

**ANTI-DISCRIMINATION COMMISSION
NORTHERN TERRITORY**

COMPLAINANT: Norma Smith

RESPONDENT: Conchitina Ciarla

**TRIBUNAL: Mr Tom Stodulka
Hearing Commissioner**

ISSUE: s. 73 - Application to join party

DATE OF HEARING: 25 August 2000

DATE OF DECISION: 23 October 2000

DECISION

Background

Mrs Norma Smith lodged a complaint alleging discrimination on the grounds of an impairment and race and failure to accommodate a special need in the area of work on 8 June 1999. Mrs Smith's complaint was against her immediate supervisor, Ms Concetta Ciarla. Both Ms Ciarla and Mrs Smith work in the laundry at Royal Darwin Hospital. They are employees of Territory Health Services (THS).

Mrs Smith's complaint was accepted by the Commission on 18 June 1999. A *prima facie* finding was made on 18 February 2000. A conciliation conference was attempted and failed on 16 March 2000. The matter was referred to Hearing on 23 March 2000.

Shortly after this, on 27 March 2000, Mrs Smith wrote to my Delegate. In a very brief letter she requested that Territory Health Services be joined as a respondent to her complaint. In this letter Mrs Smith suggests that it had at some time previously been suggested to her to join THS as a respondent (by whom or when is not apparent). However, she did not take up this advice as, she states, she was distressed and confused at the time. In this letter the Complainant also noted that she believed that THS was already joined in this Commission because of a "case with TIO" [a workers compensation claim] she was already pursuing, which also involved THS. This correspondence was placed on the Hearing file. As the request was received after the complaint had been referred to Hearing, it could only be the Hearing Commissioner, in this case myself, that determined the request.

The matter was listed for a Directions Hearing on 25 August 2000. At that Hearing, the Complainant and Respondent appeared in person. The Complainant was assisted by Mr Ted Milliken (a practicing psychologist) in the role of a support person. The respondent was assisted by Mr Jeff Fraser, an employee of THS, also in the role of a support person.

At the Directions Hearing Mrs Smith repeated her application to join THS as a respondent in the complaint. It was apparent at the Hearing that neither party was in a position to present argument to me on whether I should accept Mrs Smith's application. I directed that the parties should address written submissions to me on the matter, at which time I would determine the issue and hold a further Directions Hearing in light of my decision.

I received written submissions from the Complainant on 15 September 2000. I have received no submissions from the Respondent in relation to this matter. I have considered the Complainant's submissions in relation to this matter and have determined to refuse her application. In light of this decision it has been unnecessary for me to seek submissions from THS in relation to the application, as no decision adverse to their interests has been made.

The Complainant's Submissions

In her written submissions the Complainant raised two main points. First, she suggested that she had not originally joined THS because she was frightened of being victimised by management, so she limited her complaint to her immediate supervisor. She stated that it was only after lodging her complaint that she became aware of the provisions of the *Anti-Discrimination Act 1992* (the Act) that protect against victimisation (section 23). Second, Mrs Smith asserts that at the time of making the complaint she was confused and distressed and unable to think clearly.

The matters raised by the Complainant may be such as to enliven a discretion, or favour its exercise once enlivened. However, in the view I have taken, I do not believe that the power to join a party to a complaint under section 73 of the Act is one I have the discretion to exercise at all once a complaint has been referred to Hearing. As such her submissions do not avail her with respect to her application pursuant to section 73.

I should note, however, section 65, regarding the time limits for making complaints, does create a discretion to accept a complaint out of time. The matters raised by the Complainant may avail her with respect to an application to bring a new complaint against her employer (THS). Consideration of the merits of such an application would have to await a decision by the Complainant to pursue that course.

Section 73

Section 73 of the Act is located within Part 6 "Resolution of Complaints." The Part is divided into five divisions entitled sequentially: Complaints, Investigations, Conciliation Process, Hearings and Miscellaneous. Section 73 is located within the first division of this part (Complaints). This Division deals with the form, formulation, notification, acceptance, rejection and withdrawal of complaints. Under the scheme of the legislation, a complaint must be accepted under the provisions of Division 1 (section 66) to have an existence under the Act. A complaint must comply with the form and content provisions in order to be

accepted. Section 64 (1) (c) requires that a complaint "so far as practicable, specify the respondent or each respondent". Section 70 requires that a respondent be notified as soon as practicable after a complaint is accepted.

The following division deals with the investigation of complaints after their acceptance. As a result of a *prima facie* finding after the investigation the conciliation provisions are enlivened. It is only in light of a failed conciliation that the Hearing provisions of Division 4 become operative.

It is within this context that section 73 exists. Its location in the Act indicates a sequential placement within the process for exercise of the joining power. That power is normally to be exercised at the time a complaint is made. If, however, the power was exercised during the investigation stage, in light of material that came to light during the investigation, and the respondent so joined was given an opportunity to contribute information to the investigation, it could not be thought that this would defeat the scheme of the Act.

It is a well respected principle of statutory interpretation that sections of an Act must be read in the context of the Act as a whole. As Isaacs and Rich JJ stated " ...every passage in a document must be read not as if it were entirely divorced from its context but as part of the whole instrument." (*Metropolitan Gas Company v The Federated Gas Employees Industrial Union* (1924) 35 CLR 449 at 455).

In the case of Anti Discrimination legislation such as the Act, the notion that the scheme of such legislation does not just create a statutory tort but also creates, as a necessary precondition to the creation of the right of action, a complete process for resolving the dispute that gives rise to the tort has been accepted by the High Court (*Re East ex parte quoc Phu Nguyuen* 159 ALR 108 at 116 per Gleeson CJ, Gummow, Hayne and Callinan JJ).

To adopt the Complainant's suggestion, that the power under section 73 can be exercised at any time, would enable the extensive provisions of the Act regarding pre-hearing procedures to be effectively defeated by a complainant who pursues a complaint against a nominal respondent to get through the conciliation procedures and then attempts to "join the world" at the hearing procedures.

While I am certainly not suggesting any *mala fides* with regards to the complainant in this matter, her case serves as an example of the policy basis to this view. THS were not joined as respondents to the complaint initially. They had no opportunity to present their view of the circumstances giving rise to the complaint in the investigation prior to the *prima facie* finding. They had no participation in the conciliation that was attempted as a necessary prelude to this hearing. To allow THS to be joined at this stage would allow the possibility of significant abuses of the

investigation, conciliation and ultimately hearing processes upon which the Act is based.

I note also that in *Zarb v North Melbourne Institute of TAFE* [VCAT No 294 of 1999, 29 February 2000, Unreported] Deputy President Cate McKenzie dealt with an application to join a respondent at hearing in similar circumstances to the present application. Deputy President McKenzie, while noting that the Victorian legislation in question allowed a discretion to join a respondent, declined to exercise that discretion. While noting the differences between the Victorian and the Northern Territory legislation, I believe the factors affecting Deputy President McKenzie's refusal to exercise her discretion support the interpretation of section 73 of the Act encompassed in this decision.

Orders

The application to join THS is dismissed. The matter has already been listed for a further Directions Hearing on Friday 10 November at 10.00 am at which time I will issue directions for the conduct of the hearing between the Complainant and the Respondent.