

ANTI-DISCRIMINATION COMMISSION  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

IN THE MATTER OF

**RAY RENOUF**  
Complainant

AND:

**AUSTRALIAN BROADCASTING  
CORPORATION**  
1st Respondent

**GARY GIBSON**  
2<sup>nd</sup> Respondent

DECISION ON COSTS

(Delivered 3 December 2001)

Mr David LOADMAN, HEARING COMMISSIONER

1. In relation to this matter it is incumbent upon the Commission to make a ruling in relation to the issue of costs sought against the complainant in this matter.
2. It is necessary to briefly highlight some aspects of the decision handed down on 14 September 2001.
3. All references are to the paragraph numbers as they appear in the decision.
4. At paragraph 8 of the decision it is highlighted that the complainant “was unaware of the fact that he was being discriminated against until he was

advised by a Mr Michael Alsop in late 1997 that conduct amounting to discrimination had been taking place “for a considerable period of time”.

5. At paragraph 9 of the decision IS SET OUT the hyperbolic assertion that Alsop made during the hearing of this matter to the effect that he “had never seen anybody persecuted as much as Ray Renouf was in my entire working life”. cursory investigation by the complainant should have revealed that to be a nonsense as was found to be the case in the decision.
6. Although of course Mr Alsop’s credibility is not discretely an issue upon which a costs order ought be predicated, transparent unreliability of what he was saying which could have been discovered by cursory investigation is relevant.
7. The complainant insisted that he had made “many” complaints, described in paragraph 16 of the decision.
8. In paragraph 17 of the decision, Claire Witham to whom the alleged many complaints were made denied the assertions and consequently the complainant was not believed in relation to those unfounded assertions at all.
9. On 25 March 1998 a meeting described in paragraph 18 of the decision was according to the evidence of Ms Witham the first occasion that the complainant asserted he had “experienced harassment on the basis of his sexuality”. However, as set out, no amount of trying was able to evoke from the complainant sufficient particularization to enable her to investigate it. It was either baseless or predicated on what should have been easily discovered as nonsense emanating from Alsop.
10. As set out in paragraph 21 of the decision, the complainant did not invoke at all the grievance procedure put in place for the purposes of protecting both a person such as the complainant if his allegations were true, or the people against whom the allegations were made.

11. In paragraph 22 of the decision, the complainant was alleged by Ms Edwards to have asserted an approach by “senior people for sexual favours”. As was found, such an incident if it had ever taken place would not, given the conclusions of the Commissioner, have been left out of the litany of complaints made by the complainant in this matter.
12. As found in paragraph 24 of the decision, “I reject entirely the allegation by the Complainant that there was a homophobic work environment at the First Respondent’s work place”. Furthermore, the Commission also highlights the finding in relation to the rejection of the complainant’s description of the second respondent as a liar.
13. In summary, there was never any objective basis upon which there could be any foundation for the complaints made against the first and second respondents.
14. Given that background the Commission then turns to the written submissions filed in relation to this issue.

### **Respondents’ submissions**

15. Written submissions were filed on behalf of the first and second respondents regarding their application for costs (“respondents’ costs submissions”).
16. It is trite that section 96 is as set out in paragraph 6 of the respondents’ costs submissions. The Commission finds that 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.
17. In the respondents’ costs submissions, commencing at paragraph 11, there are submissions in relation to categorizing proceedings as either vexatious or as “initiated” without reasonable cause.

18. This Commission does not find it appropriate to be constrained by the philosophy applicable to costs orders under the *Work Place Relations Act* (1986).
19. The Tribunal does accept that Alsop made mischievous comments to the complainant and that those utterings were the basis upon which the complainant subsequently brought the proceedings. It must follow from the historical recounting of selected pieces of evidence as outlined above that the Commission believes it would have been prudent for complainant at least to test the veracity of the allegations made by Alsop by independent means. He chose not to do so but to embrace the utterings as a basis for the proceedings against both respondents.
20. The respondents allege there exists an analogy with the decision in *Langley v University of New South Wales* (1984) EOC para 92-018, the dictum of Hutley J being set out at paragraph 26 of the respondent's costs submissions.

### **Complainant's submissions**

21. Written submissions were filed on behalf of the complainant in relation to the application for costs ("complainant's costs submissions").
22. The Commission accepts that the philosophy cited in the authorities at pages 2 and 3 of the complainant's costs submissions do not and ought not form the basis upon which any costs order might be made against the complainant in this proceeding and the issue of the *Industrial Relations Act* has already been addressed in this decision.
23. The Commission accepts there was a basis for the complainant to go beyond the "prima facie" stage.
24. The complainant's costs submissions at page 5 and thereafter sets out various decisions relating to comparable jurisdictions elsewhere in the Commonwealth of Australia concerning costs.

25. At page 6 of the complainant's costs submissions, there is cited a single instance of a costs order being made "because case was so lacking in any real foundation that it should never have been brought".
26. The Commission does accept principles in the dictum cited at page 7 (*Murphy v Colorific Lithographics ADT of 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."*

27. That must however have a corollary. If applications are specious and are based upon hearsay communications, in respect of which no investigation of any nature has been carried out, and where at best there is a blindly held belief as to the veracity of the hearsay evidence, that should also not be encouraged for obvious legal and logical reasons.
28. This Commission does not embrace the philosophy that "a general belief in their own victimization ... when that belief is held to be unreasonable" is a basis for refusing the orders sought by the respondents.
29. The reason asserted at page 8 of complainant's costs submissions as being sufficient to discount categorisation of "unreasonable" is not adopted nor does this Commission embrace the submission that to found a successful costs order the categorisation of the conduct of the complainant must be that the complaint was "lacking in substance". Although the Commission has found that the complainant was "the unfortunate victim of Alsop's mischief" it does not embrace the submission that should necessarily provide a shield against a costs order as asserted in page 9 of the complainant's costs submissions.
30. In respect of the succeeding submission, the issue is not whether the complainant was obliged to lodge a written complaint within the complaints structure of the first respondent prior to filing a complaint of discrimination

with the Commission, but rather whether as a matter of fairness, particularly given the hearsay nature of the allegations, he ought not to have allowed at the employer level the appropriate investigation to be carried out in respect of the complainant. That after all would have obviated the respondents becoming embroiled in a lengthy and expensive prejudicial and embarrassing proceeding.

31. The Commission does not embrace the submission that the “prima facie finding” would not have been made unless there was sufficient evidence to substantiate the complaint. That evidence existed in the form of the evidence of Mr Alsop and no other credible basis. Given Alsop’s managerial position, it is at least arguable that the lack of care and caution by the complainant in not checking proceeding as he did could form the basis for a costs order against him.
32. Whilst the Commission does not accept there existed an opportunity until the evidence was tested to make any application under section 102, it does embrace the submission of Mr Tippett recounted at page 12 of the complainant’s costs submissions.
33. In the circumstances the Commission will make an order in the following terms.

### **Order**

34. That there be no order for the payment of the costs of first and or second respondent by the complainant.

Dated: 3 December 2001

DAVID LOADMAN  
Hearing Commissioner