

ANTI-DISCRIMINATION COMMISSION
NORTHERN TERRITORY

COMPLAINANT: **CHRISTINA HOSKING**

RESPONDENT: **CHRIS FRASER**
CENTRALIAN RECRUITING

NUMBER: **1 of 1995**

TRIBUNAL: **DAWN LAWRIE**
HEARING COMMISSIONER

COUNSEL ASSISTING: **SALLY GEARIN**

SUBJECT: **THE EFFECT OF SECTION 66 OF**
THE ANTI-DISCRIMINATION
ACT

DATE OF DECISION: **21 AUGUST 1995**

On 21 August 1995, I heard submissions as to whether I could proceed to hear a complaint where *Section 66* of the NT *Anti-Discrimination Act 1992* (the 'Act') may not have been complied with.

Under Section 13(1)(h) of the *Anti-Discrimination Act 1992*, one of my functions as Commissioner is to promote an understanding of the Act. I have therefore decided to publish my ruling on those submissions.

On 11 March 1994 the Office of the Anti-Discrimination Commissioner received a complaint from Ms Christina Hosking against Mr Chris Fraser, trading as Centralian Recruiting, alleging prohibited conduct by seeking unnecessary information on which unlawful discrimination might be based, contrary to *S.26* of the NT *Anti-Discrimination Act 1992*.

In letters dated 16 May 1994 a delegate of the Commissioner advised the Complainant that the complaint had been accepted, and wrote to the Respondent Mr Chris Fraser of Centralian Recruiting outlining the substance of the complaint and seeking his response.

Attempts at conciliation were unsuccessful and eventually a Hearing was convened in Alice Springs on 21 August 1995.

Mr Sean Stewart sought leave to represent the Respondent, Mr Fraser, and raised questions regarding *s.66* of the Act and the Commissioner's jurisdiction to hear the matter.

The Complainant, Ms Hosking, was unrepresented, and opposed leave being given for the Respondent to be represented.

Submissions by both parties, and Counsel Assisting were considered.

I drew the parties attention to *s.90* of the Act (Conduct of Proceedings) which states the Commissioner:

"shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms."

s.90(1)(b)

and:

"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."

s.90(1)(c)

Leave was given for Mr Stewart to address me on the issue of *s.66* and my jurisdiction to hear the matter, however if, after hearing all arguments, I determined to proceed, leave to represent the Respondent would not be given, having regard to the fact that the Complainant was unrepresented, I had the benefit of Counsel Assisting, and the points outlined in *s.90*.

Mr Stewart was then asked to address me on the jurisdictional issue.

Section 66 of the Act states:

"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."

Mr Stewart stated:

"There was a letter of complaint received by the Commission on 11th March 1994. The complaint was not reported to be accepted until 16th May 1994, thus the 60 day stipulation for acceptance or rejection of the complaint expired on or about 10th May 1994. The action of the

Commissioner is preparing to accept the complaint, or be prepared to accept the complaint was fully 6 days late."

It was Mr Stewart's submission that *s.66* did not have any provision for extension of time as is the case in *s.65* of the Act, that *s.66* was couched in mandatory terms, that the Commissioner (or in this case her delegate) had a duty to accept or reject the complaint within 60 days and as that had not allegedly occurred the Commissioner did not have power to continue to deal with the matter.

Counsel assisting submitted that while the decision to accept or reject a complaint is to be taken within 60 days, the notification to the Complainant of that decision follows, and does not of itself have to be within 60 days.

There was no notation on the file as to when the Commissioner's delegate had decided to accept the complaint pursuant to *s.66*, but it was agreed the Complainant actually received notification of acceptance by a letter dated 16 May.

Counsel assisting submitted:

"The issue here is not whether or not you have the power to extend the time limit, the issue is what is the consequence in this statute for not complying with it. Now if you take my learned friend's argument to its logical conclusion, this would mean that an error, an administrative error in the Commissioner's office would disentitle the complaint to a remedy. That would create in my submission an absurd result and is contrary to the purpose of the legislation. ...

The purpose of the statute is not to disentitle the Complainant to a remedy. This purpose of this particular section is to give the Complainant a remedy if their complaint is not being dealt with expeditiously. And of course, non-compliance with *Section 66* would entitle a Complainant to seek the

prerogative writ of mandamus in a court directing the Commission to deal with the complaint."

Having carefully considered the arguments put to me, I made the following finding:

"On the question of when exactly the decision was made, (and I draw the distinction between the letter which went out, the distinction between notification of acceptance or rejection and the decision to accept or reject) - I accept the evidence that the Complainant received a phone call some time before receiving the letter. But it is not possible with any precision to determine exactly on what date she received that phone call, and therefore whether it was before or after this date of 10th May.

I'll turn to the submissions you have made about the mandatory aspect of *Section 66*, "the Commissioner shall" and the decisions to which you have directed my attention and I accept that argument Mr Stewart, that this is a clear indication of the legislature that the Commissioner or Commissioner's delegate 'without undue delay will attend to the complaint' or the allegation they have received. I do not have a problem with that. There are several time limits set in this Act, one is that the Commissioner cannot receive a complaint of an alleged occurrence before the commencement of the Act, and that is absolutely binding and the Act commenced on 1st August 1993. Then as it has been pointed out there is the time limit inherent in *s.65* that 'it (the complaint) shall be made not later than 6 months after the alleged prohibited conduct took place'. However, there is the discretion 'if circumstances are such that the Commissioner is satisfied it is appropriate to do so, to accept the complaint outside that time limit'. We come to the acceptance or rejection of the complaint. I then turn my mind to the consequences of not complying with that *Section 66*. While it does appear that it is a problem for the administration of the Act and those administering it, I cannot agree that failure to comply with *Section 66* should automatically render such a complaint unable to be addressed, that is remove entirely the jurisdiction

of the Commissioner from the investigation proceeding to a decision on the complaint. I agree with learned counsel assisting that the thrust of that *Section 66* appears to give a remedy to a Complainant to ensure that the matter they have raised will be addressed. Either accepted or rejected. And if the Commission is deficient in its operations they can resort to a prerogative writ so that the decision must be made. That section is there to ensure that matters do not remain in abeyance. Accordingly, Mr Stewart, I believe that notwithstanding that we - I cannot - reach a finding as to exactly when the decision to accept the complaint was made, I believe that it would not have a bearing on my jurisdiction to hear this matter flowing from the inability to conciliate the complaint. And accordingly, I intend to proceed with the hearing."

The decision was not appealed.

DAWN LAWRIE

Commissioner

21 August 1995