

CITATION: *Pat Mubwandarikwa v Anti Discrimination Commission & Alcan Gove Pty Ltd [2007] NTMC 071*

PARTIES: PAT MUBWANDARIKWA
v
ANTI DISCRIMINATION COMMISSIONER
AND
ALCAN GOVE PTY LTD

TITLE OF COURT: Local Court

JURISDICTION: Anti- Discrimination Appeal

FILE NO(s): 20707311

DELIVERED ON: 30th October 2007

DELIVERED AT: Darwin

HEARING DATE(s): 25th October 2007

JUDGMENT OF: Relieving Magistrate Fong Lim

CATCHWORDS:

Appeal – Anti- Discrimination – thoroughness of investigation – prima facie case – powers of delegate on investigation - sections 75 & 92 of Anti Discrimination Act (NT)

Fiorido v Anti Discrimination Commissioner [2001] NTMC 38
Spires v Anti- Discrimination Commissioner [2001] NTMC 80
Gedling v Anti- Discrimination Commission and Charles Darwin University [2004] NTMC 034
Spires v Anti- Discrimination Commission & Darwin International Hotels & Anthony Mather & Northern Territory Training Authority [2002] NTMC 023
Martin v McGowan, McCue and Anti Discrimination Commissioner [2001] NTMC 63
Sharma v Legal Aid (Qld)[2002] FCAFC 196
North Galanjanja Aboriginal Corporation v State of Queensland [1996] 185 CLR 595

REPRESENTATION:

Counsel:

Appellant: Mr Fogarty
First Respondent: Ms Lisson

Second Respondent:

Mr O'Loughlin

Solicitors:

Appellant:

Darwin Community Legal Service

First Respondent:

Self

Second Respondent:

Corrs Chambers Westgarth

Judgment category classification:

C

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[2007] NTMC 071

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64

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20707311

[2007] NTMC 071

BETWEEN:

PAT MUBWANDARIKWA
Appellant

AND:

**ANTI DISCRIMINATION
COMMISSIONER**
First Respondent

ALCAN GOVE PTY LTD
Second Respondent

REASONS FOR DECISION

(Delivered 30th October 2007)

Ms FONG LIM RSM:

1. The Appellant made complaint to the First Respondent about alleged prohibited conduct of the Second Respondent arising out of his employment with the Second Respondent. The Appellant alleges that he was discriminated against by the Second Respondent on the grounds of his race, conduct prohibited by section 19 (1)(a) of the Anti Discrimination Act (NT) (“the Act”). The Appellants initial complaint was accepted by the First Respondent under section 66 of the Act and then dismissed after an investigation took place pursuant to section 75 of the Act.
2. The Appellant’s grounds of appeal are that:
 1. The First Respondent’s investigation was firstly an improper exercise of the hearing power.

2. The First Respondent failed to ensure that the Appellant had a reasonable opportunity to present his case.
3. The investigation undertaken by the First Respondent was not thorough enough as mandated by section 75 of the Act.
3. The Appellant abandoned his first ground of appeal regarding the improper exercise of the hearing power during the investigation.
4. Both the Appellant and the Second Respondent produced written submissions to the court and the First Respondent indicated that they would not be making any submissions in the Appeal.
5. There is no dispute about the nature of the appeal from a decision of the Anti Discrimination Commissioner. That is the appeal is an appeal by way of rehearing on the papers unless fresh evidence is admitted by leave of the court (see *Spires v Anti Discrimination Commissioner* [2001] NTMC 80 and *Fiorido v Anti Discrimination Commissioner* [2001]NTMC 38). The Appellant made no application for the admission of fresh evidence.
6. The remedies available to the Appellant on an Appeal are set out in section 107 of the Act as follows:

107. Powers of Local Court

The Local Court, on hearing an appeal under this Part, may –

- (a) affirm or vary the decision or order appealed against;
- (b) quash the decision or order appealed against and substitute any decision or order that the Commissioner may make under this Act;
- (c) remit the matter to the Commissioner for further hearing or consideration, or for rehearing; and/or
- (d) make such other orders (including as to costs) as the Court considers appropriate

7. It is important to deal with the Appellant’s claim against the First Respondent first because if this Court finds that the First Respondent’s

investigation into the complaint was not thorough enough as mandated by the Act or the First Respondent failed to give the Appellant reasonable opportunity to present his case then the logical remedy available to the Appellant is for the matter to be referred back to the Commissioner for further investigation. This Court does not have the investigative powers of the Commissioner and if there is further information to be gathered to be considered in deciding whether there is “prima facie evidence” then that is a role for the Commissioner or his delegate. Of course should this Court find that there was no error of the delegate in the investigation this Court can go on to decide whether the information provided by both parties was prima facie evidence of the prohibited conduct and then either quash, confirm or vary the delegate’s decision.

8. **“Reasonable opportunity”** – The submissions made in the Appellant’s outline of submissions in relation to this ground of appeal is that the Delegate reached conclusions “without further investigation”. He concludes in paragraph 15:

“In light of the equivocal response from the solicitors for the Second Respondent, as exacted in paragraphs 12 to 14 above, and the incomplete materials and gaps that confronted the First Respondent at the time of making the decision, further investigation by the First Respondent was warranted.”

9. There is no specific complaint that the Appellant should have had the opportunity to respond to the responses of the Second Respondent. In fact subsequent to Second Respondent’s letter of response of 3rd of July 2006 to the Appellant’s claim, the Appellant corresponded with the First Respondent several more times before the First Respondent made its ruling of the 8th of February 2007. That correspondence concludes with a letter from the Darwin Community Legal Service, assisting the Appellant, of the 30th November 2006 which stated:

“We confirm we are of the view that the Commission could “be satisfied that there prima facie evidence to substantiate the allegation

of prohibited conduct in the complaint based on the material that was previously before it and we do not believe any further material was necessary (*my emphasis*) from either party to enable a decision to be made by the Commission in this regard.

Our client has, however, instructed us to provide you with his response to Alcan Gove's letter of 16th October 2006 and a copy of our client's response is attached for your information."

10. It is clear from that correspondence that the legal representatives of the Appellant were of the opinion that their client had ample opportunity to provide the delegate with relevant information. It is also clear that the Appellant had one more opportunity to put his case in the attachment to this letter.
11. It is clear that that the Appellant was afforded reasonable opportunity to answer the response of the Second Respondent and was of the opinion that he had provided the First Respondent with all of the relevant information he presently had in relation to his complaint accordingly this ground of appeal must fail.
12. **"Thorough Investigation and Prima Facie Evidence"** - The remaining ground of Appeal is that the First Respondent did not complete a thorough investigation before coming to its conclusion. After investigation of the complaint the Commissioner's delegate dismissed the complaint on the basis that:

"there is insufficient prima facie evidence of prohibited conduct under section 76 of the Northern Territory Anti Discrimination Act 1993" (see page 16 of the First Respondent's letter to the Appellant dated 8th February 2007) .

13. The Delegate came to that conclusion after considering material put before her by the Appellant in his application, responding correspondence of the Second Respondent and copies of primary documents by the Second Respondent. The complaint by the Appellant is that the Delegate should have investigated further before making her decision and in particular

should have required the Second Respondent to produce copies of emails sent by him to management about his treatment, looked at examples of other technical writers work to establish if there was anything in the claim that his work was substandard and spoken to his co-workers about his attitude toward team members. The Appellant also argues that the First Respondent should have ordered “certain employees of the Second Respondent to give statements under section 92(1) of the Act” (see paragraph 16 of the Appellant’s outline of submissions).

14. Counsel for the Appellant submitted that it was not enough for the delegate to accept the Second Respondent’s response at face value especially when the evidence of the Appellant’s substandard work came from the very people the Appellant complains were racially discriminatory toward him. That argument is based on the fact that racial discrimination is usually difficult to prove and there is rarely direct evidence of it. The decision maker is entitled to look at all of the circumstances and make reasonable inferences about the motivation of the person or entity accused of discriminatory behaviour (see *Sharma v Legal Aid (Qld)* [2002] FCAFC 196). Counsel for the Appellant submitted that the Delegate could not consider what the reasonable inferences were unless she had taken her investigation further than just accepting the Second Respondent’s explanation for everything.
15. Counsel for the Second Respondent submitted that when the delegate is considering whether there is prima facie evidence before her to establish the basis of a complaint the delegate is entitled to consider the evidence which is available after a thorough investigation but the Appellant cannot expect that the investigative process used as an avenue to allow a fishing expedition to take place. The Applicant must produce some evidence which would support a claim of discrimination or give the delegate enough cause to investigate the matter further.

16. The question for this Court must be how far should a delegate investigate before being satisfied that he/she has enough information to establish whether prima facie evidence exists and what powers does a delegate have in its investigative process.
17. It is the Appellant's case that the delegate should have required the Second Respondent to produce certain documents and ordered certain employees of the Second Respondent to give statements under section 92(1) of the Anti – Discrimination Act. The preliminary question is whether the delegate has the power to require the production of documents and to require people to give statements during an investigation
18. Section 92(1) of the Act gives the Commissioner power to do certain things:
 92. Powers of Commissioner in respect of proceedings (*my emphasis*)
 - (1) The Commissioner may, in writing, order a person –
 - (a) to attend proceedings under this Act until excused;
 - (b) to give evidence on oath or affirmation;
 - (c) to provide to the Commissioner a document or class of documents as specified in the order; or
 - (d) to provide to the Commissioner, in writing signed by the person, information in the possession of the person relevant to the proceedings as specified in the order.
 - (2) If a document is provided to the Commissioner under subsection (1), the Commissioner –
 - (a) may take possession of, and may copy or take extracts from, the document;
 - (b) may retain possession of the document for such period as is reasonably necessary; and
 - (c) during the period a document is retained under paragraph (b), shall allow a person who, if the document were not in the possession

of the Commissioner, would be entitled to inspect it, to inspect the document at all reasonable times.

(3) For the purposes of subsection (1) –

(a) the Commissioner may administer an oath or affirmation; and

(b) a witness attending the proceedings may be examined, cross-examined and re-examined.

(4) A person is not required to give evidence or provide a document under this section if the person objects on the ground of privilege that the person would be entitled to claim if the person were a witness in proceedings in the Supreme Court.

19. There are no specific powers of the Commissioner set out in the Act. Section 75 provides for the conduct of an investigation as follows:

“(1) An investigation under this Division shall be conducted in such a manner as the Commissioner thinks fit.

(2) An investigation under this Division shall be carried out with as little formality and technicality and with as much expedition as the requirements of this Act and proper consideration of the matters before the Commissioner permit.”

20. These provisions make it clear that the Delegate has the discretion to conduct the investigation in the manner they think fit in the circumstances and with as little formality and technicality as possible.
21. Whether the powers set out in section 92 of the Act are meant to be used in an investigation pursuant to section 75 of the Act can only be established by considering the object of the Act and the scheme created by Part 6 of the Act for the “Resolution of Complaints”. The objects of the Act are set out in section 3 of the Act and to paraphrase they are to promote recognition and acceptance in the community of the right of equal opportunity, to eliminate discrimination in all areas of life and specifically to eliminate sexual harassment.

22. Part 6 of the Act creates that three tiered approach to the “Resolution of Complaints” the initial assessment of the complaint (section 66) where the claim is either accepted or rejected on the basis that it is either, frivolous or vexatious, trivial, misconceived or lacking in substance or fails to disclose any prohibited conduct. The next stage is where the Commissioner accepts the claim under section 66 and then undertakes an investigation to ascertain whether there is prima facie evidence to substantiate the allegation of prohibited conduct (section 75 & 76). The final stage is where the Commissioner has decided there is prima facie evidence and the matter is either referred to a conciliation or a hearing before the Commissioner for final resolution. The conciliation process is set out in Division 3 of Part 6 and may result in the matter being referred to a hearing if not resolved. Division 4 sets out the processes to be adopted in the conduct of the hearing.
23. This court has previously considered the three stepped process provided for the consideration of complaints under the Act and has found that the initial consideration under section 66 of the Act does not require the delegate to look further than the information provided to him by the complainant (see Trigg SM in *Gedling v Anti Discrimination Commission & Charles Darwin University* [2004] NTMC 034). The next step under section 75 of the Act requires a thorough investigation and an administrative decision by the delegate whether there is prima facie evidence which indicates prohibited conduct (see Luppino SM in *Spires v Anti Discrimination Commissioner & Northern Territory of Australia* [2001] NTMC 80 and Wallace SM in *Spires v Anti Discrimination Commission & Anthony Mather & Northern Territory Training Authority* [2002] NTMC 023). The final step in the process being a hearing before the Commissioner where evidence is taken and a decision is made by the Commissioner on the merits of the case.
24. Section 92 must be considered with this structure in mind. The investigation under section 75 is an evidence gathering exercise it is not the Delegate’s role to decide issues of fact and /or law it is just to establish if prima facie

evidence exists to support the complaint. Section 76 requires the Delegate to be thorough in his/her investigation. The powers in section 92 relate are given to the Commissioner “in respect of proceedings”, the question is whether an investigation is a “proceedings”. The Court was not provided with detailed submissions from either party as to whether section 92 does relate to the investigation under section 75. When this question was put to the Appellant’s counsel his submission was that he thought that the powers did apply and the Second Respondent only refers to this issue in passing in paragraph 77 of their written submissions indicating a view that section 90 regulated both the conduct of both the investigation and a hearing under the Act. The Second Respondent comes to this conclusion because the word “proceedings” is used in the title of that section.

25. In the Shorter Oxford Dictionary the word “proceedings” is defined as

“ A particular action or course of action, piece of conduct or behaviour; a transaction, the instituting or carrying on of an action at law ; a legal action or process; any act done by authority of a court of law; any step taken in a cause by either party”

and “investigation” is defined as:

“The act of investigating; search, inquiry; systematic examination; minute and careful research.”

26. In my view the intention of the legislation is clear on the literal interpretation of the sections. A proceedings is a the carrying on of an action at law including any step taken in a the carrying on of an action at law, an investigation is where a person is collecting evidence and making enquiries in relation to the existence of evidence. While the term “proceedings” could possibly include the investigation, accepting the complaint as the initiating process for an adjudication of the matter and therefore the investigation could be a proceeding in the resolution of the complaint. In the context of the scheme created by the Act it is my view that in the present case the investigation is not a proceeding. The purpose of the investigation is

consistent to gather information to ensure that any complaint which is to go further in the process had some substance and would not be a waste of the Commissioner's time and resources. The investigation is to be conducted with as little formality and technicality as possible if the Delegate were to have section 92 powers in their investigation that would not encourage informality in that investigation.

27. If an investigating officer could order a person to give sworn evidence and if that person refused for them to be subject a fine of up to \$1000 for a natural person and \$5000 for a company (see 92(5)) then surely that is increasing the formality of the process and further creating unwanted technicality (eg arguments could be had as to whether the order was properly made or served on the person). Further the penalty for failing to give evidence would be disproportionate with the purpose of an investigation into prima facie evidence.
28. In my view any reference to "proceedings" in Division 5 of Part 6 of the Act must be a reference to the progression of a complaint beyond the investigation period. For the delegate to exercise the powers set out in section 92 during an investigation would be allowing the delegate to pursue a fact finding mission to establish facts as far as they can be established, this in my view would be the improper exercise of the Court's hearing power (see *North Ganalanja Aboriginal Corporation v State of Queensland* [1996] 185 CLR 59).
29. It might be argued that this interpretation makes a paper tiger of the Commissioner's investigative powers. I do not adhere to that argument. The Commissioner's greatest power on investigation is to refer a matter to a hearing and should a respondent want to avoid that situation it is in their best interest to provide the investigating delegate with their co-operation and full response to the enquiry. If a reasonable inference of prohibited behaviour can be made from the Respondent's behaviour including how he

reacts to the investigation then the matter will either be referred to conciliation or a hearing. The Respondent could possibly avoid that situation by cooperation with the investigator.

30. My view that the provisions in Division 5 relate to the conciliation and hearing function of the Commissioner and not the investigation process is supported by one other factor.
31. While it is clear that Division 5 related to proceedings other than hearing because if it was intended that the powers in section 92 should only relate to the hearing function then they would have been included in the Division 4 not in a Division of its own, the references to the conciliation process as a “conciliation proceedings” throughout Division 3 of Part 6 of the Act strengthens the view that the legislature intended to differentiate the investigation stage of the process from “proceedings” under the Act. If the investigation was intended to be characterised as a proceeding then it would have been referred to as an investigation “proceeding”.
32. Therefore the powers of the Commissioner to order the production of documents or require the provision of statements from witnesses do not apply to the investigation stage of the complaint resolution. That is not to say that these things cannot be requested by the Commissioner during an investigation.
33. The authorities also consider the extent to which the investigation pursuant to section 75 should be taken eg in *Spires v Anti Discrimination Commissioner & Northern Territory of Australia* [2001] NTMC 80 there was a dispute about the delegate’s failure to request access to an application for a licence with the Motor Vehicle Registry, the respondent in that proceedings, however His Honour Mr Luppino SM found that while the requirement is for the delegate to conduct a thorough investigation :

“in the absence of the appellant showing the relevance of that document to this Court, I think that Commissioner properly decided not to call for that documents or have regard to it.”

34. It is clear that the depth of the investigative process is within the discretion of the delegate and depends very much on the facts of a particular case. In the present case the Appellant makes complaint that the accumulation of a number of instances of bad treatment, as perceived by him, by his employer should have led to the reasonable inference that he was treated in that way because of his race. The Second Respondent argues that the complaints may be a basis for an unfair dismissal claim but there is no evidence that race was in anyway an issue.
35. The Appellant argues that as discrimination can only be established by comparison, that is, would the appellant been treated differently had he not been African, then the delegate should have investigated the treatment of others by comparison to treatment of the Appellant and in this instance the investigation did not go far enough to allow that comparison to be made.
36. The Appellant suggests that there are emails in existence which would indicate the difficulties he was having with his supervisors and further that other employees would shed light on his relationship with other members of the team. The Appellant argues that only the First Respondent can produce the emails and the delegate should have taken it upon herself to question the other staff members.
37. The Second Respondent argues that before the delegate can be expected to request further documentation and interview third parties the Appellant must give the delegate reason to suspect that those documents and interviews would produce prima facie evidence of the prohibited conduct.
38. The only complaint which stands out as a possible indication of racial discrimination to is the reference to “pink technical writers”. The Appellant accepts that “pink” is a term used on the mine site to describe jobs and

buildings which are between or relate to both sides of the mining operation. The mining operation is physically split into two sections which by nature of the work done there is predominately red clay colour or white alumina powder. The administration block is in the centre of operations and called the “pink palace”. Therefore on the face of it, “prima facie”, the reference to “pink technical writers” in itself is not evidence of racial discrimination. The Appellant’s complaint that in reference to himself the term was used in a derogatory manner the only evidence of that is the Appellant’s own feeling. He says in his complaint that:

“she used it at irrelevant instances and with such irreverence that though I never discussed it with the other team members and without being politically correct I noted the tongue- in –cheek references and even other team members realised it.”

39. The Appellant did not point to any particular dates and times when these references were made where others may have been a witness it nor did he provide the delegate with names of the “other team members (who) realised it”. Without those references the delegate could not be expected to interview all members of the team about the whole three months the Appellant was employed. If the Appellant knows of others who realised the term was being used in an inappropriate way in relation to him he ought to have provided the delegate with those details. It is for the Applicant to provide the delegate with as much relevant information as is available to him to ensure any investigation conducted by the delegate is relevant and fruitful.
40. Further the Appellant couldn’t indicate to the delegate the dates (or even approximate dates) of the email correspondence which he says exists and nor could he indicate to the delegate the content of those emails or to whom they were sent. It is not enough for the Appellant to indicate there were some emails but not provide any detail enabling the delegate to identify those emails to the Second Respondent. It would be an onerous task for the Second Respondent to find these emails without those details (the Second Respondent is a large company with many employees) when the other

documents already produced by the Appellant and First Respondent do not support what is claimed by the Appellant.

41. At this point it is important to discuss the meaning of the phrase “prima facie evidence”, in the previous decisions of this court the issue has been discussed and French J’s comments in *Re Waanyi Peoples’ Native Title Application* [1995] 129 ALR 100 have been applied in the context of section 75 of the Act. His Honour said:

“In my opinion the words “prima facie case” are used in s63(3)(a) in a permissive sense. A prima facie claim in that sense is made out when there is evidence of each of the elements necessary to establish native title and from which the conclusion can be drawn that native title exists. It is not necessary, however, for the purposes of s 63(3)(a) that the applicant produce such evidence at that point in the process. The applicant does not have to make out a prima facie case. The application has simply to show that a prima facie claim *can* be made out. That means that the presidential member has to be satisfied that evidence exists or can be obtained which is capable of establishing each of the elements of the case.”

42. Mr Luppino in *Spires v Anti Discrimination Commission and the Northern Territory* (supra) states that those comments highlight the difference between “prima facie evidence” and “prima facie case”. I respectfully agree that there must be a distinction made between the two terms.
43. In *Dew v Delegate of Anti Discrimination Commissioner* [1996] EOC 92-823 Martin CJ considered the meaning of prima facie by applying the reasoning in *Beecham Group v Bristol Laboratories Pty Ltd* (1986-69 118 CLR 618 where Kitto, Taylor, Menzies and Owen JJ state in relation to a prima facie case:

“that if the evidence remains as it is there is a probability that at trial of the action the plaintiff be held entitled to relief”

44. His Honour Chief Justice Martin also found that in considering the evidence the court can “include inferences which are fairly open to it”.

45. The Second Respondent suggested that the application of French J's reasoning in the Waanyi People's case *supra* by this court in the past must be viewed with caution for two reasons, his decision was overturned by the High Court and the legislative scheme for the acceptance and adjudication of claims under the Native Titles Act while similar to that created under the Anti Discrimination Act (NT) it differs in a significant way.
46. In *North Galalaja Aboriginal Corporation v Queensland* [1996] 185 CLR 595 (Waanyi peoples case on appeal) the High Court majority held that His Honour Justice French was in error in his reasoning confirming the actions taken by his registrar when deciding whether to reject the applicant's claim. The Registrar in that instance obtained further information from a third party before deciding to reject the claim and His Honour accepted and considered that evidence on the appeal as well as required submissions from other parties. His Honour also rejected the claim as he was of the view that the Native Title had been extinguished. Their Honours, Brennan CJ, Dawson, Toohey, Gaudron and Gummow, found that the role of the Court pursuant to section 63 could not be construed as authorising the administrative rejection of an application where the claim was fairly arguable. To reject an application upon material produced by a third party after an adversarial contest on arguable questions of fact or law was to perform a function reserved to the Court.
47. It is important to note that section 63 of the Native Title Act, subject of the Waanyi People's case, does not include a power of the Registrar or the Presidential member to investigate the claim or to invite submissions from parties contra to the applicant's claim. The fact that French J did invite submissions and received other evidence before making his decision to confirm the Registrar's decision was criticised by their honours.
48. Section 75 of the Anti Discrimination Act (NT) clearly requires the delegate to investigate the claim and that includes responses from the respondent to

the claim and any other evidence that the delegate decides is relevant to collect and therefore that ruling of the High Court in Waanyi Peoples case does not apply in the present instance.

49. What does apply is the High Court's classification of the role of the Presidential member of the tribunal pursuant to section 63(3) and that is to distinguish it from the role of the Court in deciding the matters of fact and law which lead to the rejection or acceptance of a claim and their Honours view of what constitutes a prima facie claim.
50. Their Honours found that a prima facie claim is established when the applicant can show evidence exists or can be obtained that which is accepted will result in the claim's success.
51. If an analogy is made to the present case then the delegate has to decide on the material provided to her by the applicant and any other material produced out of her investigation that evidence exists or can be obtained of the prohibited conduct. If the delegate decides that evidence if accepted will result in the Appellant's claim being found proven then there is "prima facie evidence" of the prohibited conduct. That evidence can include any reasonable inference open on the evidence. The delegate should not embark on an enquiry leading to conclusions of fact and law which decide the issues between the parties that is a matter for the Commissioner on a full hearing of the matter.
52. The evidence produced by the Applicant shows a history of unfortunate and perhaps bad management decisions regarding the Applicant's employment, eg the inclusion of the Fly in Fly out clause of his contract (of course whether the Second Respondent can unilaterally excise that term from the contract is matter for another forum), the failure to provide the Applicant with adequate accommodation (in my view it is not adequate to provide an employee with accommodation which leaks and have the attitude that it just the way it is) and a breakdown of the relationship between the parties. The

evidence produced by the Applicant, including the suggestion that the use of the term “pink technical writer” in relation to the applicant was used in a derogatory matter was not in itself prima facie evidence of the basis for a complaint. Even if you look at all of the examples given by the Applicant together and assess the reasonable inferences that can be made from that evidence there is not enough evidence, if accepted in its entirety, which would result in the probable success of the Appellant’s complaint. In my view it is not a reasonable inference from the evidence provided by the Appellant that he has been discriminated against on the basis of his race. A reasonable inference from that evidence is that the Appellant was the subject of inadequate human resource management by the company.

53. If you then take the further evidence, arising out of the investigation, the contemporaneous emails produced of complaints about the attitude of the Appellant to his supervisor, Mr Hathaway’s and Ms Ford’s indication that the termination of the Appellant’s contract of employment was because of his standard of work and his attitude to his superiors and others of the team and the explanation given of the term “pink technical writers” given by the Second Respondent. The explanation given by the Second Respondent of all areas of complaint is plausible. There is a concession by Hathaway that he raised his voice at the Appellant but no concession about the use of “pink technical writers” as a derogatory term. Hathaway admits that his relationship with the Appellant had deteriorated and that is documented in the emails.
54. There is no suggestion by the Appellant that there were any witnesses to the use of “pink technical writers” in a derogatory manner towards the Appellant. There is some suggestion by the Appellant that the delegate should talk to certain people to get a truer view of the situation. He is not specific in how these people would assist his case nor does he indicate that he has spoken to them and that they support his view that his was unfairly treated on the grounds of his race.

55. If the Appellant had suggested that the Second Respondent produce particular reports by other writers and a further piece of work by himself to compare the standards and further suggested the time frames given to him were different to those give to others there may have been some grounds to expect that delegate go further in her investigation. What the Appellant submits is that because discrimination is a matter of comparison of treatment the delegate should gather information which allows her to make that comparison and in this matter she has not. I agree with the Appellant that discrimination is a matter of comparison and that the delegate should have that in mind when investigating a claim however it is my view that the delegate cannot be required to go off on a fishing expedition without any prospects of that expedition being fruitful. If the Appellant had referred to the work of another employee which was at the same standard as his yet was not treated in the same way as he was then the delegate may have had some ground for requiring that work and the work produced by the Appellant be produced to her. The Appellant did not provide that information and in my view it is reasonable for the delegate to not to pursue that line of investigation further than she did.
56. The Appellant did provide details of other employees whose accommodation situation seemed to be more favourable however the information provided by the Second Respondent provided the basis for the difference and that is that the Appellant had marked his marital status as single on his application form and his accommodation was consistent with that. The acceptance that the accommodation provided to the Appellant and to at least one other single employees did leak does not support racial discrimination against the Appellant as another non – African employee was in the same situation. The fact that the Appellant also had the opportunity to amend his marital status to being partnered yet he refused also supports the Second Respondent’s decision to keep him in the single accommodation. I am of the view that the delegate had no reason to investigate this issue further.

57. The breakdown in the Appellant's relationship with Hathaway and Ford is clear from the evidence however the alleged racial basis for that breakdown is only supported by a feeling that the Appellant had about how he was treated. The Appellant provides evidence that there was an argument between himself and Hathaway and that is confirmed by Hathaway and both agreed it was about the Appellant's work. There was no direct or indirect reference to the Appellant's race in that argument.
58. There is also evidence of an email from a former supervisor of the Appellant, a "Brendan" who confirms he was having difficulties with the Appellant in following his directions. That supports the Second Respondent's claim that race had nothing to do with the Appellant's dismissal.
59. The Appellant did not suggest further investigation take place in relation to this matter.
60. **Conclusion :** Given the above it is my view that the investigation undertaken by the delegate was thorough as mandated by the legislation and that her conclusion that there was not enough prima facie evidence to support a complaint of prohibited conduct was correct. While I accept that race has only to be one of the reasons for differential treatment of the Appellant the prima facie evidence does not support a complaint that he was treated differently to other employees nor was there evidence to suggest race played any part in the Appellants' treatment by the Second Respondent.
61. My orders are:
62. The Appeal is dismissed
63. The First Respondent's ruling is confirmed
64. Each party bear their own costs of this appeal.

Dated this 30th day of October 2007.

Tanya Fong Lim
RELIEVING STIPENDIARY MAGISTRATE