

NORTHERN TERRITORY ANTI-DISCRIMINATION COMMISSION

LOCATION: DARWIN

TRIBUNAL: SIMON RICE
HEARING COMMISSIONER

DATE OF HEARING: ON THE PAPERS

HEARING NO: C20100027-02

COMPLAINANTS: PEREIRA

RESPONDENT: COMMISSIONER OF POLICE

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

DATE OF DECISION: Written Decision given on
26 /03/12

REASONS FOR DECISION

1. DECISION:

- 1.1. For the reasons set out below, I direct that the material ordered to be produced, and delivered by the respondent to the Registry subject to objection, be made available to the complainant, on conditions.

2. FACTUAL BACKGROUND

- 2.1. Relevantly to this decision, on 7 February 2012 I made these directions:

1. Direct that on or before 3 February 2012 both parties will seek from the Registry the issuance of an order for the production of documents.
2. If either party wishes to object to the order that is made they will lodge their objection on or before Friday 24 February 2012.
3. If such an objection is filed and served then the other party will on or before 12 March 2012 file and serve a response to that objection.

- 2.2. On 3 February 2012 I made this order for production, directed to the respondent:

regarding Trainee Constable Colin Jenkinson and Trainee Constable Kyle Ferricks, all documents relating to

- (a) the instigation, conduct and conclusion of investigations in 2008, by or on behalf of the Commissioner, into allegations of dishonest conduct, and
- (b) any decision by or on behalf of the Commissioner as to what action to take in light of those investigations.

- 2.3. On 17 February the respondent delivered documents to the Registry, sealed and subject to objection. On 24 February the respondent wrote to the Registry, setting out reasons for the objection.

- 2.4. The Registry has received no communication from the complainant on this issue.

2.5. I have not inspected the documents ordered to be produced ('the documents'). Their nature is apparent from their description. The respondent's objection is not in terms that requires me to distinguish among the documents.

3. RELEVANCE OF THE MATERIALS SOUGHT

3.1. The respondent says that the documents are not relevant.

3.2. I understand the law to be as follows:

1. 'There must be a legitimate forensic purpose relating to the principal action and a reasonable chance that the documents sought by the subpoena will further that purpose ... it is inappropriate to use a subpoena as a substitute for discovery' (*Hudson & Anor v Branir & Anor* [2005] NTCA 5 per Martin CJ (with whom Riley J agreed) at [25]).
2. Even when there is a legitimate forensic purpose, 'it is also necessary to consider whether the subpoena is merely a fishing exercise in the hope of obtaining documents relevant to that purpose' (*Hudson* per Martin CJ at [38]).
3. A 'fishing expedition' is an exercise where a party is 'endeavouring not to obtain evidence to support their case, but to discover whether they had a case at all, or to discover the nature of the case of the defendant', (*Hudson* per Martin CJ at [39] citing Adams J in *Roads and Traffic Authority v Conolly*, in turn citing Brownie A-JA in *Commissioner of Police v Tuxford*).
4. It is not a fishing expedition 'if it appears to be "on the cards" that the documents sought will be relevant to an issue raised by the accused' (*Hudson* per Martin (BR) CJ at [38] citing Gibbs CJ in *Alister v The Queen* [1983] HCA 45, (1984) 154 CLR 404).
5. Alternatively to the test of 'on the cards', it is enough that 'there is a reasonable chance that the documents in question' will meet the specified forensic purpose (*Hudson* per Martin CJ at [39] citing Adams J in *Roads and Traffic Authority v Conolly*).
6. As for the different terms used to express the test, Martin CJ in *Hudson* at [41]:

[t]here may be little difference between the "on the cards" test and a test expressed as "a reasonable chance that the documents in question will serve the purpose so specified". Excessive refinement should be avoided. The Court must apply a practical test which is sound in principle and fair to the parties. In my view, either formulation satisfies those criteria.

7. In *The Queen v Law & Ors* [2008] NTCCA 4 Martin CJ reviewed judicial discussion of the test, focussing on what degree of 'possibility' attaches to the whether the material will meet the specified forensic purpose. Relying on Cummins J in *Director of Public Prosecutions (VIC) v Selway* [2007] VSC 244; (2007) 172 A Crim R 359 and Bell J in *Ragg v Magistrates' Court of Victoria* [2008] VSC 1, Martin CJ (at [76]-[84]) decided that the standard is that of 'reasonable possibility', having regard to the importance of the issue to which it is said the subpoena relates (broadly interpreted), to the importance of the document in question in the determination of that issue, and to the circumstances as a whole, while being careful not to deprive a party of documents which could be of assistance.
- 3.3. The respondent rightly says that this Commission cannot conduct an unfair dismissal proceeding, and cannot conduct a 'broad ranging inquiry into the NT Police practices concerning disciplinary decisions made of prospective employees'. The documents are not sought for those purposes, and those are not the issues to which the complainant says the documents relate.
- 3.4. The respondent rightly says that this Commission should not permit a fishing expedition because the complainant 'hopes the documents may be relevant'. The respondent says that the complainant has not shown that the documents are relevant to any issue. I disagree. At the directions hearing the complainant's legal representative explained that the forensic purpose to which there is a reasonable chance that the documents relate is establishing a comparator so as to meet the test for discrimination. Further, the description of the documents is consistent with there being a reasonable chance that they will meet that purpose.
- 3.5. Whether the documents actually meet that purpose is a matter to be decided if and when they are relied on as evidence by the complainant in the hearing. The respondent's argument, made at this stage, that the documents do not in fact meet the forensic purpose, can be made at the stage – if it occurs – that they are tendered.

3.6. In my view, the documents are properly sought under an order for production and should be produced, unless for reasons of harm to the public interest they should not be produced.

4. PUBLIC INTEREST IMMUNITY

4.1. The respondent says that there is a public interest in not providing access to the documents.

4.2. I understand the law to be that the claim of public interest immunity, which relies on the public harm from disclosure, must be weighed against the competing public interest of the proper administration of justice, which ensures access to relevant and otherwise admissible evidence of significance to the issues in the trial (*Alcoota & Anor v CLC & Ors* [2001] NTSC 30 at [30]-[31] per Martin CJ, citing *The Commonwealth v Northern Land Council* [1993] HCA 24; (1992-1993) 176 CLR 604 at 616, and Spigelman CJ in *Egan v Chadwick* [1999] NSWCA 176; (1999) 46 NSWLR 563 at 573.

4.3. The proper administration of justice in this matter should ensure that the complainant has access to relevant and otherwise admissible evidence of significance to the issues in the trial. The complainant says that the documents will help him to establish his claim if they provide evidence of a comparator for purposes of meeting a test for discrimination under the *Anti-Discrimination Act*; denying access to the documents the documents would therefore frustrate the administration of justice.

4.4. Against this, the respondent says that there will be public harm from disclosure because there is an over-riding 'need to safeguard the proper functioning of the executive arm of government and of the public service'. Specifically, the respondent says that the documents will reveal 'past matters which are not relevant to their current roles', with an attendant risk that 'disclosure of those past events may be misused or [used] to undermine the integrity and competence of the officers'. Further, the respondent says that the documents relate to a confidential process 'designed to maintain integrity in the police

service' and that the officers to whom the documents relate 'would not be seen' by the officers to whom they relate. Finally, the respondent says that the production of the documents would undermine the confidential nature of the respondent's disciplinary process.

- 4.5. These are serious considerations, and I do not consider them lightly. I must weigh them against real possibility that the documents will help the complainant establish his claim of unlawful discrimination. It may be that the complainant's case will fail for want of access to the documents. At the same time, steps can be taken to guard against the concerns raised by the respondent. As has been pointed out in similar proceedings (*JA v State of New South Wales (New South Wales Police) (No 2)* [2004] NSWADT 76 at [14]):

Access to documents produced in answer to a summons are given to a specified party or parties. There are legal limits on the on the use of material obtained under summons. (*Esso Australia Resources Ltd v Plowman* [1995] HCA 19; (1995) 183 CLR 10 at 33, *Home Office v Harman* [1983] 1 AC 280.) A party who is granted access to documents is not entitled to use those documents other than for purposes connected with the proceedings. If a proper case is made out, the privacy of individuals can be protected by the Tribunal making an order as to the confidentiality of exhibits.

- 4.6. On balance, I am of the view that the frustration of the administration of justice in this case, if the documents are not made available, outweighs any public harm that might be done if the documents are made available under certain conditions.
- 4.7. The respondent has proposed conditions under which the documents, if the they are produced, should be used. I have taken those proposed conditions into account in making the orders below.

5. DECISION AND ORDERS

- 5.1. I dismiss the application by the respondent for the non-production of documents delivered to the Registry subject to objection. The following orders do not extend to the use of the documents at the hearing. It may be that the complainant will not in fact propose to use documents at the hearing; if he does, and they are admissible,

then appropriate conditions can be considered at that time.
Accordingly, I order that:

1. the documents be produced to the complainant subject to the following conditions
 - i. the documents shall be produced to, and inspected by, only the complainant's legal representatives, to enable them to assess whether the documents are in fact likely to help the complainant establish his claim of unlawful discrimination
 - ii. the complainant's legal representatives will exercise the order for access in (1) above at the premises of the Commission and, subject to (3) below, may make personal notes but may not make copies of any of the documents
 - iii. when exercising the order for access in accordance with (2) above, the complainant's legal representatives will not make any notes of personal identifying details of the officers to whom the documents relate other than to record their name and rank
 - iv. the complainant's legal representatives will not convey to any other person, including the complainant:
 - a. the names or personal identifying details of any person referred to in the documents, or
 - b. any information about the conduct of the officers which was the subject of the disciplinary procedures to which the documents relate
 - v. nothing in these conditions is intended to prevent the complainant's legal representatives from advising the complainant on whether the documents are likely to help him establish his claim of unlawful discrimination, or from obtaining relevant instructions from him.
2. the parties have leave to approach the Registry for further orders.



Simon Rice
Hearing Commissioner
26 March 2012