Northern Territory Anti-Discrimination Commission

NORTHERN TERRITORY ANTI-DISCRIMINATION COMMISSION

LOCATION:	**DARWIN**
TRIBUNAL:	**TERRY LISSON** **HEARING COMMISSIONER**
DATE OF HEARING:	**13-14 DECEMBER 2006**
HEARING NO:	**1 of 2006**
COMPLAINANT:	**BERICE ANNING**
RESPONDENT:	**BATCHELOR INSTITUTE OF INDIGENOUS TERTIARY EDUCATION**
COUNSEL ASSISTING:	**PENNY TURNER**
COUNSEL:	**BERICE ANNING in person**
	WADE ROPER Special Counsel **ALIX CAMERON Clayton Utz**
DATE OF DECISION:	**Written Decision given on 12 January 2007**

REASONS FOR DECISION

1. BACKGROUND:

1.1. The Complainant, Ms Berice Anning, is an indigenous woman with a long work history as an educator at the tertiary level.

1.2. The Respondent, Batchelor Institute of Indigenous Tertiary Education [BIITE], is a tertiary educational institution established under the *Batchelor Institute of Indigenous Tertiary Education Act*. The affairs of BIITE are governed by a Council whose membership and roles are defined by sections 10(3) and 11(3) of the BIITE Act in such a way that the Council is predominantly comprised of Aboriginal and Torres Straight Islanders considered to have a commitment to the development of vocational education and training opportunities for indigenous persons.

1.3. The Complainant was employed by BIITE on a three year executive contract of employment as Assistant Academic Director at the Batchelor campus commencing on 10 November 2003.

1.4. Shortly after the first anniversary of the Complainant's employment, in early December 2004, a decision was made by the Council to contract an independent Business Strategy Consultant, Mr Des Semple, to review the executive management structure at BIITE and provide advice and recommendations regarding ways of improving the functioning of the agency.

1.5. On 15 March 2005 Mr Semple produced a report titled "*Organisational Review of the Batchelor Institute of Indigenous Tertiary Education: Executive Management Team Roles and Responsibilities"* ['the Semple Report'].

1.6. The Semple Report proposed a new structure with re-designed management processes and recommended that all existing executive positions be vacated and the new restructured positions be advertised and filled with applicants competing in an open merit-based selection process.

1.7. As a result of this 'spill and fill' process the Complainant lost her existing position and was required to re-apply if she wished to compete for a position. She declined to do so and therefore her contract of employment was terminated on 27 September 2005.

1.8. The Complainant alleges that this treatment of her by the Respondent was unfavourable treatment based on the attribute of her race and was therefore unlawful discrimination in the area of work.

1.9. The complaint involves consideration of sections 19, 20, 28, 31, 57, 77, 88, 90, 91, 95, and 96 of the *Northern Territory Anti-Discrimination Act 1992* ['the Act']. These sections are reproduced at the end of this decision for reference.

2. THE HEARING

2.1. The complaint was heard at Darwin on 13 and 14 December 2006.

2.2. The Complainant was self represented. In light of this, the Anti-Discrimination Commissioner appointed Ms Penny Turner as Counsel Assisting, to ensure that the Complainant was not disadvantaged and that her case was fully presented in order to properly inform the Commissioner. Ms Turner devoted a large amount of time and effort to the matter and her assistance to all parties and the Commission was very valuable and greatly appreciated.

2.3. The Respondent was represented by Wade Roper, Special Counsel, assisted by Alix Cameron of Clayton Utz. Leave had been previously granted pursuant to section 95 of the Act for the Respondent to be legally represented.

2.4. A very large amount of written material was put before the Commission. This included the 629 page 'Section 77' report which contained all documents provided by the parties in the course of the investigation of the complaint.

2.5. For the purpose of the hearing, the Complainant filed and served a great deal of material which included three statutory declarations from witnesses in support of her complaint. These witnesses were available for cross examination, although the Respondent did not seek to do so. The Complainant also gave oral evidence.

2.6. The Respondent had previously filed and served four affidavits, and acknowledged that the weight to be given to these affidavits must be less because the deponents of those affidavits were not made available for cross examination.

2.7. All of this material was carefully considered by me prior to the commencement of the Hearing and in making this decision.

2.8. In making my findings I have borne in mind that pursuant to section 90(1)(a) of the Act, the Commissioner "*is not bound by the rules of evidence and … may obtain information on any matter as the Commissioner considers appropriate*".

3. THE COMPLAINT

3.1. A brief outline of the background to the complaint is contained in section 1 above.

3.2. In essence, the treatment that the Complainant alleges is discriminatory is that, after her existing position was "disestablished" as a result of

restructuring the BIITE executive management, she was not redeployed to another position in the new executive structure and was advised that if she wished to be retained in employment she would have to make an application and compete for a position on merit.

3.3. The Complainant alleges that this treatment of her was racial discrimination because she was treated less favourably by the Respondent than a non-indigenous person would have been treated in the same circumstances. In this regard she points to the fact that another, non-indigenous member of the senior academic staff, the Registrar Holly Marjerrison, was treated more favourably in that she was directly redeployed to a position within the new academic executive structure and did not have to go through the same process which was required of Ms Anning.

3.4. The Complainant raised four main issues in support of her complaint of race discrimination:

i. That she was 'targeted' by Council through the Semple Report;
ii. That another non-indigenous member of the Executive was treated more favourably
iii. That the positive discrimination (special measure) policy at BIITE was discontinued which resulted in her position being de-identified and in Council forming a view that indigenous persons couldn't perform competently
iv. That racial slurs and derogatory comments from staff were racially discriminatory, and led up to the Semple Report and its implementation which were therefore also discriminatory.

3.5. The Respondent adamantly denies that any of its actions towards the Complainant were based on her race and maintains that the reasons for the different treatment of Ms Marjerrison (which is not denied) were based on other factors in no way connected with race.

3.6. Pursuant to section 91(1) of the Act the onus is on the Complainant to prove her complaint on the balance of probabilities.

4. THE SEMPLE REPORT:

4.1. The material in the Section 77 Report establishes that in late November 2004 the Council formed the view that there were problems, described in the materials as "dysfunction", at the Institute. In his affidavit filed in this matter, the Deputy Chairperson of the Council at that time, Mr Des Rogers, conveniently summarises the circumstances as follows:

> *7. …...The problems were brought to the Council's attention by the staff in the campus in Alice Springs.*

8. *It was in or about late November and early December 2004 that Council realized that there were problems requiring its attention.*
9. *The Council had a meeting with a number of people in Alice Springs and had a telephone hook up with the majority of the Institute staff from the Institute campuses. My impression was that the Institute staff expressed to Council grave concerns with the dysfunction at the executive management level of the Institute, namely, with the executive staff…*
16. *Council had major concerns for the Institute. There was no unity, there was a lot of in-fighting and there had been a number of staff who had actually resigned and left.*

4.2. These concerns led to the decision by the Council to appoint an independent analyst ("a solutions broker") to review the situation. As previously discussed in the background section of this decision, the person chosen to be the analyst, was Mr Des Semple, who produced the Semple Report in March 2005.

4.3. Mr Semple had been recommended for the position by the Northern Territory Commissioner for Public Employment, and, in paragraph 15 of his affidavit, Mr Rogers further explains the Council's reasons for selecting Mr Semple:

> 15. *One of the reasons Council decided on Des Semple was because of his experience, but also because he was from interstate so he had no understanding of, or no affiliation with, people within the Institute itself. Council thought that was a far more professional and better approach than the Council, or the Executive Council dealing with the management problems, or somebody with knowledge of the Institute.*

4.4. The Terms of Reference which were given to the analyst are set out in Paragraph 2 of the Semple Report:

> *1. …investigate and determine the basis of the Batchelor Institute senior management dysfunction and recommend appropriate action to the Council Executive including the detail of the process to be followed if mediation or remediation fails.*
> *2. ….implement a conflict resolution process between Executive staff*
> *3. …Conduct a review of Executive contracts.*
> *4. Development of individual performance plans for Executive staff, which will include a review process.*
> *5. Make recommendations on an organisational structure at the Executive level.*

4.5. In paragraph 7 of his affidavit filed in the matter, the analyst, Mr Semple swore that:

> *7. I was given terms of reference by the Council and my consultation proceeded on the basis of the terms of reference. The terms of reference were clear. I was not instructed to work towards an outcome that had been pre-determined in any way.*

4.6. Mr Semple proceeded with his review and prepared his finding for the Council in the form of the Semple Report which was approved and accepted by the Council on 18 March 2005. The Report summarised fourteen specific recommendations and proposals in Chapter 7 'Conclusion and Council Decisions'. These recommendations and proposals included a new executive management structure for the Institute, the advertising of the new executive management positions, and the negotiation of redundancy payments "*within designated limits*" for the existing Executive members.

4.7. In December 2004 when the Council commissioned the Semple Report there were five members of the Executive: the Director Veronica Arbon; the Deputy Director Trevor Cook; the General Manager Barry Hinton; the Registrar Holly Marjerrison; the Assistant Academic Director; and the Complainant Berice Anning. Three of these five, Ms Arbon, Mr Cook and Ms Anning, are indigenous, the other two, Mr Hinton and Ms Marjerrison, are not indigenous.

4.8. The Semple review and report are not an issue of dispute between the parties. During the course of the Hearing Ms Anning acknowledged several times that the Semple Report itself and the recommendations made by Mr Semple did not discriminate.

4.9. However, Ms Anning claimed in her evidence at the Hearing and in her written material before the Commission that the Semple Report may have been commissioned specifically to "target" her. For example, in paragraph 13 and paragraph 4 of her Submissions, she says:

> *13. The Review of the Executive from December 2004 to March 2005* ***was a ploy*** *to remove the Director CEO and then myself as the call to terminate the Director and Assistant Director (Academic) had failed on 2-3 December*
>
> 4. *In order to understand the basis of my complaint, it is necessary to view the history leading up to the Institute's restructure and the basis for which I was targeted. I refer the Commissioner to a document I provided during the hearing, a copy of which was also provided to the Respondent entitled "Opening Statement for NT ADC Hearing Set Down for 13-14 December 2006".*

4.10. The reference to 'targeting' which Ms Anning refers to in her Opening Statement appears in paragraph 3 which states:

> 3. *The fact is, it is fact that I was targeted and undermined during the process of implementing my core academic tasks within my role and responsibilities, based on my identity/employment as an Indigenous female executive member, my name slandered, called racist names behind my back but in the presence of other Indigenous staff, ridiculed for my appearance and abused with foul language.*

4.11. Although there is no specific reference in any of the material contained in the section 77 report or otherwise before me to indicate that Ms Anning was directly targeted by the Semple review, she appeared to be arguing that I should infer this, relying on the history leading to the Semple Review and its implementation which she illustrated by the flow chart she relied upon and explained to me in detail at the hearing.

4.12. I cannot make the inference which Ms Anning seeks because the evidence does not support Ms Anning's view that she was the specific target of the Semple review, which clearly applied to all members of the executive. Also it is important to note that even if there was evidence to suggest she was the specific target of the review, there still is no evidence to support the allegation that the reason she was the target was because of her race.

4.13. I consider it unlikely, in fact, inconceivable, that the Council would have gone through the process of appointing an independent solutions broker, approving a restructuring of the whole Executive, vacating all of the existing Executive positions, and advertising to refill the new positions, just to remove Ms Anning because of her aboriginal race.

5.9. DIFFERENCE IN TREATMENT BETWEEN THE COMPLAINANT AND HOLLY MARJERRISON:

5.1. Ms Anning was notified on March 25 2005 by a letter from Rose Kunoth-Monks, the Chairperson of the Council, of the outcome of the Executive structure review and the consequent "spill and fill" restructuring of the executive that had been approved based on the recommendations of the Semple Report.

5.2. The letter explained that if members of the former Executive wished to remain employed with BIITE they would have to apply for positions in the new structure. In this regard the letter suggested to Ms Anning that the position that most resembled her old one was the Head of Academic and Research.

5.3. The letter also made it clear that if Ms Anning chose not to apply for a position or was unsuccessful in such an application, that her contract would be "*terminated under Paragraph 56(1) of the contract, which enables your*

contract to be terminated by giving notice in writing." The letter went on to explain the basis for the payout Ms Anning might expect to receive if her contract was ultimately terminated.

5.4. Ms Anning agreed at the Hearing that the recommendations of the Semple Report itself were not discriminatory and that, at the time it was tabled, the recommendations made in the report applied to and equally affected all of the five members of the existing executive management at BIITE.

5.5. However, for various reasons due to resignations or terminations of the other executive staff, by the beginning of June 2005 only Holly Marjerrison and the Complainant remained employed by BIITE.

5.6. In her Submission the Complainant argued that at that point, by reason of being the only former member of the Executive left, Ms Marjerrison became "*the comparator for the purpose of [my] complaint*."

5.7. Ms Anning's use of the term 'the comparator' appears to be in reference to the definition of discrimination contained in section 20 (2) of the Act which provides that:

> (2) *Without limiting the generality of the definition of discrimination set out in section 20(1), discrimination takes place if a person with an attribute is treated less favourably than a person who has not, or is believed not to have, such an attribute*."

5.8. It is not in dispute that Ms Marjerrison, who was redeployed to a position in the re-structured Executive without having to go through the selection process, was treated more favourably by BIITE than Ms Anning.

5.9. Ms Anning's argument, as put forward in her evidence and submissions, is that unlawful discrimination is established merely by demonstrating that she is indigenous and was treated less favourably than Ms Marjerrison, who is non-indigenous. She states this argument in paragraph 16 and 17 of her Submission as follows:

> *16. Holly Marjerrison is not of aboriginal descent. I am. No evidence or information is before the Commission from the Respondent as to why I was not afforded the same consideration and opportunity as Ms Marjerrison for redeployment. The Commission has information as to why more favourable treatment has been given to Ms Marjerrison, however, the issue before the Commission, which the Respondent was required to counter was why I was treated less favourably.*
>
> *17. As my employer, and one of the two executives (Ms Marjerrison being one of them) remaining under the former executive management structure, the Respondent*

was obliged to give me a similar level of consideration that was accorded to Ms Marjerrison. No information was provided by the Respondent as to why a similar submission was not made to Council about me and my circumstances and how they would be affected by the restructure. The Commissioner must therefore draw an adverse inference, namely that one of the reasons I was treated less favourably than Holly Marjerrison was because of my race.

5.10. With all due respect to Ms Anning, (who did an admirable job of representing herself in this matter), this argument is flawed. The question that is before me is not "*why [Ms Anning] was treated less favourably*." It is: 'Was the less favourable treatment of Ms Anning, or, alternatively, the more favourable treatment of Ms Marjerrison, based on race?'

5.11. The onus of establishing that the treatment was based on race rests on the Complainant, not on the Respondent. It is not sufficient proof of racial discrimination for Ms Anning to show that there was less favourable treatment and then simply point to the fact that she is indigenous and Ms Marjerrison is not.

5.12. The Complainant, not the Respondent, must show how her less favourable treatment was on the **basis** of her race. Despite this being made clear to Ms Anning by both me and by Counsel Assisting, and having affording her every opportunity to lead evidence to demonstrate this, she was unable to do so.

5.13. The Respondent freely admits that Ms Marjerrison was treated more favourably than the Complainant, but has provided a plausible explanation for this difference which is that it was more cost effective and administratively sensible to retain a long term employee who was shortly due to retire in any event.

5.14. The rationale behind the Council's decision regarding the treatment of Ms Marjerrison is contained in various sources within the Section 77 Report, and is summarised in paragraph 23 of Des Roger's affidavit:

> *23. Holly had indicated that she did not intend to apply for a position in the new restructure and that she would retire. She did not seem to want to go through that process of reapplying for a role within the Institute. A submission was made to Council by the interim Director, John Ingram, in relation to the impact of the restructure on Holly. The Council specifically decided that because of a variety of reasons including:*
>
> *(a) Holly's long association with the organisation*
> *(b) Because she had so much of the Institute's intellectual property/corporate knowledge; and*

(c) *There would be a substantial cost saving because Holly would not be made redundant and she would leave soon anyway*

5.15. His explanation is reflected in the specific wording of the Resolution passed by Council at their meeting on 25 July 2005 which states:

7.e. Appointment of Substantive Registrar (Holly Marjerrison)

RESOLUTION: Council agree that

1. *Holly Marjerrison be offered the position of Head of Staff and Student Services on her present remuneration package, including salary sacrificing for a vehicle. But by January 2007, the remuneration package would be brought into line with the approved remuneration package for Heads of Division, including a superannuation contribution by the Institute of 9%.*
2. *Holly Marjerrison be required to relinquish tenure should she accept the position of Head of Division, Staff and Student Services, and*
3. *When Holly accepts the position of Head of Division, Staff and Student Services, a letter be sent to staff advising them and noting that this is at a lower level than her substantive position of Registrar. It was also agreed that, in view of her corporate knowledge of the Institute, it was desirable to offer her the position of Head of Division, Staff and Student Services.*

5.16. The cost saving associated with not making Holly Marjerrison redundant is further demonstrated in the affidavit of Graham Brennan where he details at annexure GVB 21 her entitlements as a compulsory transferee from the NTPS, which entitled her to a range of preserved terms and conditions upon involuntary redundancy.

5.17. I accept the Respondent's explanation that there were valid operational reasons for their actions and that there was nothing whatsoever in the difference of treatment afforded to Ms Marjerrison which was racially discriminatory. It is not race discrimination simply to treat two persons of different race in a different manner. To be unlawful discrimination the difference must be based on the race of the person, and this was not the case in this matter.

6.9. THE SPECIAL MEASURES ISSUE:

6.1. Another allegation made by Ms Anning was that the 'de-identification' of her position amounted to racial discrimination.

6.2. It is acknowledged by the parties that Ms Anning was originally employed by BIITE under a program of 'Identified' indigenous positions which was in place at BIITE to ensure a high proportion of indigenous persons on staff.

6.3. The practice of creating designated indigenous positions is in itself discriminatory, in that it favours one race above another. However this is not unlawful discrimination because there is a specific exemption in the Act which permits such 'positive' discrimination. This exemption is the "Special Measures" exemption contained in section 57 of the Act, which provides:

> *(1)A person may discriminate against a person in a program, plan or arrangement designed to promote equality of opportunity for a group of people who are disadvantaged or have a special need because of an attribute.*
> *(2)Subsection (1) applies only until equality of opportunity has been achieved*.

6.4. Section 57 is a discretionary provision, allowing only that a person "may" put in to place a program, plan or arrangement that discriminates in favour of a disadvantaged group and, in doing so, not breach the Act. There is nothing in the Act or the section that requires the implementation of special measures programs. Accordingly, it cannot be unlawful discrimination for an employer **not** to have an arrangement of identified indigenous positions, or to discontinue an existing special measures plan.

6.5. This is the situation which occurred in relation to the executive positions at BIITE. The recommendation in the Semple Report was that all of the executive positions should be vacated, restructured, advertised and filled on a merit-based selection process. This meant the end to the 'identified' status of Ms Anning's position, but the mere removal of a previously existing positive discrimination policy, does not amount to unfavourable treatment on the basis of race.

6.6. Although Ms Anning may believe that BIITE's replacement of 'identified' positions with merit-based selection processes was unfair discrimination against indigenous persons, this is not the case in law. Nothing about the change by BIITE to an open competition for positions can be viewed to be racially discriminatory. A merit-based selection process is by definition a non-discriminatory one.

6.7. Ms Anning has put forward another suggestion as to how the move by BIITE away from identified indigenous positions resulted in her being discriminated against on the basis of race. She discusses this in paragraph 4 of her Submission where she puts forward a view that, when Council accepted the complaints about the Executive prior to initiating the Semple review, this showed an "*acceptance of all the negative information/statements as being evidenced-based complaints*" and "*was based on the fact that I was an Indigenous female academic and therefore I could not perform competently in my job*."

6.8. She goes on to state in that paragraph that:

> *4. …The general view accepted by Council of Indigenous staff's qualifications are stated by Maurie Ryan at the meeting of 29 November 2004 when he states to the previous Director CEO "**Why are all these positions identified. We need the best people to do the jobs**." and "**Many Indigenous staff cannot do the job".***

6.9. I take this to mean that Ms Anning is arguing that, by agreeing to move away from identified positions, Council was of an overall view that indigenous persons generally, and Ms Anning specifically, could not perform competently and this is why she was treated as she was.

6.10. Ms Anning spoke further to this issue when presenting her flow chart to me as part of her oral submission and referred me specifically to an email which had been sent by Des Rogers to Adrian Burkenhagen in the Staff Development section of BIITE on 7 September 2005. This email (Exhibit 3 in the proceedings) was discussing a press release which had been sent to Media by the union criticising the decision to cease the indigenisation program.

6.11. Ms Anning specifically emphasized the following comments made by Mr Rogers in that email:

> *After almost 10 months of difficult, complex and sensitive negotiations I find it appalling that some people now want to defend and justify the indigenisation of the executive positions of BIITE is absolutely hypocritical to say the least.*
>
> *BIITE needs the best possible people to fill these positions and as in the past the first criteria will be MERIT! Some Indigenous staff could very well take a lead from Council members who have been proactive in lobbying Indigenous people to apply for these positions.*

6.12. Although Ms Anning made it clear that she believes these comments support her allegations of race discrimination by the Council, I do not share her view. While the comments made by Mr Rogers make it clear he does not support a specific indiginisation program, they do not in any way suggest he has formed a discriminatory view that indigenous persons cannot be competent. On the contrary, he is obviously advocating for Council proactively lobbying Indigenous people to apply for the positions.

6.13. For the reasons I have discussed, the change by Council to the policy recommended by the Semple Report of moving away from 'identified' positions to merit-based selection, does not establish Ms Anning's claim of race discrimination.

7. ALLEGATIONS OF DEROGATORY COMMENTS MADE BY BIITE STAFF:

7.1. The Complainant tendered at Hearing a statutory declaration obtained from a former employee of BIITE who swore that, prior to the Semple Report being commissioned, some staff members at BIITE often made derogatory statements and slurs about Ms Berice Anning to the effect that she was 'racist' because she wanted to change the academic structure at BIITE.

7.2. The 'slurs' as set out by the witness making the statutory declaration (who requested that her name not be reported in this decision) described such comments made by staff as:

> *"Berice thinks she is good because of her position in the Institute"*
> *"the f….ing racist bitch" and at times "the black racist bitch"*
> *"those two black bitches were on a power trip"*
> *"what a f…king cow"*
> *"what a f…king black bitch"*

7.3. I note that in paragraph 5 of her Submissions Ms Anning states:

> *5. The fact is, I was targeted and undermined during the process of implementing my core academic tasks within my roles and responsibilities, based on my identity/employment as an Indigenous female executive member, my name slandered, called racist names behind my back but in the presence of other Indigenous staff and others, ridiculed for my appearance and abused with foul language.*

7.4. It would appear from this that Ms Anning seemed to think that, if these slurs did in fact occur, they in some way support her allegations of racial discrimination. I cannot agree with this reasoning.

7.5. The mere fact that some staff members – ones whom Ms Anning acknowledged were junior to her and not in positions of power which gave them the ability to direct BIITE policy – made derogatory comments about her, does not establish, or even assist in establishing, that she was a victim of racial discrimination by her employer, BIITE Council.

7.6. I think it likely that it is common, in unhappy workplaces such as BIITE was at that time, for staff to make derogatory comments about their supervisors. The fact that the alleged derogatory remarks in this particular case used the term 'racist' and 'black', does not turn them into behaviour that amounts to unlawful race discrimination.

7.7. It is not discrimination within the meaning of the Act to call someone racist (which is arguably exactly what the Complainant has done by making her allegations against the Respondent), and it is also not unlawful discrimination simply to put 'black' in front of an insulting comment made behind a person's back, however rude or distasteful that may be to some.

7.8. However, I understand that Ms Anning is going further in her allegations to allege that these sorts of comments were the first steps in a program of race discrimination against her. In this regard she states at paragraphs 2 and 20 of her Submission that:

> *2. The dissent within the BIITE towards the academic regrouping by a number of mainly non-Indigenous staff and some Indigenous staff, was utilised by a number of senior managers and two executive staff to begin a process whereby BIITE staff were making false statements on my management abilities; performance and communication; as well as competency in my position as an executive (the Assistant Director (Academic).*
>
> *20. It is my submission, that these slurs and staff's discontent towards academic regrouping and my attempts to implement Council's indigenisation policy was what led to the complaints by various staff regarding my performance and the actions of two of the former executive management to attempt to undermine my position and that of the former Directors. These complaints, which were partly based on my race, formed the basis of the alleged dysfunction among the Executive and the implementation by Council of the Semple review and restructure.*

7.9. I take these submissions by Ms Anning to mean that she believes that her active promotion of "indigenisation" was what led staff to be unhappy with her management style, thereby bringing about the Semple review and the subsequent treatment of her.

7.10. The proposition the Complainant appears to be suggesting is essentially that the derogatory comments demonstrate that it was race discrimination for some of the staff to resent her attempts to implement indigenisation policies, and therefore race discrimination for them to complain to the Council about her, and consequently race discrimination for the Council to form a view that there was dysfunction in the Executive and implement the Semple Report.

7.11. Whether or not there was harmony in the workplace, and whether or not there was misconduct by some employees who uttered derogatory comments, are perhaps questions relevant to an industrial relations tribunal on the issue of unfair termination. However they are not issues which I must address. They are not relevant to the allegation that BIITE Council engaged in race discrimination by adopting the recommendations of the Semple Report.

7.12. It is beyond doubt that, for whatever reasons they formed this view, the Council perceived a "dysfunction" within the Executive. This lead to the independent Semple review and report, which clearly, as all concerned agree, did not discriminate in its terms. It serves no purpose in the matter

before me to explore the 'rights and wrongs' of internal staff conflict that proceed the analyst's report.

8. FINDINGS:

8.1 The Anti-Discrimination Commission does not have jurisdiction to deal with general situations of unfair or unequal treatment in the workplace. This is not a forum for dealing with disputes of a strictly industrial nature or for righting situations where employees feel they have been wrongly treated in the workplace.

8.2 I must limit my finding only to the issue of unlawful discrimination, which, pursuant to sections 19 and 20 of the Act, is defined as unfavourable treatment which occurs on the basis of an attribute as set out in the Act, in this case, race. The onus of proof of the complaint lies with the Complainant who must prove her complaint on the balance of probabilities.

8.3 It is my view that she has failed to discharge that onus. It is not sufficient for her to rely on the fact that she is indigenous and Ms Marjerrison is not. She must show that the less favourable treatment she received was on the basis of her race. It is apparent from my discussion of the facts and evidence above that she has failed to do so.

8.4 Ms Anning has suggested that I should "*draw an adverse inference, namely that one of the reasons* [she] *was treated less favourably … was because of* [her] *race."* This argument is similar to that raised in the matter of *Sharma v Legal Aid Queensland* [2001] FCA 1699*,* which was a complaint under the Commonwealth *Racial Discrimination Act* ['the RDA'] dealing with allegations of race discrimination in recruitment. In that matter Keifel J held that a court should be wary of presuming the existence of racism and went on to dismiss the complaint. The decision was upheld on appeal (*Sharma v Legal Aid* Queensland [2002 FCAFC 196*)* and that Court indicated a view that the standard of proof for breaches of the RDA is the standard referred to in *Briginshaw v Briginshaw* (1938) 60 CLR 336 and that racial discrimination is not "lightly to be inferred".

8.5 In *Briginshaw* the High Court established that in civil matters (in that case an action for divorce on the grounds of adultery), where a finding would have grave consequences for the respondent, the evidence against the respondent should be clear and compelling. Dixon J held that:

> *Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations*

which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

8.6 The issue of the application of the Briginshaw test as the appropriate standard of proof to be applied in discrimination cases was raised in the matter of *Smith v Hehir* [2001] EOC 93-165, 75571 in which Member Tahmindjis held that:

> *Overall, the complainant has an obligation to prove her case on the balance of probabilities (s.204). It is now clearly established in Australian anti-discrimination law that this burden of proof is subject to the application of the test set out in Briginshaw v. Briginshaw (1938) 60 CLR 336, where the High Court of Australia held that in applying the civil standard of proof, account must be taken of the gravity of the allegations and of the serious consequences to the respondent following any adverse finding. This means that the more serious the allegations are, it may be reasonable to expect a complainant to prove the case beyond a slight difference in probity when weighing the evidence. Allegations of sexual harassment are serious matters. Therefore, the complainant in this case must establish to the satisfaction of the Tribunal that the events as alleged by her occurred, and at a level greater than the merest difference in the balance of probabilities.*

8.7 This authority strengthens my view that, even if there was something in the evidence to suggest that race might be a factor in the actions of the Respondent (which in any event I do not find to be the case), it would not be appropriate for me to infer race discrimination on that basis.

8.8 After having received, and closely considered, all the evidence it is my finding that:

- The Complainant has not established on the balance of probabilities that she was treated less favourably than a person who was non-indigenous would have been in the same or similar circumstances.

- The Respondent's treatment of the Complainant was based only on the Council's decision to proceed with the recommendation of the Semple Report and had nothing whatsoever to do with Ms Anning's race.

- The more favourable treatment of another, non-indigenous member of the Executive, Ms Holly Marjerrison, was not based on her race and therefore she does not stand as a suitable comparator upon which to conclude that Ms Anning's treatment was race-based.

9. CONCLUDING REMARKS:

9.1 Having carefully considered all of the material before me, and having had the benefit of hearing Ms Anning's oral submissions, I have no doubt that she genuinely believes that she was unfairly treated and is sincere in her belief that she was the victim of race discrimination. This mistaken belief stems, in my view, from a number of sources:

- a misconception of the law leading her to think that the removal of identified indigenous hiring practices is a form of racial discrimination
- an inability to appreciate that, although it is correct that she and Ms Marjerrison are of different races and were treated differently, the reasons for the difference in treatment between them was not based on race but rather on other factors
- her firmly held conviction that she is an exceptionally competent "indigenous female educator" and that therefore BIITE should have been keen to keep her, leading to a view forming in her mind that the only possible explanation for their actions was race discrimination
- comments and actions by some of the staff working under her at BIITE which caused her to believe that Council's concerns were related to her promotion of "indiginisation" programs and this therefore amounted to discrimination on the basis of race

9.2 We cannot know what would have happened if Ms Anning had applied for an executive position under the new plan. What we do know is that there is clear evidence that she was advised of her right to apply in letters such as the one earlier referred to from Rose Kunoth-Monks, and others that were sent to Ms Anning by the BIITE Human Resources section, specifically suggesting that she apply for the position of Head of Academic and Research.

9.3 I note that Graham Brennan, the Human Resources Manager for BIITE states in paragraph 34 of his affidavit that:

> *It is again my view that had Anning applied for the position of Head of Academic and Research she would have been a strong contender and would have been seriously considered for appointment.*

9.4 Des Rogers is on record as saying that indigenous persons were being actively encouraged to apply, and it is reasonable to suppose that indigenous applicants might well have been given a preference in the hiring process. These actions are not consistent with Ms Anning's allegations that the reason for BIITE's treatment of her was because of her race.

9.5 Because Ms Anning convinced herself that BIITE was treating her unfairly and discriminating against her, and perhaps because her pride was injured because Holly Marjerrison had been redeployed into a position whereas she was required to go through the application process, Ms Anning chose not to apply for any position at BIITE. This resulted in her position being terminated, but she must share in the responsibility for this outcome. It is not reasonable for her to allege that she was terminated on the basis of her race, when she chose herself not to 'test the waters' by applying for a position.

10. COSTS:

10.1 Pursuant to section 96 of the Act "*each party to a complaint shall pay his or her own costs in respect of proceedings under this Act*." This is the general rule. However the section goes on to allow that notwithstanding this, "*the Commissioner may make an order as to costs*."

10.2 The Respondent requested at Hearing that, should I make a finding, as I have now done, dismissing the complaint, they be heard on the question of costs. In his final submissions Counsel for the Respondent urged me not to forget the "*rights of the Respondent*" and submitted that the Complainant had used the hearing process to "*bandy about words like race discrimination*" against an "*organisation specifically dedicated to advancing the cause of indigenous persons*." In the view of the Respondent, the Complainant engaged in a "*disgraceful use of the Commission's resources*" to advance a complaint which was a "*nonsense*".

10.3 I can appreciate why the Respondent took great offence at the allegations of race discrimination made in the complaint, particularly in light of the fact that they were unsupported by the evidence. I also recognise that the Respondent has incurred substantial legal costs in defending the complaint.

10.4 Nevertheless, although I have found that there was no evidence to support the allegations of racial discrimination, and acknowledge that the premise Ms Anning asked the Commission to accept – that is, that BIITE, an educational institute specifically dedicated to the promotion of indigenous education and training, and governed by a Council of aboriginal persons with a known commitment to these goals, chose to treat Ms Anning unfavourably because of her aboriginal race, and to favour Ms Marjerrison because she was 'white' – is an implausible allegation, I am currently of the view that it is not appropriate to order costs in this matter.

10.5 As I have said earlier, no one, having sat through the hearing, could doubt that Ms Anning genuinely felt aggrieved by her treatment received at the hands of the Respondent and also believed, however without substance her allegations may have been, that she had been the victim of racial discrimination. Notwithstanding the 'no costs' nature of the Commission process, if I had developed even a suspicion that Ms Anning appreciated the weakness of her case and yet had pursued it simply to be vexatious and in some way 'punish' the Respondent, I might have been more inclined to award costs. However, I do not believe this to be the case.

10.6 At the hearing, even in the face of direct questions put to her by myself, Counsel Assisting and Counsel for the Respondent, going to the implausibility of the scenario she suggested, and to the issue of how her less favourable treatment was on the basis of her race, the Complainant remained resolute in her conviction that she was the victim of racial discrimination. If she had not had the opportunity to follow through with the matter and have 'her day in court', I am certain that she would have never ceased believing that she was the victim of unfair race discrimination. Hopefully the hearing process and the explanation in these reasons for decision will cause her to feel satisfied that her allegations of race discrimination have been properly aired and carefully considered and she will now be able to move on with her life.

10.7 Accordingly I make no order as to costs at this time, as it is my view, at this point, without having heard further from the parties on this issue, that this is an appropriate matter for each party to pay their own costs pursuant to the provisions of section 96 (1). However, if the Respondent wishes to make application for an order for costs, I grant leave to do so, by way of brief written submission, within 7 days of the date of issue of this decision.

ORDERS:

The complaint is dismissed.

No order as to costs at this time.

Terry Lisson
Hearing Commissioner
12 January 2007

STATUTORY PROVISIONS:

The sections of the NT *Anti-Discrimination Act 2004* ("the Act") which are relevant to this complaint are set out below.

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; ….

(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.

57. Special measures

(1) A person may discriminate against a person in a program, plan or arrangement designed to promote equality of opportunity for a group of people who are disadvantaged or have a special need because of an attribute.

(2) Subsection (1) applies only until equality of opportunity has been achieved.

77. Report of Commissioner

(1) The Commissioner may prepare a report relating to the investigation of a complaint under this Division which may be considered at a subsequent hearing of the complaint.

(2) A report prepared under subsection (1) shall not contain a record of oral statements made by a person in the course of the investigation.

(3) Where a report prepared under subsection (1) is considered at the hearing of the complaint, a copy of the report shall be provided to the complainant and the respondent.

88. Orders after hearing

(1) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint is substantiated, the Commissioner may make one or more of the following orders:

(a) an order requiring the respondent not to repeat or continue the prohibited conduct;

(b) an order requiring the respondent to pay to the complainant or another person, within a specified period, an amount, being an amount not more than that prescribed, that the Commissioner considers appropriate as compensation for loss or damage caused by the prohibited conduct;

(c) an order requiring the respondent to do specified things to redress loss or damage suffered by the complainant or any other person because of the prohibited conduct;

(d) an order declaring void all or part of an agreement made in connection with the prohibited conduct, either from the time the agreement was made or subsequently.

(2) In this section, the specified things a respondent may be required to do, include, but are not limited to the following:

(a) employing, reinstating or re-employing a person;

(b) promoting a person;

(c) moving a person to a specified position within a specified time.

(3) In this section, "damage", in relation to a person, includes the offence, embarrassment, humiliation, and intimidation suffered by the person.

(4) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint is not substantiated the Commissioner shall make an order dismissing the complaint.

90. Conduct of proceedings

(1) In the conduct of proceedings under this Act, the Commissioner –

(a) is not bound by the rules of evidence and the Commissioner may obtain information on any matter as the Commissioner considers appropriate;

(b) shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms;

(c) may give directions relating to procedure that, in the Commissioner's opinion, will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties;

(d) may draw conclusions of fact from any proceeding before a court or tribunal;

(e) may adopt any findings or decisions of a court or tribunal that may be relevant to the proceedings; and

(f) may conduct proceedings in the absence of a party who was given reasonable notice to attend but failed to do so without reasonable excuse.

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.

95. Parties may be legally represented

A complainant or a respondent may be represented before the Commissioner by a legal practitioner with the leave of the Commissioner.

96. Costs

(1) Subject to subsection (2) and section 80, each party to a complaint shall pay his or her own costs in respect of proceedings under this Act.

(2) Notwithstanding subsection (1), the Commissioner may make an order as to costs.