

**DATE OF DECISION: Written Decision given on 15 August 2012**

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## **REASONS FOR DECISION**

### **1. DECISION:**

- 1.1. For the reasons set out below, I find that the prohibited conduct alleged in the complaint is not substantiated, and I dismiss the complaint.

### **2. FACTUAL BACKGROUND**

- 2.1. Mr Pereira was detained by state authorities in East Timor for 30 days in November – December 2002, after an incident involving a firearm. In early 2003 he left East Timor and has not returned. The circumstances of his detention and release are the subject of dispute, and are considered in detail below.
- 2.2. In November 2007 Mr Pereira was employed by the Northern Territory Commissioner of Police ('Police Commissioner') as a trainee constable, but did not disclose to the Police Commissioner any information concerning his detention in East Timor. He commenced the trainee course in Feb 2008 and completed it on 7 August 2008. During July 2008 the Police Commissioner became aware of the incident in East Timor. On 7 August 2008 the Police Commissioner terminated Mr Pereira's employment.
- 2.3. Reference in this decision to 'the relevant time' is a reference to the period July-August 2008, which is the period when the Police Commissioner decided to terminate Mr Pereira's employment.

### **3. COMPLAINT**

- 3.1. Mr Pereira believes that what happened to him in East Timor was a reason for the Police Commissioner's terminating his employment, and in early 2009 Mr Pereira made a complaint to the Australian Human Rights Commission of discrimination on the basis of his having a criminal record. He withdrew that complaint and later in 2009 he made a complaint to the Northern Territory Anti-Discrimination

Commissioner (AD Commissioner) of discrimination on the basis of his having an irrelevant criminal record.

- 3.2. The AD Commissioner accepted Mr Pereira's complaint on 15 September 2009, and a delegate of the AD Commissioner investigated the complaint. The delegate was satisfied that there was prima facie evidence to substantiate the allegation of prohibited conduct, and Mr Pereira's complaint proceeded to conciliation. That process did not resolve the complaint, and Mr Pereira's complaint was then referred to a hearing.
- 3.3. The Police Commissioner applied to the AD Commissioner, under s102 *Anti-Discrimination Act (AD Act)* to discontinue the proceedings, but that application was dismissed (*Pereira v Commissioner of Police*, NT Anti-Discrimination Commission, 29 August 2011).

#### **4. FACTS IN ISSUE**

- 4.1. Mr Pereira's complaint is that the Police Commissioner discriminated against him because of his attribute of 'irrelevant criminal record' (ss 4, 19, 20, 31 *AD Act*).
- 4.2. The conduct itself is not in issue; the parties agree that Mr Pereira's employment was terminated. What is in issue is why Mr Pereira's employment was terminated (ss 31), and whether the termination was 'less favourable treatment' (s 20(1)).
- 4.3. Mr Pereira says that a reason for the Police Commissioner's dismissing him was his having an irrelevant criminal record (ss 19(q)). The Police Commissioner denies that Mr Pereira's irrelevant criminal record was a reason for his dismissal, and says that the sole reason was Mr Pereira's failure to disclose what had happened in East Timor.

#### **5. JURISDICTIONAL FACT**

- 5.1. Before considering the evidence to decide why Mr Pereira's employment was terminated, and whether that termination was 'less favourable treatment', I must decide whether Mr Pereira had, at the relevant time, the attribute which he says was the reason for the

Commissioner's conduct: an irrelevant criminal record. The Commissioner submitted that this is a fact of which I must be satisfied before I can proceed to exercise jurisdiction under the *AD Act*, that is, a jurisdictional fact.

- 5.2. I agree that whether a complainant has an attribute prescribed in s 19(1) is a jurisdictional fact. It is a fact 'that will attract [the] jurisdiction' (*State Electricity Commission v Rabel & Ors* [1996] VSC 78 at [28]). If a complainant did not at the relevant time have a prescribed attribute, then I have no jurisdiction under the Act: 'a complaint must fall within the terms of the Act to be dealt with under the Act' (*Rabel* at [28]).
- 5.3. Mr Pereira must prove, on the balance of probabilities, that the prohibited conduct occurred (s 91(1)). This burden extends to Mr Pereira's having to prove all elements that render the conduct prohibited, including that he has a prescribed attribute.
- 5.4. Procedurally, the issue should have arisen much earlier than it did. The Police Commissioner did not rely on the question of jurisdictional fact in his signed 'Respondent's Statement of Facts, Issues, Areas of Disagreement and List of Documents' which was filed in the proceedings in October 2010. Nor did he rely on it in his application for me to discontinue the proceedings in January 2011, when he argued that, for other reasons, the complaint was all or any of misconceived, lacking in substance or failing to disclose any prohibited conduct (*Pereira*, 29 August 2011).
- 5.5. It was not until the morning of the hearing that the Police Commissioner first argued that I cannot be satisfied as to the particular jurisdictional fact of Mr Pereira's having a prescribed attribute. Mr Pereira did not contest that a complainant's having a prescribed attribute is a jurisdictional fact, and did not apply to adjourn the hearing to be able to better address the issue. Counsel for Mr Pereira addressed the issue in his opening, in evidence from Mr Pereira, and in his submissions. I am satisfied that Mr Pereira's

case was not prejudiced by the Police Commissioner's late reliance on the question of jurisdictional fact.

- 5.6. One potential area of prejudice was Mr Pereira's not having called his wife to give evidence. On the basis that she appears to have had some knowledge relevant to whether Mr Pereira has an irrelevant criminal record, counsel for the Police Commissioner submitted that I should infer from her not having been called to give evidence that any evidence she would have given would not have assisted Mr Pereira's case. In the reasons below I have arrived at my decision without needing to have regard to the fact that Mr Pereira's wife could have given evidence, or that she did not give evidence.

## **6. IRRELEVANT CRIMINAL RECORD**

- 6.1. The jurisdictional fact on which Mr Pereira relies is that, at the relevant time, he had the attribute of 'irrelevant criminal record'. Alternatively, Mr Pereira relies on the Police Commissioner's having believed at the relevant time that Mr Pereira had that attribute (s 20(2)(a))
- 6.2. In my preliminary decision in this matter, (*Pereira*, 29 August 2011) at paragraph 5.2 I expressed views about the meaning of the term 'irrelevant criminal record', saying that it invited an inquiry into the 'relevance' of a criminal record. After hearing argument and submissions on the issue I believe that I was wrong in what I said. It remains the case that to refer to the attribute as an 'irrelevant' criminal record is unhelpful drafting, as it incorporates into the definition an evaluation of the circumstantial status of the record; the *AD Act* proscribes reliance on a record in certain circumstances, and, but for (b)(ix) of the definition, it is the occurrence of those circumstances which renders the record 'irrelevant'. Whatever the record is called in the *AD Act*, the factual issue is whether there is a record which meets the statutory definition. If there is then the attribute exists, if not then it does not. I believe too that the view of the Australian Human Rights Commission which I referred to – that

the term 'irrelevant criminal record' incorporates the defence found in other legislation of 'inherent requirements of a job' – is wrong. There is no 'defence' in the name the *AD Act* gives to the record which is the prescribed attribute, and there is no argument to be had about 'inherent requirements of a job' when deciding whether the facts show that the statutory definition of the attribute of 'irrelevant criminal record' is satisfied.

6.3. In sub-section (a) of the definition in s 4, an 'irrelevant criminal record' is a spent record within the meaning of the *Criminal Records (Spent Convictions) Act*.

6.4. In sub-section (b) of the definition in s 4, an 'irrelevant criminal record' is a 'record relating to arrest, interrogation or criminal proceedings' where:

(i) no further action was taken in relation to the arrest, interrogation or charge of the person; or

(ii) no charge has been laid; or

(iii) the charge was dismissed; or

(iv) the prosecution was withdrawn; or

(v) the person was discharged, whether or not on conviction; or

(vi) the person was found not guilty; or

(vii) the person's finding of guilt was quashed or set aside; or

(viii) the person was granted a pardon; or

(ix) the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises.

6.5. Although it is not explicit in the terms of the provision, my understanding of the provision in the context in which it operates is that the arrest referred to is the arrest of the person who claims to have the attribute of irrelevant criminal record, the interrogation

referred to is the interrogation of the person who claims to have the attribute of irrelevant criminal record, and the criminal proceedings referred to are criminal proceedings of which the person who claims to have the attribute of irrelevant criminal record is the subject.

- 6.6. Subsection (b)(i) recognises that the circumstance where ‘no further action is taken’ can arise for each of an arrest, an interrogation, and proceedings. The circumstances described in (ii)-(viii) may or may not arise for each of an arrest, an interrogation or criminal proceedings, and therefore suggest different permutations of what could be an irrelevant criminal record. For example, a record might relate to an arrest where the prosecution was withdrawn, or might relate to an interrogation where no charge was laid, or might relate to criminal proceedings where a finding of guilt was quashed.
- 6.7. In deciding whether, at the relevant time, Mr Pereira had the attribute of ‘irrelevant criminal record’ the factual questions are (1) whether there existed a record relating to Mr Pereira’s arrest or interrogation or criminal proceedings, and, if so, (2) whether any of the circumstances in (b) existed.
- 6.8. I consider later the alternative argument under s 20(2)(a) that the Police Commissioner believed at the relevant time that Mr Pereira had the attribute of ‘irrelevant criminal record’.
- 6.9. In submissions, Mr Pereira says that his irrelevant criminal record is one relating to an arrest where no further action was taken ((b)(i)), no charge has been laid ((b)(ii)), the prosecution was withdrawn ((b)(iv)), or he was granted a pardon ((b)(viii)). Mr Pereira is not able to be more specific than this because although he can describe what happened to him, he says is unable to characterise what happened to him in formal procedural terms within the East Timorese legal system. His uncertainty in this regard leaves open the possibility that at least some of the other circumstances in (4)(b) might describe what happened.

## 7. THE EXISTENCE OF A RECORD

- 7.1. There is no evidence of a record relating to interrogation of Mr Pereira. There is, however, evidence of a record relating to the arrest of Mr Pereira.
- 7.2. Mr Pereira's evidence – and his consistent view – has been that he was not arrested. He appears to have had this view because nothing happened that had, for him, the usual indicators of an arrest. He says that he was not told he was under arrest, that he was told that he was being detained for his own safety, and that he did not understand the nature of the consequent court proceedings. In the hearing, under cross-examination, Mr Pereira agreed that he was arrested. I accept that Mr Pereira has the genuine belief that he was not subjected to what he recognised as an arrest, but the evidence establishes that he was in fact arrested in a manner that is recognisable in our legal system, that is, he was involuntarily detained by officers of the state and charged with an offence.
- 7.3. Annexure DG9 to the affidavit of Senior Sergeant Debra Gabolinscy (Exhibit R3) is a document on the letterhead of the United Nations Mission of Support in East Timor (UNMISSET), dated 18 November 2002. It states, relevantly, 'I request the safe custody of prisoner Rui Fernando F. PEREIRA, arrested by Police on 16 November 2002, at Dili, for the offence of Unlawful shooting'. The document is in the case for the Police Commissioner. The Police Commissioner agrees in submissions (para 62) that this document is 'a record of an arrest'.
- 7.4. Accordingly, I am satisfied that at the relevant time there was a record relating to the arrest of Mr Pereira.
- 7.5. There is evidence of records relating to criminal proceedings concerning Mr Pereira.
- 7.6. I note that in Mr Pereira's affidavit (Exhibit A1), he states that he attended a hearing on or about 18 November 2002, the nature and



detail of which he did not understand. In his oral evidence, he states that he attended ‘what I think was a hearing’ on 18 November 2002.

- 7.7. Exhibit R6 is a translation of what appears to be court record. The translation, dated 20 December 2011, is by a translator accredited with the (Australian) National Accreditation Authority for Translators and Interpreters (NAATI). The first page of the document is a statement of facts by the District Attorney, from proceedings in Dili in East Timor on 30 January 2003; it recites a version of the facts of the incident that led to Mr Pereira’s arrest (a version which differs from Mr Pereira’s own account), and it states that ‘the District Attorney accuses [Mr Pereira] of [the crimes of] physical aggression causing injury [and] possession of a firearm without licence/authorisation’.
- 7.8. The second page of Exhibit R6 contains what appears to be three extracts from a court record. The first extract, titled ‘Page 96’, records that ‘the defendant did not appear before the court and therefore the judge adjourned the day of judgment’. The second extract, titled ‘Page 97’, records that ‘the firearm was submitted’ on 27 January 2004. The third extract, titled ‘Page 98’, records that ‘judgment was passed ... in the absence of the defendant and his lawyer’, and that the judge ruled that the firearm be surrendered to the State, a bond paid by the defendant be paid to the State, and that the defendant be listed as a person prohibited entry to East Timor.
- 7.9. Exhibit R7 is a translation of a letter, dated 20 April 2003, from an ‘A da Costa’ who identifies themselves in the letter as a ‘parent-in-law’ of Mr Pereira. The translation, dated 20 December 2011, is by a translator accredited with NAATI. The letter states that Mr Pereira ‘is completely incapable of appearing for His Judgement, which is set for the 22<sup>nd</sup> day of April of 2003 at 9.30 because he has returned to Portugal ...’. The letter goes on to say ‘We thank Your Honour, with

all due respect to rule in the case of [Mr Pereira] in his presence or absence’.

7.10. In light of this evidence, I am satisfied that that at the relevant time there was a record relating to criminal proceedings concerning Mr Pereira.

## **8. THE EXISTENCE OF OTHER CIRCUMSTANCES: A GENERAL APPROACH**

8.1. The next question is whether, in relation to the record of arrest or the record of criminal proceedings, there existed at the relevant time any of the circumstances set out in (a) and (b) of the definition of irrelevant criminal record.

8.2. The circumstances set out in (a) and (b) describe three ways in which a person with a record of arrest or a record of criminal proceedings can have the attribute of ‘irrelevant criminal record’:

- the person has been convicted but their conviction is ‘spent’ within the meaning of the *Criminal Records (Spent Convictions) Act* ((a))
- the person has been arrested, interrogated or the subject of criminal proceedings, but there is no charge, prosecution, or conviction against them at the relevant time ((b)(i)-(viii))
- the person has been found guilty of an offence but in circumstances that are not directly relevant to the situation in which the discrimination arises ((b)(ix)).

8.3. Paragraphs (a) and (b)(ix) of the definition are straightforward and state simply what I have identified as the first and third ways in which a person can have the attribute of ‘irrelevant criminal record’. As to (a), the question of a spent record does not arise on the facts of this case. As to (b)(ix), there was no argument and no evidence was led, perhaps because the provision assumes a finding of guilt, which Mr Pereira denies.

- 8.4. Paragraphs (b)(i)-(viii) of the definition specify different ways, in common law criminal procedure, by which a person who has been arrested, interrogated or subject to criminal proceedings, could have no charge, prosecution, or conviction against them.
- 8.5. When assessing the evidence to see if it describes any of the circumstances in (b)(i)-(viii), a difficulty is that the relevant facts occurred in East Timor. An assumption that was made in these proceedings is that concepts in the *AD Act* such as record, interrogation, charge, finding of guilt, quashing and pardon, for example, have the same meaning in East Timor as they have in the Northern Territory, and that we should find in an account of an experience of the East Timorese criminal justice system the same indications of the stages and results of criminal procedure that we would expect to find in our common law system. I understand, however, that the legal system in East Timor to be essentially a civil law system rather than the common law system within which the *AD Act* was drafted and operates, and that the system of criminal justice in East Timor was, in 2002-2003, some combination of Portuguese and Indonesian law and procedure, and rules of criminal procedure promulgated by the United Nations Transitional Administration in East Timor. Accordingly, an assumption that concepts in common law criminal proceedings are the same in East Timorese criminal proceedings is perhaps unwarranted. But this assumption explains to an extent the difficulty that Mr Pereira has had in being able to say, from his own experience, whether he was arrested, what the nature of the proceedings were, and whether and how the proceedings were finalised.
- 8.6. As I have said above, I am satisfied that Mr Pereira was arrested, and was the subject of criminal proceedings. The next question, as I have phrased it, is whether, at the relevant time, Mr Pereira was the subject of charge, prosecution, or conviction.

- 8.7. I have reviewed the evidence to see what it tells me about what happened in the criminal proceedings that followed Mr Pereira's arrest.
- 8.8. In Mr Pereira's affidavit (Exhibit A1), after he says that he attended a hearing the nature and detail of which he did not understand, he says that he was detained in 'protective custody', from which he was released on or about 21 January 2003 by order of the Attorney General. He says he then left East Timor and has not returned. In Mr Pereira's oral evidence, after saying that he attended 'what I think was a hearing', he says 'I really don't know what happened, because they were speaking Bahasa Indonesia ... at the end I was told that I was going to spend 30 days in prison'.
- 8.9. Mr Pereira attaches to his affidavit two documents which he says help to explain what happened in the proceedings. The first, RP2, is a translation of Mr Pereira's statutory declaration, dated 21 January 2003, and witnessed by Dr Longuinhos Monteiro. The translation, dated 16 September 2008, is by the NT Interpreting and Translation Service. Mr Pereira declares that 'after the annulation / filing of my lawsuit due to the procedural circumstances which this law suit engendered, this lawsuit will be held in camera'. He declares as that 'I will never again mention anything in relation to the developments which took place in Dili during the period of October to December 2002, and/or claim any compensation (for psychological damage) from the Timorese Government in relation to this case's procedural acts'. I do not understand the meaning of document RP2 and cannot see its relevance.
- 8.10. The second document, RP3, is said by Mr Pereira in his statement to be 'a true copy of a certificate provided by Dr Longuinhos Monteiro'. The document is undated, although it can be inferred from its terms that it was created on or after 21 January 2003, and Mr Pereira's evidence is Dr Monteiro signed it on 21 January 2003. In the document Dr Monteiro states in English '[I] hereby declare that the

matter surrounding Rui Pereira in East Timor in 2002, was quashed. Furthermore, Rui Pereira was never charged or convicted of any offence. Due to the art. 36 of the Constitution of Timor-Leste, Rui Pereira was sworn to state secrecy of justice by my office on the 21<sup>st</sup> of January 2003’.

- 8.11. Exhibit R5 is a letter, in English, dated 17 January 2003, from Mr Pereira’s legal representatives to officers of the East Timorese court: the Deputy General Prosecutor, the District Prosecutor and the Investigating Judge. The letter states that the court had, on 19 December 2002, ‘granted a conditional release to [Mr Pereira] under several conditions among others, a payment of security money of US \$15,000’. The letter makes a request of the Deputy General Prosecutor that ‘the investigation process into the case ... be closed’.
- 8.12. Exhibit R6 is a translation of what appears to be court record, and Exhibit R7 is a translation of a letter; I have described both of them above at paragraphs 7.7 – 7.9.
- 8.13. Exhibits 5, 6 and 7 support a finding that Mr Pereira was arrested, charged and the subject of criminal proceedings. Document R3 does not persuade me otherwise.
- 8.14. Document RP3 records a statement by the Attorney General Dr Monteiro in late January 2003 that ‘Rui Pereira was never charged’, but I cannot reconcile that statement with documentary evidence that he was charged. Further, in Document RP3 the Attorney General states that ‘Rui Pereira was ... never convicted’, but that is not probative of the issue because there is no evidence, or any claim by Mr Pereira, that a trial had taken place at that time. Finally, in Document RP3 the Attorney General states that ‘the matter ... was quashed’, but I do not understand the meaning of that statement; if it means – as it would in Australia – that a conviction no longer stood, then I cannot reconcile it with the concurrent statement that Mr Pereira was never charged or convicted, or with documentary evidence that proceedings involving Mr Pereira continued until 2004.

- 8.15. On the evidence, I am satisfied that some form of court proceedings concerning Mr Pereira continued until April 2004. Those court proceedings concluded in his absence. There is, however, no evidence that relates to the entering of a conviction. The references in Exhibit R3 to ‘judgment was passed’, and to the ‘ruling’ of the judge, do not refer to a conviction.
- 8.16. It is possible that the proceedings that continued were what would be recognised in our legal system as a civil claim for damages and not a criminal prosecution; the references to ‘judgment’ and ‘ruling’ are consistent with that view. But at the same time, the court’s having ordered forfeiture of the \$15,000 that had been paid to secure Mr Pereira’s release from detention suggests that the proceedings were criminal proceedings. Exhibit 6 is a translation of a document that records proceedings that took place in a legal system different from our own, and while it is evidence of proceedings, I cannot confidently infer from it that they were ‘criminal proceedings’.
- 8.17. Because of the difficulty of equating the records of East Timorese legal process with terms used in (b)(i)-(viii) to describe common law criminal legal process, I have, in the preceding paragraphs, taken what I think is the generous approach of looking at the evidence in light of the general effect of (b)(i)-(viii), asking whether Mr Pereira – having been arrested and the subject of criminal proceedings – was the subject of charge, prosecution or conviction at the relevant time. Because the evidence does not establish what became of the charges Mr Pereira faced and of the proceedings he was subject to, I cannot be satisfied that, at the relevant time, Mr Pereira was not the subject of charge, prosecution or conviction.

## **9. THE EXISTENCE OF OTHER CIRCUMSTANCES: A SPECIFIC APPROACH**

- 9.1. Assessing the evidence against the precise terms of (b)(i)-(viii) leads me to the same conclusion. Looking first at (b)(i) of the definition, Mr Pereira’s own evidence is that further action was taken after his arrest, and the documentary evidence supports that. Accordingly, I

am not satisfied that the record relating to his arrest is one in relation to which no further action was taken.

- 9.2. Looking next at (b)(ii) of the definition, the only evidence before me that Mr Pereira was not charged is in RP3, which I deal with at paragraph 8.14 above. Against that, there is probative documentary evidence that Mr Pereira was charged. In the circumstances I am not satisfied that the record relating to his arrest, or the record relating to criminal proceedings are records where no charge has been laid.
- 9.3. Looking next at (b)(iii) of the definition, the evidence establishes that there were court proceedings. The evidence does not enable me to say whether, when or how the criminal charges were resolved.
- 9.4. Looking next at (b)(iii)-(viii), the only evidence before me that Mr Pereira was not charged, that the prosecution was withdrawn, that Mr Pereira was discharged, that Mr Pereira was found not guilty, that a finding of guilt was quashed or set aside, or that Mr Pereira was granted a pardon, is document RP3 which I deal with at paragraph 8.14 above. There is probative evidence – in Exhibits 6 and 7 – that after the Attorney General signed RP3 Mr Pereira continued to be the subject of proceedings during 2003 and until April 2004 but they do not support a finding as to whether, when and how the criminal charges were resolved. I therefore cannot be satisfied that the record relating to an arrest or the record relating to criminal proceedings is a record where the charge was dismissed ((4)(b)(iii)), where the prosecution was withdrawn ((4)(b)(iv)), where Mr Pereira was discharged ((4)(b)(v)), where Mr Pereira was found not guilty ((4)(b)(vi)), where a finding of guilt was quashed or set aside ((4)(b)(vii)), or where Mr Pereira was granted a pardon ((4)(b)(viii)).

## **10. MR PEREIRA'S BELIEF**

- 10.1. Mr Pereira left East Timor while proceedings were under way and has not returned. I accept what Mr Pereira says, that he never fully

understood what the proceedings were about. In his ignorance of what the proceedings were about and of what happened after he left East Timor, Mr Pereira has relied on the statement of the Attorney General that he was no longer the subject of charge, prosecution or conviction. He may also have believed that the legal proceedings that continued were proceedings for compensation and were not criminal proceedings, although he has said nothing, and has offered no evidence, to that effect.

- 10.2. In Mr Pereira's view, therefore, although he has a record of arrest and of criminal proceedings, there is no related charge, prosecution, or conviction against him. That is in fact how counsel for Mr Pereira put Mr Pereira's case in submissions (my emphasis): '*as far as Mr Pereira was concerned, no charge was laid against him (etc)*'. Based on his view of what had happened, Mr Pereira made a discrimination complaint premised on his having the attribute of an irrelevant criminal record. The evidence does not, however, support his view, and leaves open the possibility that there is a conviction against him.
- 10.3. To meet the very precise requirements of the *AD Act* (see paragraph 13.1 below), Mr Pereira needs to have clearly explained the proceedings to which he was subject in East Timor, and led evidence to prove when and how those proceedings concluded. In fact, I am not satisfied that Mr Pereira has given the best account he can of what happened between November 2002 and January 2003, quite apart from making further inquiries to establish what the final outcome of the proceedings were. For example, Mr Pereira has consistently relied on his ignorance of the language and confusion as to the nature of the proceedings to say that he did not know if he had been arrested and charged. In my view this is not consistent with evidence that he was legally represented and that he had the active support of his wife, and I am not satisfied that Mr Pereira was as ignorant of the nature of the proceedings as he has said he was. Further, Mr Pereira has given evidence that the Attorney General



intervened to release him from custody; in my view this is not consistent with evidence that that he was released after 30 days detention by order of the court on payment of \$15,000 surety.

- 10.4. Mr Pereira's evidence gives a less clear account of what happened to him in East Timor than is given by the documentary evidence. The documentary evidence leaves open the real possibility that Mr Pereira was at the relevant time the subject of a conviction in East Timor.
- 10.5. Taking account the whole of the evidence, I am not satisfied that at the time the Police Commissioner terminated Mr Pereira's employment, Mr Pereira was not the subject of conviction. I am, therefore, not satisfied that Mr Pereira had an irrelevant criminal record at the relevant time.

#### **11.POLICE COMMISSIONER'S BELIEF AS TO IRRELEVANT CRIMINAL RECORD**

- 11.1. In his submissions, counsel for Mr Pereira, having argued the case for Mr Pereira's having an irrelevant criminal record, then says 'in any event, the evidence clearly demonstrates that as far as [officers of the Police Commissioner] were concerned, they had proceeded on the basis that records may exist revealing a criminal record'. The submission refers to two Annexures to the affidavit of Senior Sergeant Gabolinsky (Exhibit R3): DG21, which is a report from Senior Sergeant Gabolinsky to Acting Superintendent Kerry James, dated 17 July 2008, and DG22 which is a report from Acting Superintendent James to 'Commander, Ethical and Professional Standards Command' dated 30 July 2008.
- 11.2. As counsel for Mr Pereira observed, whether there exists an irrelevant criminal records seems to be a mixed question of law and fact. A person would not characterise their belief as to certain facts as a belief in the existence of an irrelevant criminal record as defined by the *AD Act*. Rather, the question is whether the Police

Commissioner, through his officers, had a belief as to certain facts which we can now see satisfy the definition in s 4 of the *AD Act*. In the simplified terms I set out at paragraph 8.2 above, the Police Commissioner would have to have believed that Mr Pereira had been arrested, interrogated or the subject of criminal proceedings, and that he was, at the relevant time, the subject of charge, prosecution or conviction.

- 11.3. The Police Commissioner did not lead evidence directly on the issue of his officers' belief about what had happened to Mr Pereira in East Timor, and it was not part of the Police Commissioner's case to do so. Evidence led by the Police Commissioner shows that the officers were aware that Mr Pereira had been detained and that there had been proceedings, but it also shows that they did not know whether or how those proceedings had been resolved.
- 11.4. Mr Pereira told the police that he had not been arrested and had not been charged, presumably because at the time that was how he understood what had happened (see paragraphs 10.1 – 10.2 above). He told the police that the matter in East Timor had been resolved, but the police did not accept this. In DG21, for example, Senior Sergeant Gabolinscy writes that '[Mr Pereira's] account of the incident cannot be accepted at face value', that in her view discovering the 'official outcome of [Mr Pereira's] proceedings would require significant background checking through such agencies as Interpol and AFP', and that '[n]otwithstanding that various enquiries can be commenced with authorities in relation to the details of this incident [t]here is no guarantee that authoritative or conclusive information can be obtained'. Similarly, in DG22 Acting Superintendent James says of Mr Pereira's account 'it [is] very difficult to verify or refute'.
- 11.5. Acting Superintendent James was not called for cross-examination. Senior Sergeant Gabolinscy was cross-examined, and it was not suggested to her that at the relevant time she believed that Mr

Pereira had been arrested, interrogated or the subject of criminal proceedings, or that he was, at the relevant time, the subject of charge, prosecution or conviction. It was not suggested to her that she believed any of the circumstances in the definition of 'irrelevant criminal record' to have been the case for Mr Pereira. The documents RP2 and RP3 are not among a bundle of documents that Senior Sergeant Gabolinscy says she considered when writing her report, and it was not suggested to her that she had seen those documents.

- 11.6. The evidence shows that the Police Commissioner, through his officers, had material before them that indicated that Mr Pereira had been arrested and charged and was the subject of criminal proceedings. But the evidence also shows that they did not know if Mr Pereira had in fact been arrested and charged and subject to proceedings, and they did not know whether and how any such proceedings had been resolved.
- 11.7. On the evidence, I am not satisfied that at the relevant time the Police Commissioner, through his officers, had a belief that there existed circumstances concerning Mr Pereira that met the definition in s 4 of the *AD Act* of an irrelevant criminal record. That is, I am not satisfied that at the relevant time the Police Commissioner, through his officers, had a belief that Mr Pereira had been arrested, interrogated or the subject of criminal proceedings, and was at the time the subject of charge, prosecution or conviction.

## **12. FINDING AND ORDER**

- 12.1. Because I am not satisfied that Mr Pereira had an irrelevant criminal record (as defined) at the relevant time, or that the Police Commissioner believed at the relevant time that he had an irrelevant criminal record, I have no jurisdiction to inquire into Mr Pereira's complaint, and I am unable to proceed to decide why Mr Pereira's employment was terminated and whether the termination was less favourable treatment.

12.2. Having heard the complaint, I find the prohibited conduct alleged in the complaint is not substantiated, and I make an order under s 88(4) dismissing the complaint.

### **13.POLICY OBSERVATION**

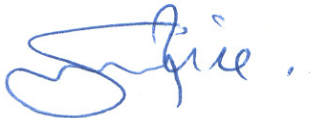
13.1. Mr Pereira has failed to meet the relatively narrow requirements of the *AD Act*. A broader approach could, for example, prohibit discrimination on the basis of an involvement in the criminal justice system which is not directly relevant to the situation in which the discrimination arises; that approach is currently limited to a finding of guilt in (b)(ix) of the definition. The approach of the *AD Act* is to prohibit discrimination only when involvement in the criminal justice system is of a particular type (arrest, interrogation or proceedings) and when a particular result has been reached (eg, acquittal, pardon etc).

13.2. As I noted in paragraph 6.2 above, the *AD Act* presumptively defines what is an ‘irrelevant’ involvement in the criminal justice system. As a result, a person whose involvement differs from the prescribed type or led to a different result, or who cannot prove precisely what the nature of the involvement was, has no opportunity to say that that involvement is an irrelevant consideration, and is not protected from discrimination. The present case suggests that an inability to prove precisely the nature of involvement may arise particularly where it occurred was in another jurisdiction.

### **14.COSTS**

14.1. I note the presumption in s 96(1) *AD Act* that each party shall pay their own costs. I note too the discussion in *Berice Anning v Batchelor Institute of Indigenous Tertiary Education (costs)* [2007] NTADComm 2, paragraphs 3-15, of the nature of the costs discretion in s 96(2), and the conclusion at paragraph 16 of that decision that ‘the costs discretion ... should only be exercised in exceptional circumstances, starting with the presumption that each party must

bear their own costs in relation to the complaint'. Nevertheless, because of the power that exists under s 96(2) I am obliged to give the Police Commissioner leave to apply for an order if he wishes. If the Police Commissioner does so he must do file and serve within 14 days of this decision; if Mr Pereira wishes, he may file and serve a reply within a further 14 days.



Simon Rice  
Hearing Commissioner