



**NORTHERN TERRITORY  
ANTI-DISCRIMINATION COMMISSION**

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**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 strike out parts  
of Complainants' Proposed  
Further Points of Claim**

**DATE OF HEARING:**       **24 April 2001**

**DATE OF DECISION:**      **3 May 2001**

## **REASONS FOR DECISION**

1. On 24 April 2001 the Respondent made an application to strike out certain parts of the Complainants' Proposed Further Points of Claim ("the Claims") filed on 27 March 2001 on the grounds that:
  - 1.1. the Claims pleaded prohibited conduct which went beyond the prohibited conduct alleged in the original complaints made by each of the Complainants;
  - 1.2. the Complainants had not obtained leave to amend their respective complaints to plead the prohibited conduct which went beyond their original complaints;
  - 1.3. unless an amendment to the original complaints was granted a Hearing Commissioner has no jurisdiction to hear the additional matters of prohibited conduct sought to be pleaded in the Claims;
  - 1.4. leave to amend cannot be granted by a Hearing Commissioner if the proposed amendment is of such a nature as to amount to a new complaint or an additional complaint.
  
2. In particular the Respondent objected to the allegations of events after the date the original complaint was lodged which are contained in the following paragraphs of each of the following Claims:
  - 2.1 Ankin - paragraphs 5, 14(b) and 16(b) (25 August 1999);
  - 2.2 Bara - paragraphs 5 and 15(b);
  - 2.3 Cameron - paragraphs 5, 8, 14 and 16 (events after 7 July 1999);
  - 2.4 Kerr - paragraphs 5, 8, 14 and 16 (events after 6 July 1999);
  - 2.5 Clarence Mamarika - paragraphs 5, 8, 14 and 16 (events after 6 July 1999);
  - 2.6 Desmond Mamarika - paragraphs 5 and 14 (events after 22 September 1999).
  
3. The filing of the Claims followed directions I made on 13 March 2001. The

purpose of the directions was to try and narrow the issues between the parties and achieve a prompt hearing of the substantial merits of the case.

4. On 24 April 2001 the Complainants also sought leave to amend their respective complaints. Ankin, Cameron, Kerr, Mamarika and Mamarika sought leave to plead a new paragraph 13 in their Claims and Bara sought leave to plead a new paragraph 14. Each of the proposed amendments made allegations of indirect discrimination. The Complainants did not otherwise seek to amend their complaints.
5. During the course of argument Counsel for the Complainant, Mr Sheldon, conceded the proposed pleading of indirect discrimination contained in paragraphs numbered 13 in the Claims of Ankin, Cameron, Kerr, Mamarika and Mamarika and numbered 14 in the Claim of Bara as currently drafted were misconceived. Consequently, I dismissed the Complainants' application to amend their complaints. Mr Sheldon stated that he would replead either paragraph 10 or paragraph 13 of the Claims so as to raise the issues the Complainants wished to raise in such a manner as to comply with the Act. He has foreshadowed that it may be necessary to make a further application to amend the complaints.
6. In support of its strike out applications the Respondent relied, inter alia, on the decisions of the New South Wales Supreme Court in **MacDonald v Puplick & Ors** Matter No 30090/97 (1998) NSWSC 428 (12 June 1998) and of the Federal Court of Australia in **Charles v Fuji Xerox Australia Pty Ltd** (2000) FCA 1531 (30 October 2000). Those decisions are authority for the proposition that without an amendment to a complaint a Complainant cannot allege, at the hearing of a complaint, acts of prohibited conduct not alleged in the original complaint.
7. Arguably, the principles stated in the above authorities are applicable to the **Anti-Discrimination Act (NT)** ("the Act").
8. Sections 60, 63 and 64 of the Act provide in substance that:
  - 8.1 a person aggrieved by prohibited conduct may make a complaint to the Commissioner;
  - 8.2 a complaint may contain more than one allegation of prohibited conduct;

- 8.3 a complaint shall be in writing and shall set out in detail the alleged prohibited conduct.
9. Sections 66 and 70 of the Act provide:
- 9.1 the Commissioner shall, not later than 60 days after receiving a complaint, accept or reject the complaint and shall, as soon as practicable thereafter, notify the complainant of the decision;
- 9.2 where a complaint is accepted under Section 66, the Commissioner shall notify the Respondent in writing of the substance of the complaint.
10. If a complaint is accepted the Commissioner is required to carry out an investigation of the alleged prohibited conduct (see s 74). At the conclusion of an investigation and provided that he is satisfied that there is prima facie evidence to substantiate the allegation of prohibited conduct in the complaint the Commissioner may proceed to conciliation or a hearing if the Commissioner believes the matter cannot be resolved by conciliation (see s 76). If the attempt at conciliation does not succeed the Commissioner shall conduct a hearing of a complaint (see s 83).
11. However, none of the above provisions precludes a complaint being amended in the 60 day period prior to its acceptance. Nor do they preclude a complaint being amended prior to the Respondent being notified of the substance of the complaint. Indeed s 64(2) of the Act contemplates such amendments may be made.
12. It is also important to note that s 63 provides that a complaint may contain more than one allegation of prohibited conduct. Further, no process in the nature of investigation, conciliation or hearing is embarked upon by a Commissioner until the complaint is accepted.
13. A practise appears to have developed within the Anti-Discrimination Commission whereby the form of complaints may be amended or, in effect, settled by a Commissioner prior to their acceptance. Such a process would appear to be consistent with the above provisions. Further, the definition of complaint is wider than the definitions considered in the above authorities. In Section 4 of the Act a complaint is defined to "means a complaint made under Part 6". The definition clearly encompasses amended complaints.

14. A complaint may be amended prior to being accepted and prior to notification being given to a Respondent.
15. Nonetheless, there is also some force in the argument that a complaint should not be amended at the hearing stage if the nature of the amendment is to add a complaint about other or additional prohibited conduct and where the affect of the late amendment may be to deprive the Respondent of the opportunity of having the additional complaint investigated and conciliated.
16. So far as the objections taken in relation to the Claims here are concerned, it is apparent most of the matters objected to were incorporated in the complaints prior to or at the time of acceptance. Many of the events objected to were certainly incorporated in the complaints prior to notification and investigation.
17. To the extent that the complaints have been impliedly amended to include the events sought to be struck out prior to acceptance and notification to the Respondent and have been the subject of investigation the Respondent's strike out application is refused as the Act contemplates that such a process may occur.
18. As to the Complaint of Ankin, paragraph 13 is struck out as are the words "and 25 August 1999" appearing in paragraph 14(b). The complaint was accepted on 4 October 1999 and notice of the complaint was given to the Chief Minister of the Northern Territory on 5 October 1999.
19. As to the claim of Bara, his complaint was accepted on 4 November 1999 and notice of the complaint was given to the Solicitor for the Northern Territory on 14 February 2000. Prior to the claim being accepted details of events and prohibited conduct covering the period from 18 March 1999 to 21 May 1999 were provided. There was no complaint of prohibited conduct beyond 21 May 1999. Consequently:
  - 19.1 the words "and 12 June 1999" are struck out of paragraph 5;
  - 19.2 paragraph 14 is struck out;
  - 19.3 the words "and 12 June 1999" are struck out of paragraph 15(b).

20. As to the Claim of Cameron, that claim was accepted on 25 August 1999 and notice was given to the Chief Minister of the Northern Territory on 14 February 2000. The notification refers to prohibited conduct in the period 5 to 12 July 1999. Paragraph 13 of the Claim is struck out. No other parts of the Claim are struck out.
21. As to the Claim of Kerr, the complaint was accepted on 16 July 1999. Notification of the complaint was given to the Chief Minister on 29 July 1999. The notification refers to prohibited conduct occurring between 2 July 1999 and 16 July 1999. Paragraph 13 of the Claim is struck out as are the words "and 20 July 1999" in paragraph 14(b).
22. As to the complaint of Clarence Mamarika, the complaint was accepted on 16 July 1999 and notification was given to the Chief Minister on 29 July 1999. The notification covers prohibited conduct between the period 2 July 1999 and 16 July 1999. Paragraph 13 is struck out as are the words "and 20 July 1999" in paragraph 14(b).
23. As to the complaint of Desmond Mamarika, the complaint was accepted on 4 November 1999 and notice of the complaint was given to the Solicitor for the Northern Territory on 14 February 2000. The notification of the complaint covers prohibited conduct between 18 March 1999 and 21 May 1999. Paragraph 13 of the Claim is struck out.
23. Save for the parts of the Complainants' Claims struck out above, the Respondent's application is dismissed.
24. The parties will note that I have not struck out certain consequential allegations which have been pleaded by the Complainants and which do not amount to allegations of additional prohibited conduct. Those matters not struck out will form part of the substantive hearing in July 2001. They are essentially matters dealing with what is said to be the consequence of the prohibited conduct complained of by the Complainants.

Dated: 3 May 2001

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S R SOUTHWOOD QC