Northern Territory Anti-Discrimination Commission

IN THE ANTI-DISCRIMINATION COMMISSION
AT DARWIN

BETWEEN:

BERICE ANNING

Complainant

AND:

BATCHELOR INSTITUTE OF INDIGENOUS TERTIARY EDUCATION

Respondent

DECISION ON COSTS

1. In my decision in this matter delivered on 12 January 2007 I made no order as to costs, as it was my view at that point, without having heard further from the parties on the costs issue, that this appeared to be an appropriate matter for each party to bear their own costs. However, leave was granted to the Respondent to make application for an order for costs, which was done by way of written submission filed on 23 January 2007.

2. I have now also received written submissions on the costs issue from Counsel Assisting, Penny Turner, and from the Complainant. All of these submissions have been carefully considered by me in making this decision on the issue of costs.

THE NATURE OF THE COSTS DISCRETION:

3. Unlike other legal forums where costs generally "follow the cause" and are awarded to provide a partial indemnity to a successful party, costs in proceedings under the *Anti-Discrimination Act* (the ADA), are determined according to the provisions of section 96.

4. Pursuant to that section, the general rule is that "*each party to a complaint shall pay his or her own costs in respect of proceedings under this Act*." However, the section goes on to provide in subsection (2) that notwithstanding this provision, "*the Commissioner may make an order as to costs*."

5. There are no express provisions in the ADA that provide assistance on the question of how the discretion conferred on the Commissioner in section 96 (2) should be exercised.

6. In *Ray Renouf v Australian Broadcasting Corporation and Gibson*, *Decision on Costs* (NTADC 3 December 2001), Hearing Commissioner Mr Loadman SM, made the following observation *(at paragraph 16)*:

> *"… the effect of section 96(1) is in fact intended to and does displace the general principle that "costs follow the case". That means that the Commissioner has a completely untrammelled and unfettered discretion to find a basis upon which nevertheless to order costs in appropriate circumstances."*

7. Further guidance has been provided in other decisions in the Commission which have indicated that the discretion of the Commissioner to order costs should only be exercised in "exceptional circumstances". (*Wall v Northern Territory Police* [2005] NTADC No.1 (22 April 2005), and *Funnell v Kunbarllanjnja Community Government Council* [1996] NTADC No. 3 (9 May 1997)).

8. The Respondent, in its submission on costs, acknowledges that "*the general rule appears to be that the discretion available to the Commissioner ought only to be exercised in exceptional circumstances"*, and specifically refers to the comments of the Commissioner in *Wall* (*Ibid*) at paragraph 6.3:

> *Although the section does give me the power to make an order as to costs, it is generally understood that the Commission is a 'no-costs' forum, and that I would only make an order as to costs in exceptional circumstances.*

9. Similar comments were made by Commissioner Bradshaw in his decision in *Funnell* (*Ibid*) dealing with an application for costs made by the Complainant, Snr Constable Funnell, following his successful complaint of victimisation against the Kunbarllanjnja Community Government Council. In his initial decision in that matter the Commissioner had agreed that the issue of costs would be determined at a later time, but said:

> *I do, however, indicate that my general position is that, subject to any argument that might be put by the parties, parties should bear their own costs excepting where costs have had to be unnecessarily incurred because of some unreasonable action of one or other of the parties.*

10. When subsequently deciding the issue of costs in that matter, Commissioner Bradshaw went on to say at page 2:

> *More precisely…the position is that costs should only be awarded in exceptional circumstances. Thus the general practice should be that each party bears their own costs. The "exceptional circumstances" would exist if, for example, one of the parties had attempted some kind of fraud or improper concealment or had taken some extreme action which caused the other party unnecessary expense or had engaged in vexatious activity.*

11. Section 110 of the *Anti-Discrimination Act 1977 (NSW*) [the NSWADA] contains a similar provision creating a presumption that each party is to bear his or her own costs with discretion afforded to the Tribunal to vary this presumption.

12. The interpretation of that provision, which I regard as strongly akin to section 96 of the ADA, was considered in *Ping (Peter) Lin v American International Assurance Company (Australia) Pty Ltd (No 3)* [2006] NSWADT 347 (6 December 2006) which canvassed a number of other costs decisions regarding the NSWADA, and noted in particular:

> *5. The Appeal Panel in Cleary Bros (Bombo) Pty Ltd v Cvetkovski observed at [63]-[65], that s114 of (now s110) does not prescribe a test to be applied, but rather creates a presumption in subsection (1) and a discretion in subsection (2). The Panel cautioned that this discretion must be exercised judicially, and* ***no authority or rule can determine whether, in any particular case, an order should be made****: Gallagher v NSW Police Service [1998] NSWEOT, 30 September 1998. The Panel went on to say at [67] that in order to justify awarding costs '****there has to be something over and beyond a normal course of circumstances':***

> *This should be understood to mean nothing other than that the presumption in section 114(1) 'must yield' when in a particular case there are circumstances justifying the making of a costs order (Penfold v Penfold (1980) 144 CLR 311at page 315). To similar effect, there may be in a particular case 'circumstances which justify the departure from the general rule' (Australian Postal Commission v Dao & Anor (No 2) (1986) 6NSWLR 497 at 505).*

6. The Appeal Panel in Tu v University of Sydney (No 2) [2002] NSWADTAP 25 observed at [42] that:

> ***The sanction of a full costs order against a complainant tends to be reserved for cases where an abuse of process is seen as having been involved, i.e. those cases where the conduct of the complainant was frivolous, vexatious or lacking in good faith.*** *[See also Z v University of A & Ors (No 9)) [2005] NSWADT 25 and Moylan v North Coast Area Health Service) [2002] NSWADT 175.]*

(The emphasis in the above quotations is mine.)

13. In considering the nature and extent of the Commissioner's discretion regarding costs, I have also considered the purpose of the ADA as set out in the second reading speech dated 1 October 1992 as follows:

> *The Bill will serve two main purposes. The first is to provide a code of conduct to support Territorians in their efforts to give others a fair go and to provide redress for those with a genuine complaint of discrimination. The second is to provide an educational process to people in the Territory to ensure that everyone understands their responsibilities in ensuring non-discriminatory behaviour.*
>
> *It has been the desire of the Government to emphasise the conciliatory, non-adversarial theme of this proposed legislation, and to make complaint pursuit readily accessible to everyone by not necessarily involving legal practitioners.*

14. Guidance as to the application of the discretion to order costs in keeping with the purpose of the ADA can also be had from these comments made at page 7 of *Murphy v Clorific Lithographics* (ADT Vic, 22 January 1997):

> *In exercising its discretion the Tribunal must have regard to the nature of the jurisdiction. If orders for costs are made too readily, people might be deterred from coming to the Tribunal and, to that extent, the policy of the legislation would be frustrated.*

15. The non-adversarial nature of the process, and beneficial nature of the legislation, is reflected in Section 90, which provides for the conduct of proceedings under the Act. Significantly, the Commissioner is not bound by the rules of evidence, may obtain information on any matter as the Commissioner considers appropriate, and:

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

16. Having regard to the guidance available from other decisions as outlined above, the purpose of the ADA, and the provisions in the ADA in relation to the conduct of the proceedings, I am of the view that the costs discretion as set out in section 96 should only be exercised in exceptional circumstances, starting with the presumption that each party must bear their own costs in relation to the complaint.

RESPONDENT'S SUBMISSIONS:

17. The Respondent puts forward several reasons in support of a finding that this matter has "fallen outside the norm and is exceptional" and therefore warrants a departure from the general rule on costs.

18. The submissions can be loosely summarised into the following categories:

- the large volume of "irrelevant" material provided by the Complainant, including hundreds of pages of documents and such things as the initial Points of Claim which were over 40 pages, was excessive and oppressive;
- the complaint lacked substance and merit and the Complainant should have realised this and not proceeded with her complaint;

- costs were unnecessarily incurred due to actions of the Complainant, including her refusal to accept the Respondent's offer to resolve the matter on the basis of each party bearing its own cost;
- the Complainant refused to accept a prima facie finding that her complaint was lacking in substance and appealed on the basis that the ADC had failed to consider further material she wished to tender;
- the Complainant required the Respondent to provide substantial further documentation, some of which may have already been available to the Complainant;
- the allegations of race discrimination against "eminent indigenous people who have by and large dedicated their careers and their lives to bettering indigenous education" were an abuse of process, and "unfounded and nothing more than scurrilous and vexatious".

The Volume of 'Irrelevant' Material and Lack of Merit in the Complaint:

19. I have some sympathy for the Respondent's frustration with the large amount of material provided by the Complainant in support of her complaint, and other actions of the Complainant which, in their view, prolonged the eventual outcome of the dismissal of the complaint. However, I am not convinced that these are the sort of exceptional circumstances which warrant an order for costs.

20. It must be remembered that the Complainant was self-represented throughout the whole complaints process. She is not like most experienced legal practitioners who would be aware that Points of Claim do not need to run to 40 pages and that in terms of presenting their case 'more' is not necessarily 'better'. It was apparent from the way that the Complainant conducted the hearing that she did not grasp these concepts.

21. It is true that much of the volume of material that the Complainant provided could be argued to be "irrelevant" to her complaint of discrimination on the basis of race. However, it is also true that she clearly did not believe this to be the case and did not have a legal representative to advise her.

22. The assessment of what is and is not relevant to the proof of a complaint is a difficult one and I do not accept that the mere fact that the Complainant was unable to prove her complaint confirms that most of her material must be viewed as irrelevant, and she as vexatious for having tendered it.

23. In my earlier decision on this matter, I noted that nothing done by the Complainant had caused me to develop even a suspicion that she appreciated the weakness of her case and yet pursued it simply to be vexatious and in some way 'punish' the Respondent.

24. During 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, the Complainant remained resolute in her conviction that she was the victim of racial discrimination and that the materials she had tendered supported this view.

25. Except for the fact that she was never unhelpful, and cannot be said to have delayed the process or failed to comply with the Commission's timetable, much of what was said about Mr Lin in the following quotation from the decision in *Ping*(*Ibid*) could be similarly said to apply to the Complainant:

> *20. We disagree with little of what has been put by AIA* [the Respondent] *about Mr Lin's conduct in these proceedings. Mr Lin repeatedly failed to comply with the Tribunal's timetable. His conduct under cross-examination could at best be described as unhelpful.* ***The characterisation of his complaints was general, inexact and forever changing. Much of the evidence on which he relied was ultimately irrelevant and that which was relevant was often provided in such a form that made it costly and time consuming to decipher.*** *The example cited of the resources wasted by AIA in attempting to unravel the analysis provided in Exhibits A3 and A4 is a case in point.*
>
> *21. Our concerns about Mr Lin's conduct in these proceedings, in particular the delay caused by his repeated and often unexplained failure to comply with directions of the Tribunal and his failure to pursue his case 'with the reasonable vigour the Tribunal is entitled to expect of litigants' were set out in an interlocutory decision published in March 2005. (See Lin v American International Assurance Company (Australia) Pty Ltd [2005] NSWADT 59 at [27]) Yet, as AIA pointed out, this troubling pattern continued.*

(The emphasis in the above quotations is mine.)

26. It seems apparent that Mr Lin's conduct, considering that it included failure to comply with directions, unhelpful conduct, delay and failure to pursue his case with reasonable vigour, was more serious than the Complainant's actions in this matter. However, I think it significant to my consideration that the Tribunal still found that:

> *22. Nevertheless, we have concluded, despite the powerful arguments advanced for AIA, that the particular circumstances of this case do not warrant an order for costs. This has been a difficult decision given that AIA was put to unnecessary additional expense because of Mr Lin's conduct.*
>
> *23. In reaching that decision we have had regard to Mr Lin's view of his complaints. We accept that he held the honest view that he had been 'discriminated' against in the colloquial sense of the word. While ultimately we found that his complaints were not substantiated, we noted that there was some evidence of different treatment afforded to Chinese and non-Chinese agents (See Lin v American Interantional Assurance Complany (Australia) Pty Ltd No.2 at [63] and [73]).*

27. I have also considered the Tribunal's further comments (at paragraph 24):

> *A complainant's subjective view about their complaint is of course not determinative. It does not follow that because a complaint is brought in 'good faith' that the complainant will automatically be 'shielded' from the possibility of an adverse costs order. There will be circumstances for example where his or her conduct in proceedings will constitute an abuse of process even though the complaint itself could not be characterised as frivolous, vexatious or lacking in good faith.*

28. However, considering that the Tribunal found that the Complainant's conduct in that matter only came "perilously close" to being vexatious and lacking in good faith, but still was not enough to justify an order of costs, I see no reason why this case, which involves less serious conduct by the Complainant, should be viewed differently.

29. Further support for this reasoning can be found in *Ray Renouf* (*Ibid*), in which, when dealing with a complaint closely analogous to this matter, the Commissioner refused an application by the Respondent to order costs against

the unsuccessful Complainant. This was despite the Commissioner finding that there was "*never any objective basis upon which there could be any foundation for the complaints made against the first and second respondents*." (paragraph 13)

30. *Funnell* (*Ibid)* is the only NTADC decision in which a party has been partially successful in a costs application before the Commissioner. However, costs were ordered against the Respondent in relation only to expenses arising from the Respondent's deliberately deceptive advice to the Commission that there had been a death of a senior person in the community thereby delaying the final hearing of the matter. It should be noted that that was the only basis upon which costs were ordered and the Commissioner otherwise held that each party should bear their own costs. For this reason I think the decision to order costs in that matter is distinguishable from the situation in the application before me.

The Refusal of the 'Offer' to Resolve the Complaint by each Party Bearing their own Costs:

31. The Respondent, at paragraph 15 of its submission under the heading "Attempted Conciliation" refers to an "offer" made on 10 August 2006 to "forgo any entitlement as to costs on the basis that the proceedings be dismissed".

32. It is worth noting that, at the time the 'offer' was made, the Respondent would in fact have had no entitlement to costs whatsoever under the Commission process. Therefore, put simply, the offer was really just another way of saying "If you proceed to hearing and are unsuccessful, we will seek costs."

33. In any event, this offer was not made to the Complainant during the hearing process (in the manner of a 'Calderbank' offer), and so is clearly part of the conduct of the parties which occurred during the dispute resolution process and attempts at conciliation which led up to the hearing.

34. In this regard I share the view put forward by Driver FM in *Ho v Regulator Australia Pty Ltd* (No 2) [2004] FMCA 402, when discussing the very similar Human Rights and Equal Opportunity Commission [HREOC] processes which precede hearings of HREOC discrimination complaints in the Federal Court:

> *I do not regard the conduct of the parties to a complaint to HREOC as relevant to a consideration of a costs order in proceedings before the Court consequent upon the termination of a complaint by HREOC. In the first place, the proceedings*

> *before HREOC are in the nature of private alternative dispute resolution proceedings. The Court only has jurisdiction to deal with the matter where conciliation fails before HREOC. It is entirely inappropriate for the Court to take into account what may or may not have occurred in the attempts at conciliation before HREOC for the purposes of costs in the court proceedings. No costs apply to conciliation proceedings before HREOC and there should be no costs implication arising subsequently in respect of those conciliation proceedings.*

35. I also have had regard to section 82 of the ADA which specifically provides that:

> *Anything said or done in the course of conciliation proceedings under this Division* ***is not to be taken into account in subsequent proceedings*** *under this Act in relation to the complaint. (The emphasis is mine)*

36. In light of this I consider the fact that the Respondent might have made such an offer, or that the Complainant did not accept it, of no consequence to my decision as to costs.

The Complainant's Refusal to Accept the Earlier Dismissal of her Complaint:

37. The Respondent's submissions refer to a written decision of 5 May 2006 where the Commissioner's Delegate discontinued the complaint pursuant to section 102 of the Act on the basis that it was misconceived or lacking in substance. The Respondent submits (at paragraph 12) that this decision is a relevant factor to show that the Complainant should have been aware that there was no evidence to substantiate her complaint.

38. I agree with the submissions put to me by Counsel Assisting that it is inappropriate for me to rely on the decision in any way in considering the issue of costs.

39. I accept the submission that the Delegate of the Commissioner was entitled to re-exercise his power completely afresh and to agree to the matter being remitted because the circumstances were that a breach of procedural fairness had arguably occurred. Having agreed to the matter being remitted to the Commission as a matter of procedural fairness, it was and is incumbent on me throughout the proceedings and in this consideration of costs, to proceed as if that decision had never been made.

40. I certainly do not agree that the Complainant, having successfully appealed the Delegate's decision to discontinue her complaint, should nevertheless have realised that there was no evidence to substantiate her complaint and declined to pursue the matter. As I have said before, it was apparent that throughout all of the proceedings, whether rightly or wrongly, the Complainant has maintained an earnest belief that her complaint does have merit and that her evidence is relevant.

The Request by the Complainant for the Respondent to Produce Documents that may in Fact have Already Been in her Possession:

41. I am not entirely sympathetic to the Respondent's submission on this point. Throughout the conduct of this complaint the Complainant maintained, and still maintains in her submissions, that there are documents, which she believed would support her complaint, which she could not produce, but which the Respondent had or could obtain.

42. It seems likely that she was aware of these documents because one of her witnesses in the proceeding, also a former employee of the Respondent, had seen them and told her about them, or actually had copies of some of them and had told her of their existence.

43. When the Respondent was unable to provide her with these copies, after what I have no reason to disbelieve was an arduous and genuine search, the Complainant was left with a dilemma. She could ask her witness to provide her with copies and tender them in the hearing (which is what she did with some of the documents), but this could lead to the Respondent accusing that witness of breaching the confidentiality terms of a termination agreement (which is in fact what did happen).

44. Nothing in the evidence before me during the hearing, or in the submissions at hand, convinces me that the Complainant sought those documents in order that (as the Respondent alleges): "*the Institute was deliberately put to the costs of undertaking a fruitless search in circumstance where the Complainant held the very documents in question.*"

45. The whole vexed question of who had copies of the documents, and whether or not they assisted the Complainant in her case or were indeed irrelevant, is, in my view, not one whose answer affects my view as to whether there were exceptional circumstances sufficient to warrant my awarding costs.

SUMMARY:

46. I accept Counsel Assisting's submission that the following principles apply with respect to costs:

    - The general rule is that each party must bear its own costs in relation to a complaint.
    - The Commissioner has discretion to depart from the general rule in exceptional circumstances.
    - The onus is on the party claiming costs to show exceptional circumstances so as to justify an order for costs.
    - The Commissioner must act judicially.
    - There is no 'hard and fast rule'; the circumstances of each case must be considered having regard to the purpose and objects of the ADA.

47. Factors relevant to whether the Commissioner should depart from the general rule that each party bear its own costs include (but are not limited to):

    - the complaint and/or a party has been frivolous or vexatious;
    - a party's conduct in the proceedings has been unreasonable or an abuse of process ;
    - a party has not acted in good faith or has been disingenuous;
    - that there has been some action over and beyond a normal course of circumstances;
    - the 'non-adversarial' and beneficial nature of the jurisdiction;
    - the risk that complainants may be deterred from making their complaints if orders for costs are made other than in exceptional circumstances.

48. The Complainant refers in paragraph 31 of her submissions to remarks of Einfeld J in *Bennett v Everitt* (1988) EOC 77 261:

> *Many discrimination cases…have to be proved by comparatively weak circumstantial evidence, without direct or perhaps any witnesses and based only on an intuition or deeply held if incorrect belief that there has been discrimination.*

49. These remarks apply aptly to the circumstances in this matter. There is no doubt in my mind, having had the benefit of observing the Complainant as she presented her case at the hearing, that she genuinely felt aggrieved by her treatment by the Respondent and also believed, however without substance her allegations may have been, that she had been the victim of racial discrimination.

50. Her obviously sincere belief in her case convinces me that she did not act vexatiously or in bad faith and, when this is coupled with the absence of any abuse of process or serious deception, there are no 'exceptional circumstances' which warrant my departing from the general rule that each party shall bear their own costs in respect of proceedings under the *Anti-Discrimination Act.*

ORDERS:

The Respondent's application for costs is dismissed.

TERRY LISSON
Hearing Commissioner

21 February 2007