
**ANTI-DISCRIMINATION COMMISSION
NORTHERN TERRITORY**

LOCATIONS: YULARA AND ALICE SPRINGS

**TRIBUNAL: TONY FITZGERALD
ANTI-DISCRIMINATION COMMISSIONER**

DATES OF HEARING: 2 - 5 MAY 2005 YULARA

20 & 21 SEPTEMBER 2005 ALICE SPRINGS

HEARING NO: 2 of 2005

**BETWEEN: TRACEY HARBOUR
Complainant**

and

**CLIVE SCOLLAY
1st Respondent**

**NYANGATJATJARA COLLEGE
2nd Respondent**

**COUNSEL: Graham Harbord authorized pursuant to
section 95 of the Anti-Discrimination Act to
represent the Respondents**

**Travis Harbour authorized pursuant to
section 62 of the Anti-Discrimination Act to
represent the Complainant**

DATE OF DECISION: Written Decision given on 28 June 2006

REASONS FOR DECISION

1. BACKGROUND

- 1.1 By letter of appointment dated 7/11/2003 (exhibit R1) (“the letter of appointment”) the Complainant, a woman of indigenous descent, was appointed Principal of Nyangatjatjara College (the Second Respondent) by the Nyangatjatjara Aboriginal Corporation (“the corporation”).
- 1.2 The Complainant’s appointment was subject to the “satisfactory completion of a six month probation period” from the commencement of employment (cl.7, letter of appointment).
- 1.3 The Second Respondent is an educational institution comprising four campuses situated within the Pitjantjatjara lands in the south-west of the Northern Territory, established in 1997 to teach and train indigenous (known in south-west Northern Territory as “Anangu”) students. The Second Respondent is an unincorporated body managed by the corporation. The corporation is an incorporated public benevolent institution established to provide and manage education, development and employment programs for Pitjantjatjara people in the south-west of the NT.
- 1.4 The First Respondent, Clive Scollay, is the CEO of the corporation and his primary role is to inform the executive and carry out the wishes of the executive, in relation to all the activities, programs and enterprises of the corporation including the Second Respondent. This includes, among other things, management of the affairs of the corporation on a day to day basis.
- 1.5 The Complainant commenced employment with the Second Respondent on 19 January 2004 pursuant to terms and conditions agreed upon by the parties and contained in the letter of appointment and also pursuant to the Nyangatjatjara College Principal’s job specification (exhibit C3) (“the job specification”).
- 1.6 The executive of the corporation decided to terminate the Complainant’s employment at an executive meeting on 3 June 2004 (exhibit R29, minutes of meeting).
- 1.7 The Complainant’s appointment as principal of the Second Respondent was terminated before the expiration of her probation period by letter dated 4 June 2004 from the corporation to the Complainant (exhibit R25).
- 1.8 Prior to the said termination of her employment, that is by written complaint dated 19 May 2004, the Complainant alleged that the

Respondents unlawfully discriminated against her in the workplace on the basis of her sex and race.

- 1.9 The Complainant alleges that unlawful discrimination was committed by the First Respondent as Chief Executive Officer (CEO) of the Second Respondent, and by the Second Respondent because of its alleged vicarious liability for the acts of the First Respondent.
- 1.10 The Respondents deny discriminating against the Complainant, and maintain that any action taken by them was necessitated by the Complainant's poor work performance.
- 1.11 By way of remedy the Complainant seeks an apology, anti-discrimination training for staff of the corporation, and damages. The Respondents seek dismissal of the complaint.

2. STATUTORY PROVISIONS

The complaint involves sections 4, 19, 20, 28, 31, 62, 91, 105 of the NT *Anti-Discrimination Act 2004* ("the Act"). These sections are set out below.

"4. Interpretation

- (1) In this Act, unless the contrary intention appears –

...

"attribute" means an attribute referred to in section 19;

...

"Commissioner" means the person appointed under section 6 to be the Anti-Discrimination Commissioner and includes a person appointed under section 11 to act as the Commissioner, when so acting;

...

"Complainant" means the person making a complaint and includes a person joined as a Complainant under section 73;

"complaint" means a complaint made under Part 6;

...

"document" includes –

- (a) paper or other material on which there is writing;
- (b) paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
- (c) an article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;

"educational authority" means the body or person administering an educational institution;

"educational institution" means a school, college, university or other institution at which any form of training or instruction is provided and includes –

- (a) a training institution within the meaning of the *Training Guarantee (Administration) Act 1990* of the Commonwealth; and
- (b) a place at which training or instruction is provided by an employer;

...

"prohibited conduct" means –

- (a) discrimination, other than discrimination exempted from the application of this Act;
- (b) sexual harassment;
- (c) victimisation;
- (d) discriminatory advertising;
- (e) seeking unnecessary information;
- (f) failure to accommodate a special need; or
- (g) aiding a contravention of this Act;

"race" includes –

- (a) the nationality, ethnic or national origin, colour, descent or ancestry of a person; and
- (b) that a person is or has been an immigrant;

"Respondent", in relation to a complaint, means the person alleged in the complaint to have engaged in prohibited conduct and includes a person joined as a Respondent under section 73;

...

"work" includes work –

- (a) in a relationship of employment (including full-time, part-time, casual, permanent and temporary employment);
- (b) under a contract for services;
- (c) remunerated in whole or in part on a commission basis;
- (d) under a statutory appointment;
- (e) by a person with an impairment in a sheltered workshop; and

(f) under a guidance program, vocational training program or other occupational training or retraining program.

(2) For the purposes of this Act, a person may be discriminated against on the ground of race even if the person is, in addition to that race, of one or more other races.

...

19. Prohibition of discrimination

(1) Subject to subsection (2), a person shall not discriminate against another person on the ground of any of the following attributes:

- (a) race;
- (b) sex;

...

(2) It is not unlawful for a person to discriminate against another person on any of the attributes referred to in subsection (1) if an exemption under Part 4 or 5 applies.

20. Discrimination

(1) For the purposes of this Act, discrimination includes –

- (a) 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
- (b) harassment on the basis of an attribute, in an area of activity referred to in Part 4.

(2) Without limiting the generality of subsection (1), discrimination takes place if a person treats or proposes to treat another person who has or had, or is believed to have or had –

- (a) an attribute;
- (b) a characteristic imputed to appertain to an attribute; or
- (c) a characteristic imputed to appertain generally to persons with an attribute,

less favourably than a person who has not, or is believed not to have, such an attribute.

(3) For discrimination to take place, it is not necessary that –

- (a) the attribute is the sole or dominant ground for the less favourable treatment; or
- (b) the person who discriminates regards the treatment as less favourable.

(4) The motive of a person alleged to have discriminated against another person is, for the purposes of this Act, irrelevant.

28. Areas of activities

This Act applies to prohibited conduct in the areas of –

...

(b) work;

...

31. Discrimination in work area

(1) A person shall not discriminate –

(a) in deciding who should be offered work;

(b) in the terms and conditions of work that is offered;

(c) in failing or refusing to offer work;

(d) by failing or refusing to grant a person seeking work access to a guidance program, vocational training program or other occupational training or retraining program; or

(e) in developing the scope or range of a program referred to in paragraph (d).

(2) A person shall not discriminate –

(a) in any variation of the terms and conditions of work;

(b) in failing or refusing to grant, or limiting, access to opportunities for promotion, transfer, training or other benefit to a worker;

(c) in dismissing a worker; or

(d) by treating a worker less favourably in any way in connection with work.

...

62. Authorisation to act for Complainant or Respondent

(1) The Commissioner may authorise a person nominated by a Complainant or Respondent to act on behalf of the Complainant or Respondent in any proceedings under this Act in respect of the complaint, and the person may act accordingly.

(2) The Commissioner may authorise a person nominated by a Complainant or Respondent to accompany the Complainant or Respondent in any proceedings under this Act in respect of the complaint and the person may assist the Complainant or Respondent in the proceedings.

(3) The Commissioner may withdraw an authorisation under this section if the Commissioner considers it appropriate to do so.

91. Burden and standard of proof

- (1) Subject to this section, it is for the Complainant to prove, on the balance of probabilities, that the prohibited conduct alleged in the complaint is substantiated.
- (2) Where a Respondent wishes to rely on an exemption, it is for the Respondent to raise and prove, on the balance of probabilities, that the exemption applies.

105. Vicarious liability

- (1) If –
 - (a) a worker of a person does an act in connection with his or her work that is unlawful under this Act; or
 - (b) an agent of a person does an act in connection with his or her duties as an agent that is unlawful under this Act,this Act applies in relation to the person as if the person had also done the act.
- (2) Subsection (1) does not apply if the person shows that he or she took all reasonable steps to prevent the worker or agent from doing the act referred to in that subsection.
- (3) For the purposes of subsection (2) and without limiting the matters that may be taken into account in determining whether the person has taken all reasonable steps, the following matters are to be considered:
 - (a) the provision of anti-discrimination training by the person;
 - (b) the development and implementation of an equal employment opportunity management plan by the person;
 - (c) the publication of an anti-discrimination policy by the person;
 - (d) the financial circumstances of the person;
 - (e) the number of workers and agents of the person.
- (4) If, after the hearing of a complaint, the Commissioner finds that prohibited conduct alleged in the complaint is substantiated in respect of an act that a person is taken to have done under subsection (1), the Commissioner must, before making an order that an amount be paid to the Complainant for loss or damage caused by the prohibited conduct –
 - (a) consider the extent of steps taken by the person to prevent the prohibited conduct; and

- (b) take those steps into consideration in determining the proportion of the amount to be paid to the Complainant by the person.

3. THE HEARING

- 3.1 The complaint was heard at Yulara NT between 2 May and 5 May 2005 inclusive and in Alice Springs on 20 and 21 September 2005.
- 3.2 The Complainant was represented by her husband Travis Harbour who was authorised to act on her behalf pursuant to section 62 of the Act. The Respondents were represented by Graham Harbord a legal practitioner from Adelaide, who was authorised to act on their behalf pursuant to section 95 of the Act.. During the hearing both parties called witnesses who were subjected to cross examination, and both parties tendered documentary evidence by consent.

4. THE COMPLAINT

- 4.1 A brief outline of the Complainant's case is contained in paragraphs 1.8, 1.9 and 1.11 above.
- 4.2 The Complainant alleges that because of her sex and race she was treated less favourably by the Respondents than a white male would have been treated in the same circumstances. The Complainant provides the previous white male principal of the Second Respondent as her comparator.
- 4.3 In support of her complaint the Complainant alleges that the Respondents inter alia expressed negative and/or insulting opinions about Aboriginal women, believed that Aboriginal women were poor managers (in an organisational sense), did not trust or have confidence in her, believed that the Complainant was unpopular with local Aboriginal (Anangu) people because of her mixed descent, attempted to undermine her position and status, (sic) set her up to fail, and failed to recognise or acknowledge her qualifications as an educator.
- 4.4 Pursuant to ss 19 and 31 of the Act it is unlawful for an employer or any other person to discriminate against another person on the ground of the latter's sex and/or race in employment.
- 4.5 The complaint is primarily about the behaviour of the First Respondent, Clive Scollay, in his capacity as CEO of the corporation. The corporation "controls" the Second Respondent. However if the Complainant successfully proves her case then the Second Respondent is vicariously liable pursuant to section 105 of the Act unless it is able to establish that it took all reasonable steps to prevent the alleged unlawful discrimination.

- 4.6 At the commencement of proceedings submissions were heard from the parties in relation to four matters raised by the Respondents.

The first concerned the grounds of complaint. In her original application the Complainant alleged age discrimination – a ground which was not raised further in subsequent discussion or documentation. The Respondents sought an assurance from the Complainant that she would not proceed with the age-related complaint. Such an assurance was forthcoming.

Secondly, the Respondents sought further assurances from the Complainant that she did not seek redress for any act taken separately by the corporation and/or the Second Respondent, and that the Complainant's claim against the Second Respondent was restricted to one in vicarious liability. Those assurances were also forthcoming.

Thirdly, the Respondents sought to restrict the ambit of the complaint to those issues raised by the Complainant in her initial complaint of June 2004. Such a restriction would have excluded issues raised in the Complainant's "Summary of Complaint" of July 2004, and the Complainant's "Points of Claim" filed February 2005. After hearing submissions from the parties I was satisfied both that the Respondents suffered no disadvantage from the retention of all the material, and that in any event the material filed subsequent to the initial June 2004 complaint was in effect illustrative of the initial complaint rather than additional to it. Accordingly, all the material was allowed into evidence.

Fourthly, the Respondents contended that the Complainant was precluded from claiming damages at hearing for termination of employment because no claim was made during the interlocutory proceedings that the termination of employment was discriminatory or unlawful or compensable in damages. After some discussion the Complainant conceded that she did not dispute the authority of the "executive council" of the corporation to terminate her employment during her 6-month probation period and conceded that she sought no remedy from the corporation or the Second Respondent for her actual termination. Accordingly I ruled that the actual termination of employment was not part of the Complainant's unlawful discrimination claim and that even though the termination was effected by the corporation and not the CEO, the Complainant may lead evidence to support her contention that the CEO influenced the corporation in a discriminatory manner to effect the termination.

5. THE EVIDENCE

5.1 The Complainant

- 5.1.1 Evidence was given by the Complainant, Tracey Harbour, of her Mt Isa origins, her family ties to Central Australia through her grandmother, her extensive qualifications in the fields of teaching and education, her previous employment, and her desire to contribute through education to Anangu communities.

Ms Harbour then gave extensive evidence (transcript 5.1.2 to 5.1.13) about her treatment by the First Respondent Clive Scollay ("Scollay") which she described as racist and sexist because it was based on Scollay's negative views about Aboriginal women.

- 5.1.2 Ms Harbour first spoke to Scollay in November 2003 when the latter rang her to offer the position of principal of the Second Respondent, Nyangatjatjara College ("the College"). She said Scollay commented then that she not resign from her federal government position but take leave without pay "because you may not last longer than six months". Scollay rang again later that month to arrange a meeting in Melbourne to sign the contract of employment. At this time he said she should not have resigned from her current position and he advised her not to bring all her possessions to Yulara because she "may not like it there".
- 5.1.3 Ms Harbour gave evidence that on her arrival in Yulara in January 2004 Scollay told her that there was "a perception here that Aboriginal women can't manage". She believed Scollay meant a perception within the corporation (transcript 3/5/05, 16.11). She gave further evidence that Scollay then shocked her by saying that Anangu do not like "yella people". She told Scollay at the time that she would prove "them" (the doubters, my brackets) wrong because there are many Aboriginal women who are successfully managing organisations.
- 5.1.4 Ms Harbour referred to exhibit C1, an email from Scollay dated 18/4/04 affirming her engagement of a principal of the Imanpa Campus but questioning the membership of the selection panel because, although Ms Harbour was a member, the panel did not involve a qualified member of the teaching staff. Ms Harbour found it offensive that Scollay, who had no qualifications as an educator, determined that she was unqualified to sit on the panel when she was chosen on merit for the position of principal and met the selection criteria.

- 5.1.5 The Complainant was shown the Nyangatjatjara College Enterprise Bargaining Agreement (exhibit C4). She said that the Nyangatjatjara Corporation was not a party to the agreement and that the agreement, in particular clause 16.1 and appendix 2 thereof, states clearly that she is the CEO of the college and a representative on the college board. She further stated (transcript 3/5/05, 22.29) that her understanding was that the agreement (especially the sections referred to above) dictated that she, not Scollay, had decision making authority on any issues affecting the college and that the powers vested in her as principal meant that she had no supervisor other than the executive of the corporation.
- 5.1.6 The Complainant was also shown her job specification (exhibit C3). Her evidence was that the document does not contemplate involvement by the CEO of the corporation (ie Scollay) in college decision making, and that the document does not vest power in Scollay as her manager, mentor or supervisor.
- 5.1.7 Ms Harbour stated that Scollay interfered with her role as principal by denying her the right to seek independent legal advice about college staffing issues and that as principal she should have been able to obtain legal advice without permission from Scollay. For example (transcript 3/5/05, 27) when there was an allegation of bullying and harassment by one staff member against another, when Ms Harbour “dismissed” a member of staff for alleged ill-treatment of students (transcript 3/5/05, 78-79) and when the executive wished to deal with a member of college non-teaching staff charged with criminal offences (infra para 5.1.17), she should have been able to obtain independent legal advice.
- 5.1.8 Ms Harbour confirmed that an email received from Scollay on behalf of the board on 19 May 2004 (exhibit C9) directed her to seek authorisation from him concerning all responsibilities within her duty statement. Prior to that date all emailed instructions came direct from Scollay and she did not consider herself bound by them. Also prior to that date she received no advice that the board wished her to take instructions from the CEO (transcript 3/5/05, 38.30). She also gave evidence that the board had ample opportunity to confirm instructions in exhibit C9 verbally, but the board did not approach her. She believed the directions contained in exhibit C9 to be in breach of the Enterprise Bargaining Agreement (exhibit C4) and her contract of employment (exhibit R1).
- 5.1.9 Ms Harbour complained in evidence that she was not personally notified about community elections for a new executive of the

corporation, or about results of the elections, nor was she invited to meet the newly elected executive. She said she learned of the election results when they were posted on a college notice board 10 days after the event in or about late April/early May 2004.

- 5.1.10 The Complainant deposed that the election of office bearers for the new executive took place at the corporation AGM on 11 May 2004, but she did not learn of that election result until 3 June because she only attended the AGM for long enough to present her principal's report. She claimed in evidence that she was unfairly given only one day's email notice by Scollay of the AGM. She said this was an attempt by Scollay to prevent her providing an adequate report to the meeting so that she could be portrayed as an incompetent Aboriginal woman.
- 5.1.11 In her evidence Ms Harbour gave further examples of her unfavourable treatment by Scollay, namely:
- 5.1.11.1 she was not invited to executive meetings especially a meeting between the executive and federal government officials about college funding
 - 5.1.11.2 failing to provide her with minutes of executive meetings – despite several requests
 - 5.1.11.3 failing (as distinct from refusing) to provide monthly financial statements for the college – even though the previous (white male) principal was given said statements
 - 5.1.11.4 failing to provide a schedule of, or information about, capital works intended for the college
 - 5.1.11.5 deliberately misleading the executive by advising it that federal funding was in jeopardy if it didn't take action against her
 - 5.1.11.6 meeting college staff without her permission – even though (according to Ms Harbour) Scollay had no responsibility for college matters, and even though Ms Harbour requested that he refer staff back to her if they approach him at first instance. The Complainant believed this behaviour by Scollay to be in breach of the Enterprise Bargaining Agreement (exhibit C4).

According to the Complainant, Scollay's interference in college business took place because of his belief that Aboriginal women

can't manage, and his failure to include her or provide her with relevant written materials was a deliberate attempt to bring about her failure as college principal.

- 5.1.12 Ms Harbour found Scollay's remarks about Anangu people not trusting 'yella fellas' offensive. In her view her ancestry was irrelevant to her ability to perform the job. Also in her view the remarks further exposed Scollay's belief that Aboriginal women, particularly the Complainant, could not manage.
- 5.1.13 Ms Harbour complained that Scollay undermined her authority in May 2004 by reinstating a staff member after she had, in what the Respondents allege was a breach of the EBA grievance procedure, suspended him for misconduct without affording him an opportunity to be heard. The misconduct involved corporal punishment of students. She also complained that Scollay further undermined her authority by refusing to allow her to seek independent legal advice about the whole affair. (transcript 3/3/05 at 77, and exhibits C7 and C8 [emails] refer.)
- 5.1.14 Under cross examination Ms Harbour said that she did not take Scollay's suggestion in November 2003 not to resign her full-time job as "advice" but as a "statement". She agreed that in her letter of appointment (exhibit R1) her employer was the corporation, her long term employment was subject to the satisfactory completion of a six month probation period, and that Clive Scollay was the signatory of the "offer and acceptance" section of the said letter as CEO of the corporation.
- 5.1.15 She was shown her job specification (exhibit C3) and she agreed that the executive of the corporation was her employer, that the college was not a separate entity to the corporation, and that pursuant to clause 2 of her job specification (exhibit C3) she was responsible to the executive. She did not agree that the words "through the executive officer" in clause 2 of her job specification meant that she was responsible to, answerable to or supervised by chief executive officer Scollay. She could not say which particular members of the executive were her supervisors. She said that prior to receiving the emailed direction from the executive on 19 May (exhibit C9, supra paragraph 5.1.8) all her directions came from Scollay, and the only reason she accepted them was because her job was under threat (transcript 3/5/05, 93.3). She said that her interpretation of exhibit C9 was that henceforth she was to accept direction from the board but that prior to C9 she "didn't have to" (transcript 3/5/05, 92.37). Prior to C9 she didn't complain to the board about having to suffer directions from Scollay because she thought she could deal with his interference herself.

- 5.1.16 The Complainant confirmed that at her meeting with Scollay on 15 January 2004 (supra paragraph 5.1.3) she received information from Scollay about some of the problems that he thought she might face in a cultural context because of Anangu suspicion about outsiders. She also confirmed that she did not complain to the executive about any of the information conveyed at this time by Scollay (transcript 3/5/05, 108) but simply said to Scollay at the time that she had better prove wrong Anangu perceptions that Aboriginal women can't manage.
- 5.1.17 Ms Harbour stated that in February 2004 she was asked by Scollay to sign and send a "please explain" letter on college letterhead to a non-teaching staff member who had been charged with criminal offences. According to Scollay the letter had been drafted by the corporation's lawyers, but Ms Harbour was not provided with proof of this. She did not agree with the content of the letter and had no proof of its source, so without telling Scollay she sought separate advice from the Chamber of Commerce.
- 5.1.18 The Complainant agreed that she'd met at least weekly with Scollay during January, February, March and April. At those meetings she received information rather than advice from Scollay about staffing issues. Also at some of those meetings Scollay told her he expressed to staff his support for her. She emailed the executive (exhibit R2) complaining about two members of staff who were allegedly attempting to undermine her, and seeking a meeting with the executive.
- 5.1.19 Ms Harbour also agreed that she sought independent advice about her sacking of a teacher in contravention of an instruction from Scollay not to do so, that she failed to advise the CEO despite his requests about events during an Anangu staff walkout on 14 May 2004 and about what transpired at an Anangu staff meeting at the college on the same day, that three teachers offered to resign in the week commencing 14 May, that there were complaints at about that time from the Teachers Union about Ms Harbour's treatment of a staff member and complaints from a different staff member about mistreatment at the hands of two other staff members.
- 5.1.20 She confirmed receiving the email from the executive described supra paragraph 5.1.8 and another email from the executive on 19 May (exhibit R19) asking her to refrain from activities designed to establish a separate college council. She also confirmed attending a community meeting at the college on 19 May, one of the agenda items of which was separation of the

college from the corporation, despite an executive directive not to attend. She admitted failing to respond to emails from Scollay on 14 May and 28 May concerning payment to absentee Anangu staff and staffing levels. She denied circulating a petition to students and staff advocating a separate college.

5.1.21 The Complainant also confirmed receiving a letter from the Independent Education Union dated 17 May (exhibit R23) proposing steps to restore the college “to normal and productive educational operations”, although she disagreed that the college was operating at below normal level.

5.1.22 Ms Harbour conceded that she was invited to executive meetings “from time to time” when the executive discussed college business, but she was never given formal written notification and sometimes only received 10 to 20 minutes notice – which in her view was not good enough.

5.1.23 During re-examination Ms Harbour confirmed that she failed to respond to many emails sent by Scollay, especially after the walk-out by staff on 19 May 2004, but said she didn’t have time because of pressing college business; the college was in crisis; six or seven staff members were on sick leave; she had to re-organise staff; she had to arrange care for students who remained on campus; and she had to ensure students and staff on communities, especially Imampa, were cared for. She was not ignoring Scollay by her failure to respond.

5.1.24 When Ms Harbour met Scollay she did not seek his approval but accessed him in his role as CEO so he could pass things on to the executive. He was a “communication channel”.

5.2 The Respondent

5.2.1 The First Respondent, Clive Scollay, gave evidence of his role as CEO of the corporation, which incorporates the college. The college is not a separate legal entity.

5.2.2 Mr Scollay gave evidence of his broad management experience and his long involvement with indigenous people in the NT and South Australia. He described the challenges facing the CEO of the corporation as arising from cross-cultural issues (eg indigenous students and families, and non-indigenous teachers); the expectations of parents; the distance between the four college campuses; college funding being based on attendance in the early part of the year which clashes with cultural “business”; health and poverty issues; and substance abuse.

- 5.2.3 Mr Scollay considered that the CEO is responsible for all staff, and for all of the various enterprises within the corporation – including the college. The CEO is obliged to keep the executive informed, provide advice to the executive and carry out the wishes of the executive, attend meetings of the executive, and supervise the college principal. According to Mr Scollay the latter is accountable to the executive through the CEO in accordance with the college principal's job specification (exhibit C3) clause 2 of which states that the principal is responsible to the board (that is, the executive) through the executive officer (that is, the CEO).

Mr Scollay's evidence was that, even though clause 2 of C3 also states that the principal is responsible for all staff employed by the college, the staff become accountable to him as CEO because the principal is accountable to him.

- 5.2.4 Mr Scollay referred to his own job specification and read into the evidence sections thereof which in his view clearly and specifically demonstrated that the CEO of the corporation is responsible for management and administration of the corporation and all its programmes, and for the recruitment, supervision, direction and training of all the corporation's employees.
- 5.2.5 The corporation's recruitment of the Complainant was described by the First Respondent in his evidence. The CEO supported her being interviewed for the position – even though he had reservations about her lack of secondary school teaching and administrative experience (transcript 19/9/05, 58.09).

Mr Scollay admitted that after the first telephone interview of the Complainant in September 2003 he commented to other interview panel members that he was aware of instances in NT organisations where conflict between indigenous and non-indigenous staff had arisen after the appointment of an indigenous manager. He was conscious of the possibility that some staff members may not support an indigenous principal and wanted to ensure that the college provided appropriate support to Ms Harbour if she were successful.

At the end of the interview process Tracey Harbour was Mr Scollay's preferred choice and he expressed that view to the interview panel and the executive.

When the Complainant was appointed Mr Scollay expected she would be a "successful principal and a good role model for

Anangu – even though she lacked teaching or administrative experience in a secondary college”.

The position of principal was offered to Ms Harbour by Mr Scollay by telephone in November 2003. At that time Scollay advised that accommodation was scarce in Yulara and he predicted that the Complainant and her family would be allocated with only a small furnished flat. In the circumstances Scollay suggested that the Complainant store her furniture elsewhere because Yulara had no storage facilities, and that the Complainant not bring her dogs because the Yulara Resort had a “no dogs” policy.

Mr Scollay also suggested to the Complainant that she retain her current position and benefits with the Commonwealth Public Service by taking leave without pay for as long as she could. According to Scollay this is common practice and has been so for college employees before and after the Complainant (eg the current college principal).

When the Complainant and Mr Scollay met in Melbourne in November 2003 to confirm the appointment of the former they each signed the letter of appointment (Exhibit R1) and they discussed Mr Scollay’s role as supervisor of the principal and his role in supervising her 6 month probation period.

On 15 January 2004, shortly after the Complainant arrived in Central Australia to take up her appointment, the Complainant met the First Respondent and during the meeting the latter admits he uttered words to the effect of:

“there is a perception here that Aboriginal women can’t manage and anything they manage will fall into a heap”.

Mr Scollay said the perception was not his but had been recounted to him by indigenous women attendees at a 12 month management course for indigenous leaders which he co-ordinated on behalf of the Institute of Aboriginal Development in Alice Springs in the early 1990s. Scollay’s intention in making the comment was to provide the Complainant with as much local knowledge as possible, to support her in her role, and to see her succeed.

Scollay denied using the term “yella fellas”, but admitted saying at the same 15 January meeting that “apercarchers” (local word for half caste), or people of mixed descent, were regarded with suspicion by Anangu (local indigenous people). Again this was

not Scollay's own perception – he was trying to acquaint the Complainant with the difficult local cross-cultural environment.

- 5.2.6 In his evidence the First Respondent explained his emailed comment to the Complainant upon the appointment of the Imampa Campus Principal (infra paragraph 5.1.4) on 18 April 2004 that “peers should be involved in the selection process”. Mr Scollay said the comment was not intended to adversely reflect upon Ms Harbour's qualifications, or her indigenous descent, or her gender. The comment reflected college practice at the time that the selection panel include a currently practising teacher from staff. The Complainant did not fall within that category.
- 5.2.7 According to Mr Scollay, he refused the Complainant permission to seek independent legal advice because it had always been the practice for the CEO to be the point of contact with the corporation's lawyers. For the same reason he refused to provide the Complainant with the name and address of the corporation's lawyers. Mr Scollay adopted this position on three occasions – in February 2004 when the college “senior management team” which included the Complainant resolved that a “please explain” letter drafted by the corporation's lawyers and signed by the Complainant issue to a non-teaching staff member charged with multiple criminal offences (supra paragraph 5.1.17, and transcript 19/9/05, 64). At the time Scollay was “taken-a-back” to learn that the Complainant had, without notice to himself or the management team, obtained alternative advice and substituted a different letter to that drafted by corporation lawyers; in May 2004 when he prevailed upon the Complainant to reinstate a teaching staff member who had been suspended for misconduct by the Complainant, and then refused permission for the Complainant to obtain independent legal advice (transcript 3/5/05, 77). On that occasion the Complainant, according to Scollay, suspended the teacher in breach of the college grievance procedure by failing to hear the teacher's version of events and; in May 2004 when there was an allegation of bullying by one staff member against another (transcript 3/5/05, 27-29).
- 5.2.8 Rather than meeting with staff without the Complainant's knowledge or approval Mr Scollay's evidence was that when he was approached directly by college staff over college staffing issues he informed them that the Complainant had his unqualified support, directed them to deal with the Complainant at first instance, told them he would inform the Complainant about the conversation, and then informed the Complainant.

- 5.2.9 Mr Scollay deposed that the notice of the corporation AGM was posted to all the communities and circulated via pigeonholes and noticeboards throughout the college and the corporation. In response to the Complainant's allegation that he failed to inform her of the result of the corporation elections, Scollay said that the poll was declared verbally on 11 May 04 at the AGM which was attended by the Complainant, and that poll results were announced to communities, corporation members, and the college community in the manner described earlier in this paragraph.
- 5.2.10 Mr Scollay denied influencing or manipulating the executive in its deliberations over whether to continue the Complainant's employment beyond her probation period. Scollay said that the decision to terminate was unanimous and that he had no vote. Also Scollay denied misleading the executive by advising it that Federal funding was in jeopardy unless the Complainant's employment was terminated (infra paragraph 5.2.15, 5.3.1, 5.3.4, 5.3.9, 5.3.10).
- 5.2.11 In answer to the Complainant's charge that Scollay excluded her from executive meetings, Scollay said she was not an elected member of the executive but attended executive meetings where issues of relevance to the college were discussed.
Mr Scollay agreed that she was not invited to meet Commonwealth Department of Education, Science and Training (DEST) officials on 3 June 2004 – but that was because the officials requested a meeting with the executive. Also, Scollay recalled that the Complainant accompanied him to Canberra for a meeting with DEST on one occasion.
- 5.2.12 Mr Scollay said in evidence that the Complainant was notified of, and invited to, the portion of executive meetings that applied to her. As for the failure to provide the Complainant with minutes of executive meetings, Mr Scollay said this practice was not directed at the Complainant in particular but it was a corporation decision for reasons of confidentiality that no staff members received minutes. On occasion excerpts of the minutes were distributed.
- 5.2.13 Mr Scollay said he was unaware that monthly college financial statements were not automatically distributed to the Complainant by "the accountants in Alice Springs". According to Scollay that was always the practice and he presumed it was continuing. He had never received a complaint from Ms Harbour about non-receipt of the statements, and as the

accounts were on target he had no reason to raise the issue with Ms Harbour.

5.2.14 Mr Scollay denied a failure to provide a schedule of capital works to the Complainant because no such schedule existed. Scollay said he regularly reported verbally to Ms Harbour during their (sixteen) meetings about his frustrations with the lack of progress in dealings with DEST over the only college capital works programme in contemplation – student accommodation.

5.2.15 In his evidence Mr Scollay raised a number of concerns held by himself and the executive about Ms Harbour's management style – all of which were set out in a letter from CEO Scollay to the Complainant dated 1 June 2004 (exhibit R24). The concerns arise mainly from the Complainant's behaviour consistent with her belief that she was not answerable to the CEO, but also extend to alleged communication failures and acting against the best interests of the corporation. Examples of executive and CEO concerns include:

5.2.15.1 "Walk-out" by Anangu college staff and students on 14 May 2004.

The CEO gave evidence that the Complainant was aware of the walk-out prior to its occurrence but failed to alert him or the executive and made no attempt to prevent the walk-out. Furthermore the Complainant failed to respond to a series of emails between 14 and 18 May 2004 from the CEO seeking reports about a staff meeting held prior to the walk-out, remaining staff and student levels, non-Anangu staff resignations and intra-staff harassment allegations.

5.2.15.2 Public meeting at the college 19 May 2004.

The CEO's evidence was that the public meeting (comprising staff, community members and students) was scheduled to discuss separation of the staff from the college. Also the CEO deposed that at a special meeting of the corporation executive (see minutes exhibit R28) attended by the Complainant on 18 May 2004, she was advised that the executive opposed the separation of the college at that time. The Complainant was also instructed by the executive to terminate the services of a consultant retained to facilitate the separation of college from corporation, to take steps to prevent the public meeting the next day, and (despite the Complainant's minuted protestations

to the executive at the meeting) to report directly to the CEO acting on behalf of the executive concerning all her responsibilities.

The CEO's evidence was that, early on the morning of 19 May 2004, he emailed the Complainant to remind her of the corporation's opposition to a separate college, and of the executive's instruction that she was to report to him, and to seek an assurance that she did not support the community meeting.

The CEO gave further evidence that he attended the public meeting and witnessed an address to the meeting by Ms Harbour during which she urged the creation of a separate college and complained that "no other principal in the country had to answer to a CEO". (Transcript 19/9/05, 88).

5.2.15.3 College Staff and Student Instability.

The CEO stated in evidence that during her 6 month tenure Ms Harbour presided over unprecedented levels of staff resignations, sick leave, workers compensation claims and staff/student unrest.

5.2.15.4 Exceeding Terms of Appointment (as outlined in Principal's Job Specification [exhibit C3]).

The CEO's evidence was that Ms Harbour engaged consultants without notifying, or seeking permission from, the executive through the CEO; sought independent legal advice without permission, and; participated in a public meeting of the college community against executive wishes.

5.2.15.5 Communication failure.

The CEO deposed to Ms Harbour's failure to communicate with the CEO and executive, and her failure to respond to numerous emails from the CEO seeking information and explanation.

5.2.15.6 Funding implications of Ms Harbour's management style.

According to Mr Scollay senior officials of DEST requested a meeting with the executive because they

were concerned at reported unrest within the college. The meeting took place on 3 June 2004 in the absence of Ms Harbour and in the presence of Scollay. Scollay's clear evidence (transcript 19/9/05 at 100) is that the executive was advised by the senior DEST official that the decision on capital works funding for the college was with the Minister and funding prospects would be enhanced if stability was restored to the college.

- 5.2.16 Mr Scollay gave further evidence that the executive met on 3 June 2004, after the meeting described immediately above, to consider whether the Complainant had satisfactorily completed her six month probation period. Scollay's evidence (transcript 19/9/05 at 106) was that the executive considered the issues raised in exhibit R24 (paragraph 5.2.15), allowed the Complainant the opportunity to give her version of the issues raised therein, and unanimously decided (in the absence of the Complainant) to terminate the Complainant's appointment.
- 5.2.17 Mr Scollay testified that concerns expressed by himself and the executive about Ms Harbour's performance and conduct were not grounded in her race or sex, but in her performance and ability as a manager.
- 5.2.18 Under cross examination Mr Scollay confirmed that in his view he had the power as delegate of the executive to direct the college principal, and the principal had the power – in consultation with the CEO – to hire and fire college staff members.

He agreed that the college EBA (exhibit C4) referred to a board of the college, rather than the executive, at the top of the Complainant's chain of command, and that no such Board existed during the Complainant's tenure. He said that during her tenure the executive acted as the college board and that the Complainant understood this.

Scollay also gave the following evidence during cross examination:

- 5.2.18.1 upon her appointment Ms Harbour was not provided by her employer with a raft of procedural information including contact details of executive members, college misconduct and grievance procedures, protocols for dealing with external stakeholders, and staff recruitment protocols;

- 5.2.18.2 minutes of executive meetings were incomplete and the status of all those present was not specified. Specifically the minutes of the executive meeting of 30 March 2004 (exhibit R27) were a summary, inaccurate in some respects, not distributed, did not obey “minute” conventions - so did not include page numbers, a record of people coming and going, passages in Pitjantjatara, or a faithful record of resolutions passed;
- 5.2.18.3 the Complainant was only given one day’s notice to prepare her annual report to the AGM on 11 May 2004;
- 5.2.18.4 the Complainant constantly raised the separation of the college from the corporation as an issue during her many meetings with Scollay, and that he (Scollay) continually advised her that it would be unwise to follow that course;
- 5.2.18.5 there was considerable support for the Complainant from the school community – namely individual leaders, students, parents – as evidenced by several petitions circulated and signed at the public meeting on 19 May (supra paragraph 5.2.15) by school community members;
- 5.2.18.6 the college staff resignation rate was lower during the Complainant’s term of office;
- 5.2.18.7 he (Scollay) did not manipulate the executive against the Complainant. He presented Exhibit R24 (supra para 5.2.15) to the executive, and the DEST officials, not he, told the executive about the potential impact on funding of college instability;
- 5.2.18.8 Scollay denied judging the Complainant’s performance on the basis she was indigenous, but solely on her competence as a manager.

5.3 Other Witnesses

- 5.3.1 Howard Smith, an executive member called by the Respondent, said that the DEST officials who met with the executive in his presence on 3 June suggested that funding for the college would not be forthcoming until the “trouble” at the college was overcome. The officials told the executive to “sort out properly” according to Smith (transcript 4/5/05, 71.09, 71.18).

- 5.3.2 Mary Burns, who taught at the college for 3.5 months of the claimant's term, was called by the Complainant and attested to the Complainant's attributes as college principal.
- 5.3.3 Dina Knowles, who was a member of teaching staff during the Complainant's term of office, gave a glowing account of the Complainant's attributes as a principal. During that time she was herself embroiled in various conflicts with four other members of staff. She confirmed the existence of intra staff conflicts prior to the Complainant's arrival and thought that CEO Scollay was more visible at the college during the Complainant's term of office than during the term of the previous (non-indigenous male) principal.
- 5.3.4 Graeme Calma, another executive member called by the Respondent, recalled as a member of the Complainant's interview panel that she was advised at interview of her obligation to report through the CEO to the executive. Calma, whilst confirming concerns at executive level about the Complainant's management style, also said that she inherited "a mess" (transcript 5/5/05, 16) at the college and that it was difficult to terminate her employment because she was supported at community level. Calma was satisfied that the DEST officials did not say they would withhold college funding, but he ventured that Scollay might have said they would.
- 5.3.5 Yami Lester, a former board member called by the Respondent, said that the executive was against a separation of the college from the corporation.
- 5.3.6 Michael Ellis, a teaching staff member called by the Respondent, tendered his resignation during Ms Harbour's tenure. He opposed the Complainant's attempts to "aboriginalise the college at any cost". His negative views about the Complainant were compounded by her failure to include him in her strategic planning.
- 5.3.7 Ian White, a former college principal (prior to the Complainant) called by the Complainant, gave evidence that he enjoyed a good relationship with CEO Scollay whilst principal. White kept Scollay fully informed and the latter did not interfere. He said staff problems existed before Ms Harbour's arrival, and that if he was required to accord staff "due process" he sought independent advice from the Chamber of Commerce with the encouragement of the CEO. White's evidence was that Ms Harbour was popular and that he, whilst employed as "principal" of the Imampa campus, supported her. During his term as overall college principal White did not receive copies of all

executive meeting minutes, but he did receive financial statements (because he approached the accountants himself and made the necessary arrangements).

- 5.3.8 Jorge Gonzalez, who taught at the college during the Complainant's term of office, was called by the Complainant. Gonzalez gave evidence that the corporation and the CEO involved themselves in college business to a greater extent during Ms Harbour's tenure than during the five years preceding her tenure.
- 5.3.9 Rodney Baird, Regional Manager DEST called by the Complainant, gave evidence that he and his superior Mark Wridgeway met with the executive on 3 June 2004 during a time of unrest at the college. He said the visit and meeting was a DEST initiative in response to information about staff unrest at the college (transcript 19/9/05, 7.45). He said that DEST was not concerned with staffing matters, and that at no stage did he or Wridgeway tell the executive or anyone that unrest at the college would jeopardise college funding. College funding, said Baird, was not a matter he or Wridgeway could comment upon because it was not their decision. Baird said that Howard Smith was mistaken when he gave evidence about being told by DEST officials at the 3 June meeting that DEST would "close out" on the money if "trouble" at the college continued.
- 5.3.10 Mark Wridgeway, assistant state manager DEST called by the Complainant, also denied saying that college unrest would jeopardise college funding. He did admit that the corporation's application for \$4.5 million for college funding was discussed at the 3 June meeting. He said his only function was to report to DEST on the state of affairs at the college, and that he had no authority to withdraw or withhold funding.

6 FINDINGS

- 6.1 Tracey Harbour's complaint is that she was discriminated against directly by the First Respondent and vicariously by the Second Respondent in her employment on the basis of her sex and race contrary to ss. 19 and 20 of the Act, and in an area of activity provided by section 28 of the Act.
- 6.2 The onus of proof of the complaint lies on the Complainant who must prove her complaint on the balance of probabilities.
- 6.3 In considering all of the events described by the parties in evidence, and the behaviour attributed to each other by the parties, I have endeavoured to bear in mind two important factors firstly: the demanding cross cultural desert environment in which the workplace is situated, and secondly,

whether the Complainant was treated less favourably than a person who was not aboriginal and/or who was not female (eg. a non-aboriginal male principal similarly circumstanced).

- 6.4 After having listened to, and closely considered, all the evidence I find that the Complainant has not been able to prove on the balance of probabilities that she was treated less favourably than a person who was not aboriginal or who was not a female would have been in the same or similar circumstances. That is, the Respondents' treatment of the Complainant resulted from their belief that she was not adequately managing the demands and requirements of the position of college principal and had nothing to do with her race or sex.
- 6.5 The determination of the complaint turns upon the lengthy evidence of the Complainant and the First Respondent. Evidence given by the witnesses called by each party added little to that provided by the parties themselves, and was of little assistance in the final determination of the matter.
- 6.6 The First Respondent admitted that most of the events giving rise to the Complainant's allegations of unfair treatment took place, but provided an explanation in defence of his actions. In relation to every allegation of unfair treatment raised by the Complainant to illustrate racial or sexual bias, I prefer and accept the explanation given by the First Respondent, as follows:
- 6.6.1 Ms Harbour's allegation commenced after Scollay's initial statements about the perception in Central Australia that Aboriginal women can't manage, that she should not resign from her Commonwealth Government employment, that she should keep the majority of her possessions in storage, and that people of mixed descent were regarded with suspicion by Anangu (paras 5.1.2, 5.1.3). I accept Mr Scollay's evidence (5.2.5) that his comments were made in the genuine belief that there may be opposition to Ms Harbour's appointment, and as a warning to a person with no central Australian experience about the difficult cross cultural environment she had entered. I accept that Scollay's remarks about "management" and "descent" were not his personal opinion. I accept that Scollay supported Ms Harbour's appointment from the outset (see paras 5.2.5, 5.2.8 exh. R27 minutes of the executive meeting 30.3.04) and accordingly I am unable to accept the construction of his remarks advanced by the Complainant. I believe it was Scollay's duty to warn Ms Harbour about the perils of the job. He may have attracted criticism had he not done so.
- 6.6.2 A fundamental platform of the Complainant's case was her insistence that as college principal she was directly and only

supervised by the executive of the corporation, rather than CEO Scollay, and not answerable in any way or liable to report to CEO Scollay in relation to “college business” (paras 5.1.5, 5.1.6). Mr Scollay and the executive contended otherwise inclusive (paras 5.2.3 to 5.2.5).

A finding for the Complainant on this “chain-of-command” issue would overcome the strong argument by the Respondents that a major shortcoming of the Complainant as manager was her failure to report to the CEO. In other words, if the Complainant can establish that she is not required to report to the CEO, then failure to report cannot count against her.

Nevertheless I have no hesitation in finding that, whilst the Complainant is ultimately answerable to the executive, she must account to the latter by reporting to the CEO.

The Complainant contends that the Nyangatjatjara College EBA (Exh C4) and her own job specification (Exh C3) provide documentary support for her independence from the CEO. The Complainant argues that Exh C4 does not include the corporation as a party and therefore the college principal is independent from it. Leaving aside the fact that the EBA expired on 27 January 2004 (that is eight days after commencement of the Complainant’s term of appointment) the problem with the Complainant’s argument is that the EBA is an agreement between the corporation and a trade union principally designed to promote the care and well being of college staff in the context of the aims and philosophy of the college; the EBA does not purport to describe the relative positions of the CEO and the college principal in the corporation chain-of-command. As such the EBA does not support the Complainant’s argument. Also the Complainant’s evidence (para 5.1.6) that her job specification does not provide for CEO involvement in college affairs is contradicted by clause 2 thereof which under the heading of “Reporting/Making Relationships” refers to the principal’s responsibility to the Board [executive] “through the Executive Officer” [CEO].

The requirement that the Complainant report to the CEO, and the Complainant’s awareness of this requirement, is supported by other evidence, namely:

6.6.2.1 Graeme Calma (transcript 5/5/05, 3.6) and Scollay(transcript 19/9/05, 60) respectively gave evidence that at the Complainant’s personal job interview in Yulara in October 2003 and at a meeting between the Complainant and the CEO in Melbourne

in January 2004 the Complainant was told about the requirement to report to the CEO.

6.6.2.2 Scollay, as representative of the executive, and the Complainant signed the Complainant's letter of appointment (Exh R1), or contract of employment, in November 2003.

6.6.2.3 Ian White, the Complainant's predecessor as college principal, and a man with whom on the Complainant's evidence she conferred both prior to and during her term of appointment, reported to the CEO whilst serving as principal.

6.6.2.4 If the Complainant was not required to report to the CEO, she was unable to nominate which member of the executive to whom she should report.

6.6.2.5 The Complainant was unconvincing under cross examination (paras 5.1.14, 5.1.15) about her relationship to the CEO. In my view she was not convinced that she need not report to the CEO. Her protestations about lack of independence did not alter the requirement to report to him.

In fact in my view the Complainant was generally an unconvincing and unimpressive witness in chief and under cross examination. She was guarded in her answers, responsible for very long delays in answering even the most simple of questions, and appeared to contrive her answers to suit her claim. Mr Scollay in the other hand made prompt and spontaneous responses to questions and was a much more impressive and credible witness.

6.6.2.6 During the Complainant's tenure she was "on probation". Scollay's evidence is that he was her "supervisor" during probation and he so informed her at their Melbourne meeting in January 2004. The Complainant denied that she had been so informed, and denied that Scollay was her supervisor, yet was unable to nominate a supervisor for probation purposes.

6.6.2.7 At an "extraordinary meeting" of the executive on 18 May 2004, (the minutes of which are exhibit R28), called by the Complainant to clarify her relationship with the CEO, the plaintiff was unequivocally

instructed by the executive of the requirement that she report directly to the CEO concerning all her responsibilities as college principal.

- 6.6.3 The CEO's direction to the Complainant that future teaching staff recruitment panels include teaching staff "peers" (Exh C1; paras 5.1.4, 5.2.6) was reasonable, reflected long standing college practice, did not seek to exclude the Complainant from the recruitment process, supported the decision of the recruitment panel (even though in the CEO's opinion the process was flawed), was not designed to demean the Complainant or diminish her qualifications, and did not subject the Complainant to unfair treatment.
- 6.6.4 The Complainant believed the CEO's refusal to permit her to obtain independent legal advice, and his refusal to provide the name and address of the corporation's lawyers, was unfair (supra paras 5.1.7, and 5.2.7). The "legal advice" policy applied to every corporation employee. In Scollay's view it is unreasonable to expect the corporation to fund independent legal advice for disgruntled employees and reasonable in a management sense for the corporation to refuse requests from its various divisions for separate and potentially conflicting legal advice.

I accept Scollay's position and I am not persuaded that the Complainant was treated unfairly in this instance. It was open to her to discuss her misgivings about legal advice policy with the CEO. It is clear on the evidence that she chose not to do so. In a least one instance she obtained independent advice, and acted upon that advice despite direction from the CEO to refrain from doing so (supra para 5.2.7).

- 6.6.5 Ms Harbour claimed several instances of unfavourable treatment by Mr Scollay were calculated to undermine her, or procure her failure as college principal. After hearing Scollay's responses I am unable to accept that he had sinister motives, but some instances in my view clearly indicate administrative deficiencies by Scollay and the executive, which affected not only the Complainant but many college staff members, and which reflect poorly on the corporation.

Ms Harbour's grievances were:

- 6.6.5.1 No personal notification of the occurrence or result of executive elections. According to Scollay the information was disseminated by notices posted at various locations, or placed in pigeon holes. In my

view the college community, and especially the principal, is deserving of more courtesy.

- 6.6.5.2 No formal notification of, or invitation to, executive meetings; no formal agenda ever produced for executive meetings. According to Scollay “accepted practice” dictated that the principal was only invited to attend when items of interest to the college were discussed. The Complainant agreed that she was invited from time to time, but informally and at short notice.
- 6.6.5.3 Failure to provide minutes of meetings. According to Scollay this omission was not reserved for the principal alone – minutes were never circulated to anyone in the college community for, in my view dubious, confidentiality reasons.
- 6.6.5.4 Failure to automatically provide monthly financial statements. Scollay assumed statements were supplied by the external college accountants, but his failure to ensure supply reveals poor administrative process and poor communication between the CEO and the Complainant (supra 5.2.13).
- 6.6.5.5 Failure to provide a schedule of capital works. I accept Scollay’s evidence that no such schedule existed, and that he reported verbally to Ms Harbour on delays in government funding (para 5.2.14).
- 6.6.5.6 Manipulated the executive so as to ensure it terminated the Complainant’s employment. According to the Complainant the most glaring manipulation concerned the supply of federal government funding (through DEST) to the college. The Complainant alleged that Scollay told the executive at its meeting on 3 June 2004 to decide the Complainant’s fate that federal funding would be imperilled unless unrest at the college was quelled. The evidence on this issue is unclear because Scollay denied the allegation and claimed that doubts over funding were raised by DEST officials Baird and Wridgeway during their meeting with the executive (attended by Scollay) earlier on 3 June. Baird and Wridgeway strenuously denied that college funding was in jeopardy or that they raised the issue (supra 5.3.9, 5.3.10), whilst executive member Howard Smith (5.3.1) confirmed Scollay’s recollection of events and executive member Graeme Calma

(5.3.4) supported the Complainant's version. Wherever the truth lies the evidence is clear that DEST officials not Scollay requested a meeting with the executive. The fact that the meeting took place during a period of considerable college unrest, and whilst an application for funding was pending, is likely of itself to have influenced the executive - no matter what (if anything) Scollay said.

It is also likely that the executive was influenced in its unanimous decision to terminate the Complainant's employment by the many "management issues" described in paras 5.2.15 and 5.2.16, and the manner in which the Complainant personally responded to those issues during her attendance at the executive meeting on 3 June 2004.

In the event I am not persuaded, that Mr Scollay manipulated the executive against the Complainant. After perusing the eight-page extract from the Minutes of executive meeting of 3 June 2004 (Exh R29) I am satisfied that the executive properly discharged its duty to carefully consider all of the evidence (summarised at 5.2.15 and 5.2.16) before arriving at its own unanimous decision to terminate Ms Harbour's appointment.

6.6.5.7 The CEO's denial of Ms Harbour's allegation that he contributed to college disharmony by meeting college staff in her absence is contained in para 5.2.8. I accept Mr Scollay's evidence on this point. He could not prevent staff approaching him, but when approached I accept that his dealings with staff appropriately acknowledged the Complainant's relationship to college staff.

- 6.7 If the Complainant had been able to prove that she was subjected to unlawful discrimination then I would have proceeded to consider whether or not the Second Respondent was vicariously liable. However, in view of my finding (supra para 6.4) that the Complainant was not subjected to prohibited conduct I am not required to consider the latter question.
- 6.8 However the concerns held by Mr Scollay and the executive about Ms Harbour's management style (supra para 5.2.15) are worthy of consideration because, according to the minutes of the 3 June executive meeting they, and not the Complainant's race or sex, prompted the executive to dismiss the Complainant.

I do not accept that the Complainant should be held solely responsible for staff unrest, and allegedly unprecedented levels of staff resignations, sick leave and workers compensation claims. The evidence is clear that the Complainant (in the words of executive member Calma) “inherited a mess” and the likelihood is that college principals with far more experience than the Complainant would have experienced difficulty resolving long standing staffing conflicts (and would have been sorely tested by many other staff conflicts) in the difficult Nyangatjatjara College remote cross cultural environment.

Nonetheless, it is clear on the evidence that the CEO and the executive were justified in having misgivings about the Complainant’s management style. For example:

- 6.8.1 The Complainant, despite abundant evidence to the contrary, refused to acknowledge her obligation to report to the CEO.

The Complainant had ample opportunity to clarify the nature of her formal relationship with the CEO but failed to do so until approximately four months of her tenure had expired. When she finally sought clarification at the executive meeting of 18 May 2004, the minutes of that meeting show that she was directed in unequivocal terms about her obligation to report to the CEO and that she continued to argue the point after receiving the direction.

- 6.8.2 The Complainant repeatedly failed to report to the CEO or the executive about the impact on college activity of the walk-out staged by Anangu staff and students on 14 May 2004(5.1.19, 5.2.15)

- 6.8.3 The Complainant not only attended a meeting of the “college community” at the college on 19 May 2004 against the express wishes of the executive and the CEO, but (also against the express wishes of the CEO and executive) failed to take steps to prevent the meeting, and then during a personal address to the meeting urged the creation of a separate college and complained about her obligation to report to the CEO. (5.1.20, 5.2.15).

Under cross examination Scollay stated that the Complainant was advised many times during the many meetings of the pair that the climate for college separation was not favourable (5.2.18).

- 6.8.4 The Complainant continually failed to provide management reports to CEO or executive, despite requests to do so, about a range of staffing issues (transcript 19/9/05 pp 91-3; exh R24 – list of unanswered emails up until 28 May 2004).

6.8.5 The Complainant engaged several consultants without notifying the CEO, seeking his permission, or revealing any consultancy terms of reference.

6.8.6 The Complainant sought independent legal advice without the permission, and against the wishes of the CEO without explanation (5.1.19, 5.2.7).

6.9 In view of my foregoing finding (supra para 6.4) that the Complainant was not treated less favourably than a person who was not aboriginal or female would have been in the same or similar circumstances, and therefore was not discriminated against in contravention of the Act, I find for the Respondent and the complaint is dismissed.

6.10 I make no order for costs.

7. CONCLUDING REMARKS

The evidence is clear that the unanimous decision of the executive to terminate Ms Harbour's employment was firmly grounded in her managerial and administrative shortcomings as college principal rather than in any other consideration such as her race or sex.

The evidence is also clear that, with the exception of some staff members, Ms Harbour was popular with students, staff and parents, and a hard working principal who was genuine and determined in her desire to progress the college through various reforms.

Unfortunately Ms Harbour's popularity within the school community appears to have been attained at the expense of a satisfactory working relationship with her employer.

Ms Harbour felt constrained by the lack of independence of the college from the corporation and by her obligation to report to the CEO. Perhaps Ms Harbour's frustration at her inability to change the organisational structure of the corporation soured her relationship with the CEO, or perhaps she was ahead of her time (definitely well ahead of the executive) in advocating her reform agenda. Certainly Mr Scollay's administrative oversights and the confident, strong-willed demeanour of both Ms Harbour and Mr Scollay also contributed to the clash between the two.

The end result however was that Ms Harbour's failure or inability to communicate with the CEO, the executive and some staff, and her failure to adequately discharge the management side of her duties, developed into a major "college management problem" which the executive was unwilling to tolerate beyond Ms Harbour's probation period.

TONY FITZGERALD
ANTI-DISCRIMINATION COMMISSIONER
28 June 2006