



NORTHERN TERRITORY
ANTI-DISCRIMINATION COMMISSION

COMPLAINANTS: Gavin Ankin
Reggie Bara
Marcus Cameron
Stanley Kerr
Clarence Mamarika
Desmond Mamarika

RESPONDENT: Northern Territory of Australia

TRIBUNAL: Steve Southwood QC
Hearing Commissioner

ISSUE: Application to review Counsel Assistings' appointment in the hearing & to disqualify Commissioner from hearing the complaints.

DATE OF HEARING: 24 April 2001

DATE OF DECISION: 26 April 2001

REASONS FOR DECISION

1. On 24 April 2001 the Respondent made an application that either
 - 1.1. I review the appointment of Mr Tippett as Counsel Assisting me in this hearing, or
 - 1.2. I disqualify myself from hearing the Complaints made by the Complainants in this proceeding.
2. The basis of the Respondent's application was that there was an apprehension that I might be partial against the Respondent if Mr Tippett remained Counsel Assisting. This was because the role of Counsel Assisting was a special role and Mr Tippett had preconceived views about the matters or some of the matters in issue. In effect, there was an apprehension that my judgment may be contaminated by Mr Tippett's preconceived views if he remained Counsel Assisting.
3. The basis of the assertion that Mr Tippett had preconceived views about the issues in the proceeding were statements he had reputedly made:
 - 3.1 on 8DDD FM Drivetime at 4.00pm on 28 July 1999;
 - 3.2 to the Northern Territory News on or about 4 August 1999; and
 - 3.3 to the Northern Territory News on or about 18 August 1999 about the need for an Aboriginal Interpreter Service to overcome delays and problems which were being experienced in the Courts in the Northern Territory.
4. After hearing submissions from Counsel for the Respondent, Ms Eastman; Counsel for the Complainants, Mr Sheldon; and Mr Tippett on 24 April 2001, I dismissed the Respondent's application. Following are my reasons for dismissing the Respondent's application.
5. The Respondent's evidence consisted of:
 - 5.1 a written document headed

"4.00pm 8DDD FM DRIVETIME - JON TIPPETT AND
DENIS BURKE - ABORIGINAL INTERPRETER SERVICE
DG970652

PROOF FOR OFFICE USE ONLY"
 - 5.2 what appears to be a photocopy of page 19 of the Northern Territory News of 4 August 1999;
 - 5.3 what appears to be a photocopy of page 6 of the Northern Territory News of 18 August 1999.
6. The Respondent did not attempt to verify the statements attributed to Mr

Tippett in the above documents in any way. When asked where the document referred to in paragraph 5.1 hereof came from, Counsel for the Respondent was only able to say the document came from a transcript service. The document itself contains the following statement: “this transcript is taken from a tape recording, and freedom from errors, omissions or misunderstandings cannot be guaranteed”.

7. There being no denial of the contents of the documents, Counsel for the Respondent made the submission that the Respondent could prove what Mr Tippett had said and presumably what his opinions were merely by asserting that Mr Tippett had made the statements attributed to him in the documents. No objection was taken to this course by the complainants.
8. I have some concerns about what weight should be given to what is attributed to Mr Tippett in the documents supplied by the Respondent. Arguably little weight should be given to any of the documents particularly the document referred to in paragraph 5.1 above.
9. However, even assuming Mr Tippett did say all of the matters attributed to him in the documents tendered by the Respondent and assuming none of the statements have been taken out of context, the Respondent’s application still fails.
10. It is important that:
 - 10.1 The statements attributed to Mr Tippett were made some 20 months ago or thereabouts;
 - 10.2 The substance of what is attributed to Mr Tippett in the document referred to in paragraph 5.1 above is:
 - 10.2.1 the problems caused in the Courts by the unavailability of interpreters of Aboriginal languages have existed for a long time;
 - 10.2.2 the High Court of Australia held in the case of **Ebatarinja v Deland** (1998) 194 CLR 444 that no person in this country can be tried properly or fairly unless that person is tried in a language that the person speaks. Indeed, the High Court specifically stated if the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial (para 22 p 454). In support of this proposition the High Court approved **R v Willie** which was decided in 1885;
 - 10.2.3 that judicial officers for many years have called for the assistance of interpreters of Aboriginal languages;

- 10.2.4 that what is needed is an organised and properly accredited service with paid employees;
- 10.2.5 that the only obstacle to the provision of an Aboriginal Interpreter Service was the government's will to do it;
- 10.2.6 that there was a role for the Federal Government to play in the provision of such services;
- 10.2.7 that the Northern Territory Government has to take the initiative;
- 10.2.8 it was obvious that the community needed an Aboriginal Interpreter Service;
- 10.3 The substance of what is attributed to Mr Tippett in the Northern Territory News on 4 August 1999 was that delays such as did, in fact, occur in **R v Mandijarra** would continue to occur without an interpreter services in Aboriginal languages;
- 10.4 The essence of what is attributed to Mr Tippett in the Northern Territory News on 18 August 1999 was:
 - 10.4.1 the Northern Territory Government has an obligation to provide the Community with an Aboriginal interpreter service;
 - 10.4.2 the obligation was about people being fairly tried;
- 10.5 In the article on 18 August 1999 it is attributed to the Chief Minister, Mr Burke, that he said he had taken the matter up with Prime Minister John Howard and was expecting a response later in the week. If what is attributed to Mr Burke is accurate then obviously he recognised a need for interpreters of Aboriginal languages;
- 10.6 The document referred to in paragraph 5.1 above also suggests that comments were made by the Chief Minister following Mr Tippett. No transcript has been provided of what Mr Burke said. The failure to provide such transcript is some evidence that the transcript of what Mr Burke said would not have assisted the Respondent in this application. See **Commercial Union Assurance v Fercom** (1991) 22 NSWLR 389, 418.
- 10.7 Since 18 August 1999 the Northern Territory Government with the assistance of the Commonwealth Government has provided an Aboriginal Interpreter Service;
- 10.8 Each complaint in his original respective complaint, inter alia, complains that:

- 10.8.1 he is an Aboriginal person;
 - 10.8.2 his first language is an Aboriginal language;
 - 10.8.3 he was unable to properly understand the proceedings against him;
 - 10.8.4 he required an interpreter to assist him understand the criminal process;
 - 10.8.5 an interpreter of his language was from time to time unavailable to assist him.
- 10.9 In response to the complaints made by the complainant the Respondent has variously admitted:
- 10.9.1 “I confirm that the facts alleged in the above mentioned matters (Ankin, Bara, Cameron, Cooper, Kerr, Mamarika, Mamarika) are not in dispute. The position of the Respondent is that there can be no discrimination on the basis of race or failure to accommodate a special need in respect of the failure to provide an Aboriginal Interpreter Service” (letter of Solicitor for the Northern Territory dated 21 March 2000);
 - 10.9.2 “As I indicated in earlier conversations the facts are not in dispute. The office of Ethnic Affairs provides a limited interpreter/translator service to non-English speaking immigrants and refugees. It was a condition of the Commonwealth funding in the initial establishment of the program that such services are to be provided to non-English speaking immigrants and refugees, who are considered to be disadvantaged” (letter of Solicitor for the Northern Territory dated 28 August 1999);
 - 10.9.3 “As I have indicated throughout, there is not likely to be any serious dispute as to the factual basis of the individual complaints of your clients and I know of no evidence which would cast doubts upon their assertions that they were handicapped, by reason of their lack of sufficient skill in the English language in their ability to fully understand Court proceedings and to instruct a solicitor” (letter of Solicitor for the Northern Territory dated 3 November 1999).

11. The statements attributed to Mr Tippett are to the following effect:

- 11.1 **Ebatarinja v Deland** confirms the necessity for Aboriginal interpreters

in appropriate circumstances if there is to be a fair trial;

- 11.2 Mr Tippett's experience was that he had been in cases where interpreters were necessary and where delays and problems had occurred when interpreters were unavailable;
 - 11.3 the Northern Territory Government should take the initiative and establish an interpreter service.
12. There is no evidence that Mr Tippett said:
- 12.1 the failure to provide interpreters of Aboriginal languages was discriminating or a breach of the Anti Discrimination Act;
 - 12.2 the Respondent was under a legal duty to provide interpreters.
13. The Respondent clearly acknowledges a need for interpreters of Aboriginal languages and that the complainants were handicapped in the ability to fully understand Court proceedings and to instruct their solicitors. I do not understand it to be the Respondent's case that:
- 13.1 an Aboriginal Interpreter Service is not required, nor
 - 13.2 that non English speaking Aboriginals may not be handicapped in Court proceedings if interpreters are not available, nor
 - 13.3 that it does not have a role to play in the provision of such services.
14. Mr Tippett has made no comment about the specific matters raised by the complaints in this proceeding.
15. The major issue in this proceeding is whether the failure of the Northern Territory Interpreter Service to provide interpreters was discriminatory.
16. It cannot be said that Mr Tippett currently holds preconceived views which affect the specific issues in this case.
17. Further:
- 17.1 Mr Tippett as Counsel Assisting is subject to my direction and control (see ss 94(2));
 - 17.2 Mr Tippett will not be involved in determining the issues which are the subject of the complaints. That is purely a matter for the Commissioner.
18. Given all of the above it cannot be said there is a reasonable apprehension of possible partiality of the kind asserted by the Respondent or otherwise by an

observer with sufficient knowledge of the subject to make a reasonable judgment.

Dated: 26 April 2001

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STEVE SOUTHWOOD QC