CITATION: *Acklin v Anti Discrimination Commissioner & Batchelor Institute of Indigenous Tertiary Education* [2008] NTMC 030

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| PARTIES: | FAY AGNES ACKLIN<br>v<br>ANTI-DISCRIMINATION COMMISSIONER<br>AND<br>BATCHELOR INSTITUTE OF INDIGENOUS TERTIARY EDUCATION |
| TITLE OF COURT: | Local Court |
| JURISDICTION: | Appellate |
| FILE NO(s): | 20706041 |
| DELIVERED ON: | 30 April 2008 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 30 November 2007 |
| JUDGMENT OF: | Ms Sue Oliver SM |

**CATCHWORDS:**

APPEAL – RACIAL DISCRIMINATION – prima facie case – thoroughness of investigation

*Anti Discrimination Act* ss 31, 75, 76 and 92
*Batchelor Institute of Indigenous Tertiary Education Act* s7
*Victoria v The Commonwealth* (1995-1996) 187 CLR 416
*Martin v McGowan, McCue and Anti Discrimination Commissioner* [2001] NTMC 6
*Fiorido v Anti Discrimination Commissioner & NT* (2001) NTMC 38
*Greg Gedling v Anti Discrimination Commission & Charles Darwin University* [2004] NTMC 034
*Mubwandarika v Anti Discrimination Commission* [2007] NTMC 071
*Gama v Qantas Airways Ltd (No 2)* [2006] FMCA 1767

**REPRESENTATION:**

*Counsel:*

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| Appellant: | In person |
| First Respondent: | Ms Lisson |

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| Second Respondent: | Mr Roper |

*Solicitors:*

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| Appellant: | Self |
| First Respondent: | Self |
| Second Respondent: | Clayton Utz |

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| Judgment category classification: | B |
| Judgment ID number: | [2008] NTMC 030 |
| Number of paragraphs: | 68 |

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

No. 20706041

*[2008] NTMC 030*

BETWEEN:

FAY AGNES ACKLIN
Appellant

AND:

ANTI DISCRIMINATION
COMMISSIONER
First Respondent

BATCHELOR INSTITUTE OF
INDIGENOUS TERTIARY EDUCATION
Second Respondent

REASONS FOR DECISION

(Delivered 30 April 2008)

Ms Sue Oliver SM:

1. This is an appeal pursuant to s 106 of the *Anti Discrimination Act*. On 22 June 2006 the delegate of the Anti Discrimination Commissioner accepted the Appellant's complaint of race discrimination against the Batchelor Institute of Indigenous Tertiary Education. An investigation of the complaint was then conducted by the First Respondent pursuant to s 74 of the *Anti Discrimination Act* and was subsequently dismissed under s 76 on the basis that there was insufficient prima facie evidence to substantiate the allegation of prohibited conduct in the complaint.

2. The Appellant, by an amended notice of appeal, relies on the following grounds:-

(1) that the First Respondent's decision is not in accordance with law;

(2) that the First Respondent erred by incorrectly applying s 76 in a manner contrary to the scheme objects and purposes of the *Anti Discrimination Act*;

(3) that the First Respondent's decision is against the weight of the evidence.

3. The Appellant's complaint was that she was treated unfairly by other employees of the Batchelor Institute, in particular, by the Head of the School in which she occupied a position of Senior Lecturer and by the Batchelor Institute Council on the basis of her race and her association with another person or persons with that same attribute. She alleged that she was harassed because of her race, was asked questions about herself which were unnecessary and upon which discrimination might be based and that she had a special need because of her race which was not catered for.

4. These matters are said to have lead to her not receiving a fresh contract on the expiry of the fixed term (three year) contract of employment in December 2005.

5. The Appellant is an Aboriginal woman, the position that she was appointed to was as a Senior Lecturer, Academic Level C, which was an identified position, that is, a position identified for being filled by a person who is Aboriginal or Torres Strait Island. The Second Respondent is an Indigenous tertiary education establishment, operating under the *Batchelor Institute of Indigenous Tertiary Education Act*. The Act establishes a governing council for the Institute, the composition of which is mandated by the Act. There are 22 council members in all, which the Second Respondent says is predominately comprised of Indigenous Australians and Torres Strait Islanders.

6. The Appellant attached considerable documentation to her complaint, primarily comprising of emails and internal memoranda passing between

various staff members and the Appellant, including those which she named in her complaint. The Second Respondent was given the opportunity to respond to the complaint. The response may be summarised by saying that it refuted the allegations made by the Appellant and suggested that the conflict which arose between herself and other members of staff, primarily with the Head of School, arose out of her failure to perform her functions as a Senior Lecturer in a timely manner and to the appropriate standard. The Second Respondent also provided to the Anti Discrimination Commissioner email and memoranda and the formal documentation relating to the Appellant's employment contract. I observe that with respect to the documentation provided by the Appellant, she did not, in all instances, provide the complete set of emails or documents that comprised the communication in question. That is, she appears to have been selective as to what parts of those communications were provided on some occasions. Much of the Second Respondent's documentation, in essence, filled in the gaps of some of those communications or placed them in context. Those documents were also provided to illustrate the way in which the Appellant conducted herself in communication with other staff members. It also illustrated that it was not an uncommon practice for e-mails to be copied to various staff members, a practice which was also engaged in by the Appellant.

7. By letter dated 25 September 2006, the Appellant addressed a response to the Second Respondent's submissions, to which the Second Respondent replied on 7 November 2006, stating that it relied upon its original response of 6 September 2006. The Second Respondent did however note that the Appellant's reply substantially broadened the allegations made by her and wished to know whether these were to be treated as new and separate complaints which have been accepted by the Anti Discrimination Commission. It does not appear from the documentation provided in the Appeal Book that this query was responded to.

8. The Act prohibits discrimination on the basis of particular attributes in specified areas. Section 19 provides a person shall not discriminate against another person on the ground of any of the following attributes:

(a) race;

(b) sex;

(c) sexuality;

(d) age;

(e) marital status;

(f) pregnancy;

(g) parenthood;

(h) breastfeeding;

(j) impairment;

(k) trade union or employer association activity;

(m) religious belief or activity;

(n) political opinion, affiliation or activity;

(p) irrelevant medical record;

(q) irrelevant criminal record;

(r) association with a person who has, or is believed to have, an attribute referred to in this section.

9. The Appellant's complaint was based on sub-sections 19 (a) and (r).

10. The Act defines discrimination in the following way:

**20. Discrimination**

(1) For the purposes of this Act, discrimination includes –

(a) any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity; and

(b) harassment on the basis of an attribute,

in an area of activity referred to in Part 4.

(2) Without limiting the generality of subsection (1), discrimination takes place if a person treats or proposes to treat another person who has or had, or is believed to have or had –

(a) an attribute;

(b) a characteristic imputed to appertain to an attribute; or

(c) a characteristic imputed to appertain generally to persons with an attribute,

less favourably than a person who has not, or is believed not to have, such an attribute.

(3) For discrimination to take place, it is not necessary that –

(a) the attribute is the sole or dominant ground for the less favourable treatment; or

(b) the person who discriminates regards the treatment as less favourable.

(4) The motive of a person alleged to have discriminated against another person is, for the purposes of this Act, irrelevant.

11. The areas of activity that are referred to in Part 4 include Division 3 – Work. Section 31 provides:

31. Discrimination in work area

(1) A person shall not discriminate –

(a) in deciding who should be offered work;

(b) in the terms and conditions of work that is offered;

(c) in failing or refusing to offer work;

(d) by failing or refusing to grant a person seeking work access to a guidance program, vocational training program or other occupational training or retraining program; or

(e) in developing the scope or range of a program referred to in paragraph (d).

(2) A person shall not discriminate –

(a) in any variation of the terms and conditions of work;

(b) in failing or refusing to grant, or limiting, access to opportunities for promotion, transfer, training or other benefit to a worker;

(c) in dismissing a worker; or

(d) by treating a worker less favourably in any way in connection with work.

**Areas of Activity where Discrimination Prohibited**

12. In her decision, the Delegate of the Commissioner did not consider which, if any, of these areas of activity were applicable to the allegations made in the complaint and appears to have considered the complaint either simply on the basis of an ambit claim of discriminatory conduct by others in her work at the Batchelor Institute, or that particular section 31 provisions had been met without specifying these provisions. In my view, for the purpose of accepting a complaint, it is necessary to identify the specific prohibition or prohibitions identified in section 31. Section 31 has no purpose unless it is to delineate the work areas in which discrimination is a prohibited act.

13. The Appellant was employed on a fixed term contract for a period of three years. The contract did not confer any renewal rights on either party. Indeed it specifically states that "This position is available for the period specified only. There is no expectation of continuing employment beyond 13 December 2005."

14. It is apparent that the prohibitions of section 31(1)(a), (b), (d) and (e) do not have application to the discrimination which the Appellant alleges occurred. The issue as to whether the Second Respondent "failed or refused to offer work" (s 31(1)(c)) would arise, if the material considered by the delegate were capable of identifying some evidence that the Appellant sought a further position or there was some circumstance under which there was a real expectation that a further position would be offered to her. In view of the clause of the contract to which I have referred to, such evidence would need to be clear and express.

15. In this regard, the Appellant alleges that she was not "re-contracted [sic] despite my work as the Indigenous person who developed and designed the Nursing Degree for Batchelor Institute" and "Despite being advised on numerous occasions that I would be coordinating the implementation of the Nursing Degree because of its "uniqueness" (Cultural Standards), I would be re-employed".

16. The complaint form completed by the Appellant alleges at Question 4 that at meetings with a senior academic from the Charles Darwin University and in a meeting with the Director of the Alice Springs Hospital and "within the Nursing Degree Accreditation Proposal, there is documented evidence that the existing Senior Lecturer C would continue with the implementation of the Nursing Degree in 2006 *(evidence will be provided when called upon).* Dr Jan Schmitzer HOS at these times advised all and sundry, that I would be the coordinator of the new nursing program."

17. There is nothing in the material provided to the First Respondent by the Appellant other than, in relation to the assertion regarding the Nursing Degree Accreditation Proposal, the Appellant is named as the "moderator" in the majority of unit descriptions attached to the proposal. I note that the document provided indicates it to be the "May Version 2005" when the emails and other correspondence provided by the Appellant clearly indicate

that the accreditation document was not complete at this time (this fact being a major source of the conflict with the Head of School). Even if accepted that this was the final version of the document, it is likely in my view that the inclusion of the Appellant's name as "moderator" of multiple units was reflective only of the current staffing situation, not of the anticipated staffing across the period of accreditation of the degree from 2005 to 2010. It would not, in my view, be sufficient of its own to constitute some holding out to the Appellant that her employment was to continue through that period. There is nothing in the materials in the Appeal Book that would support the other assertions.

18. Consequently, there is nothing in the materials to suggest that she was discriminated against on prohibited grounds by a failure or refusal to offer her work. The complaint in respect of the areas of activity set out in s 31(1) is not therefore made out.

19. Section 31(2)(a),(b) or (c) are clearly inapplicable to the allegations. In particular, as argued by the Second Respondent, there was no dismissal of the Appellant. Her contract of employment simply came to an end on the relevant date, such an outcome is not a dismissal.

> "As a matter of ordinary language, an employer does not terminate an employee's employment when his or her term of employment expires. Rather, employment comes to an end by agreement or, where the term is fixed by award or statute, by operation of law". *Victoria v The Commonwealth* (1995-1996) 187 CLR 416 at 520.

20. The remaining possible area of activity is therefore whether she was discriminated against by being treated less favourably in any way in connection with work (s 31(2)(d)). To summarise her assertion in this regard, as set out at Question 5 of the complaint form, it is that there was a sustained attack on her intellectual capabilities, that she was targeted by other non Indigenous staff members to get her to go, and that she was

constantly harassed and degraded in public areas and in front of junior staff over whom she had supervision.

21. I turn then to the grounds of appeal.

**Grounds of Appeal**

22. In a document entitled "outline of submissions" dated 9 August 2007 and filed in this Court, the Appellant expanded on the broad grounds that I have set out in [2] above. I will address the appeal grounds as they appear in that document although there is some overlap in them.

**First Respondent Exercised a Hearing Power**

23. Whilst the First Respondent took the general position of abiding the Court's jurisdiction in relation to the appeal, i.e. that in accordance with its usual practice, the substantive issues would not be addressed by it on the appeal, it did make submissions in regard to the grounds of appeal that raised issues going to the practice and procedure of the Commission.

24. The Appellant's assertion is that the First Respondent did not apply the proper test which is required at the investigation stage because the First Respondent applied a test requiring the Appellant to prove her complaint on the balance of probabilities.

25. As observed by Mr Luppino SM in *Martin v McGowan, McCue and Anti Discrimination Commissioner* [2001] NTMC 6 at [6], the *Anti Discrimination Act* establishes a three stage process for the determination of complaints. At the first stage, unmeritorious complaints may be rejected pursuant to the Commissioner's power in s 66. If the Commissioner however accepts the complaint, then it must be investigated in accordance with Division 2 of Part 6. On completion of the investigation, the Commissioner must determine either that the complaint be dismissed or if satisfied that there is prima facie evidence to substantiate the allegation of

prohibited conduct in the complaint, the matter is to proceed to conciliation, or, if the Commissioner believes it cannot be resolved by conciliation, the matter is to proceed to a hearing (s 76).

26. The test to be applied at the conclusion of an investigation is therefore whether there is prima facie evidence to substantiate the allegation of prohibited conduct. In this matter, the First Respondent was required to consider whether there was prima facie evidence that the Appellant had been treated less favourably in any way in connection with work on the basis of her Aboriginality or her association with another Aboriginal person.

27. Where a complaint proceeds to hearing, it is for the Appellant to prove, on the balance of probabilities, that the prohibited conduct alleged in the complaint is substantiated (s 91).

28. The Appellant relies on various statements from the delegate's decision to contend that the test applied by the delegate was not the prima facie test, but rather that she rejected the complaint on the basis that the Appellant had not proved the complaint on the balance of probabilities. The relevant passages referred to are:

> "Subject to this section, it is for the complainant to prove, on the balance of probabilities, that the prohibited conduct alleged in the complaint is substantiated".
>
> "To succeed in a complaint, a complainant must be able to establish, on the balance of probabilities that the conduct complained of was meted out because of their race".
>
> "Pursuant to section 91 of the Act, it is the complainant who bears the burden of proof to establish, on the balance of probabilities, that the conduct alleged is substantiated".
>
> "In my view, the evidence presented in this matter could not reasonably satisfy the Commissioner that the respondent's treatment of the complainant constitutes discrimination or prohibited conduct within the meaning of the Act".

29. However it is clear that in citing these passages, the Appellant has taken them out of the context in which they appear (particularly the first two passages, which when read in full context, make it clear that the delegate understands that there is a distinction between what is required to proceed beyond the investigation stage and what is required for a complaint to be found proved). The Appellant has also ignored the conclusion reached by the delegate at page 16 of her reasons where, after reference to former decisions of this Court, she said:

> "Based on these authorities, it is clear that the complainant does not need to prove a case on the balance of probabilities at this stage. To meet the prima facie test, the complainant needs only to satisfy the Anti Discrimination Commission that, if all the evidence before the Commission remains as it is, there is a probability that at a hearing, the complainant will be held entitled to relief".

30. In my view this is a correct statement of the law. The reference by the delegate to the standard of proof required at hearing in the passages relied on by the Appellant and referred to above, does not suggest that this is the test she applied. She was assessing whether there was any evidence, capable at hearing, of meeting the required standard of proof. If such evidence, does, in the view of the delegate exist, then she must refer the matter for hearing. If it does not, then the complaint is dismissed at the conclusion of the investigation. That is the purpose of the investigation, to assess the present evidence so that only cases which have merit proceed to hearing.

31. The Appellant further contends that the First Respondent went beyond the investigative powers in Part 6, Division 2 by determining what reasonable inferences could and could not be drawn based on incomplete and untested material. The contention has no basis. In relation to the material being "untested", the very point of the investigation is to assess whether there is a prima facie case available on evidentiary material that is untested. This applies as much to the Appellant's material as to the Second Respondent's materials submitted to the Commission for the investigation. The very

nature of an investigation is a consideration of what direct evidence exists and what inferences might reasonably and properly be drawn from the material before the Commissioner.

**Failure to Ensure Appellant a Reasonable Opportunity to Present her Case**

32. The Appellant says that the First Respondent failed to give proper or any consideration to material comprising dot point notes and minutes of a meeting in Alice Springs, an email from a Des Rogers to an Adrian Burkenhagen and to the Aboriginal and Torres Strait Islander Employment and Career Pathway Strategy. Each of these are matters to which she referred in her response to the Second Respondent's reply to the complaint (set out at pages E1077-1102 of the Appeal Book) however the actual documents do not appear to have been provided to the Commissioner. It appears from the emails that were provided to the Commissioner by the Second Respondent (at F887-888 of the Appeal Book), that the Appellant had not obtained either the dot points of the meeting referred to or the minutes of the meeting, despite her sending an email to "All staff" requesting the minutes and a response from one person mentioning the dot points. I allowed the Appellant to tender the e-mail between Rogers and Burkenhagen ("R&B") at the hearing.

33. There is nothing to suggest that the Commissioner did not give full and proper consideration to all the documents presented by both parties and to the submissions made in respect of those documents. Indeed in her decision, the First Respondent specifically refers to a passage from the Appellant's submission referred to above. The decision references many of the submissions made by the Appellant and documents contained within the Appeal Book. The Appeal Book runs to 1104 pages. The majority of those pages contain multiple copies of documents. The delegate cannot be expected to have referred to and canvassed each and every one of these documents in her decision. Having read each of those documents myself, on

the face of the matters referred to in the decision of the First Respondent, it appears to me that she had fully explored and considered all the material provided by each of the parties.

34. The content of the e-mail R&B did not, in my view, introduce anything further than what was not already apparent from the material provided by each party, that is, that there was ill feeling between some Indigenous members of staff and the Batchelor Institute Council. The other documents referred to by the Appellant appear to have been aimed also at this point. That some staff members may have felt that they were being treated unfairly does not, of itself, give rise to an inference that Indigenous members of staff were being discriminated against. What is required is some objective evidence of discrimination, not just the views of particular persons. I do not think that the materials referred to would have assisted the Appellant, nor in the circumstances regarding the First Respondent's attention being drawn to them, do I think that the First Respondent was required to attempt to locate them which seem to be what the Appellant suggests by this submission, particularly when the Appellant appears to have been unable to do so herself. Had they in fact been received and considered, some question may have arisen as to whether they constituted a fresh complaint, as suggested by the Second Respondent in its letter of 7 November 2006.

**Investigation of the Complaint was not Thorough**

35. The Appellant alleges that the First Respondent erred by failing to properly exercise its discretion to order certain employees of the Second Respondent to give statements under s 92(1) of the Act and therefore, failed to properly investigate the complaint, in particular, by not:

    (a) getting statements of the Appellant's work performance and of others so as to compare their respective treatment;

(b) investigating what occurred between some employees of the Second Respondent at a meeting in Alice Springs on 29 November 2005;

(c) requesting copies of all formal written complaints which ought to have been submitted by those colleagues in accordance with the EBA;

(d) ordering the production of all workplace performance, workplace health and safety records and other employment records, documents and materials about the Appellant.

36. The Appellant referred to authorities of this Court which refer to the investigation stage and what is required. In particular, that the process is 'an intelligence gathering exercise' *Fiorido v Anti Discrimination Commissioner & NT* (2001) NTMC 38 and that an investigation should be "thorough" and full. *Martin v McGowan, McCue & Anti Discrimination Commission* (2001) NTMC 63 and *Greg Gedling v Anti Discrimination Commission & Charles Darwin University* [2004] NTMC 034 as required by s 75(3)(a).

37. The Second Respondent submitted that the scope of the investigative process was within the discretion of the delegate and what might be required depended on the facts of a particular case. It submitted that given the volume of material comprised in the Appeal Book, the Appellant had been provided with ample opportunity to present evidence to the Commissioner in support of her complaint.

38. I agree with this submission. With the exception of the Alice Springs meeting which is mentioned in the emails I have referred to above at [32] and in the submissions dated 25 September 2006, the matters referred to above at [35] seem to be a retrospective consideration as to what else the Appellant might have turned to support her complaint following the decision of the delegate. I am not persuaded that these are matters that the delegate should have set out to obtain and consider. The investigation process needs to be thorough and it may be, in some cases where the initial material

provided gives rise to particular inferences that may be confirmed by further material and that material may be readily obtained, that proper investigation might include obtaining that material.

39. However here, the material suggested at (a), (b) and (c) could only be obtained by requiring the Second Respondent to produce that documentation. That could only be done by exercise of the powers contained in s 92(1) of the Act. In my view, those powers do not apply at the investigation stage of a complaint.

40. I respectfully accept and adopt the reasoning of Relieving Magistrate Fong Lim in *Mubwandarika v Anti Discrimination Commission* [2007] NTMC 071 that an investigation is not a "proceeding" which would invoke the powers in s 92 to compel the production of documents and other information. In addition to the matters canvassed by Her Honour, I would note that there are a number of provisions contained within Part 6, Division 5 that refer to "proceedings" that can only have been intended to have application to hearings. Section 92(1)(a) provides that the Commissioner may, in writing, order a person to attend proceedings under the Act until excused and s 92(1)(b) provides that the Commissioner may order a person to give evidence on oath or affirmation. The investigation stage of a complaint is not of such a nature that a person could be ordered to attend until excused or be required to "give evidence". Section 91 is likewise instructive. It provides, *inter alia,* that the Commissioner is not bound by the rules of evidence and the Commissioner may obtain information on any matter as the Commissioner considers appropriate (s 91(a)) and may conduct proceedings in the absence of a party who was given reasonable notice to attend but failed to do so without reasonable excuse (s 91(f)). A consideration of all of the matters in Part 6, Division 5 indicates their relationship to hearings (burden of proof, costs, legal representation, witness fees, interim orders, anonymity orders, written reasons, and enforcement of orders). In my view, this indicates an intention that Division 5 applies to hearings. It would be

inconsistent with the general rules of statutory interpretation to single out a particular power for application to investigations simply because it is capable of being read in that way. The powers conferred by s 92 are powers confined to hearings, as are, in my view, the other matters set out in Part 6, Division 5.

41. I have earlier referred to the material connected with the meeting in Alice Springs. It is not necessary for me to repeat those observations.

**"Whole of Circumstances" Approach**

42. As I understand this submission, it is that the First Respondent erred because the delegate of the Commissioner failed to consider the inference that could be drawn from the material before her, including by failing to call for and consider the material that I have just referred to above. I have dealt with the question of the additional materials above.

43. A consideration of material may result in a conclusion that there is direct evidence that establishes a prima facie case of discrimination or that there is circumstantial evidence that gives rise to an inference in that regard. The investigator may draw whatever reasonable inferences arise from the material in order to make a determination as to whether a *prima facie* case exists.

44. I do not consider that the delegate failed to draw an available inference that the Appellant was discriminated against because of her race or her association with other Indigenous staff members. A consideration of the material presented by the Appellant in support of her complaint raises, at the most, an inference that the Appellant may have been subject to some harassment or unfair treatment in her employment. There is nothing in that material which suggests any racial basis for such treatment, if in fact it could be substantiated. Once the material provided by the Second Respondent in reply is considered, the stronger inference, indeed the direct

evidence, appears to be that the Appellant was simply not performing her duties to the expected standard and this is what has caused the falling out between herself and the Head of School. The conclusion I draw from a consideration of all of the material is that the Appellant, during 2005, was more concerned with defending her status as a Senior Lecturer than in addressing the matters she was asked to address and properly attending to the duties that was required of that position. This caused conflict between herself and the Head of School and affected her relationship with colleagues.

45. The document that was tendered by the Appellant at hearing and which I understood at the time to be a guide to point me to the relevant documents said to support her complaint, in fact contains allegations about the performance of another staff member, in order to explain why she was not responsible for the failure to provide results in a unit in the proper time frame and to show that this was something of a "set up" to prove she could not perform her duties. I can find nothing in the papers in the Appeal Book that suggest that she ever previously raised that it was this staff member who was responsible for the failure to report the grades either at the time in the numerous emails that passed between staff members (except for a reference in one email that this staff member also had a CD copy of the results) or in any of the submissions made to the Commission. I am not prepared to accept this as evidence properly before this Court for consideration on the appeal. In any event, the delay in the provision of results was only one of the matters in contention in the performance of her duties. The degree accreditation process and her relationship as a supervisor with staff were clearly also major performance issues.

**Reasonable Inferences Recognised as Available**

46. The Appellant contends that the First Respondent failed to consider an inference that was available, that is, that the basis of her alleged harassment

and failure to offer her a further contract was because of her race. The Appellant referred to a passage from *Gama v Qantas Airways Ltd (No 2)* [2006] FMCA 1767 at [22] as follows:

> "Hunyor notes in his article "Skin-deep: Proof and Inferences of Racial Discrimination in Employment" Sydney Law Review [2003] Vol.25:535, examining the problem of proof encountered by complainants in racial discrimination cases:
>
> > "In Australian jurisdictions...some degree of causal connection between the impugned act and the race of a complainant must be shown. There have been a variety of differing formulations of the appropriate test. These have included requiring a complainant to prove that the 'true basis' or 'true ground' of a decision was race, or that race was 'a factor' in the relevant decision of a respondent. However, proving the 'true basis' of an impugned act will often pose difficulties for complainants in discrimination cases. ...In the absence of a clear statement of bias or expression of a discriminatory intention, there may be no direct evidence to support an allegation of discrimination and a complainant may have to attempt to rely upon inferences from the surrounding circumstances – often expressed in terms such as 'there could be no other reason for the decision other than my race': *Einfield J in Bennett v Everitt* (1988) EOC 77,621 at 77,721. In cases involving employment, complainants face particular difficulties."

47. The quotation is an accurate reference to the passage as it appears in *Gama v Qantas Airways Ltd (No 2).* Curiously though, the attribution by the author Hunyor to Einfield J ('there could be no other reason for the decision other than my race') does not actually appear anywhere in *Bennett v Everitt.* At the page reference provided, Einfield J does make comment on the difficulty complainants may have in proving that a dismissal from employment was made on discriminatory grounds and says that reliance may "have to be proved by comparatively weak circumstantial evidence, without direct or perhaps any witnesses and based only on an intuition or a deeply held if correct belief that there has been discrimination."

48. Whatever is the correct attribution of the passage referred to in the Hunyor article, it does not assist the Appellant. She must be able to point to some

evidence, direct or circumstantial, that shows differential treatment on the basis of her race. Such an inference might be drawn in circumstances such as those suggested in the passage from the article and attributed to Einfield J, that is, where there is no direct evidence of discrimination but there can be **no** other reason for the treatment at issue. In such a case, an inference could be drawn that race was a factor in the person's treatment. This is not such a case. The delegate had before her ample direct evidence to show that there were continuing issues arising by at least in the second half of 2005 as to the Appellant's work performance, particularly with respect to the accreditation of the Bachelor of Nursing and her conduct with other staff members. As I have said, there is no direct evidence of racial discrimination and nothing in the materials from which an inference of that kind may be drawn.

**Race Need Only be One Reason for Conduct**

49. The Appellant submits that the First Respondent erred in failing to consider that the Appellant's race or her association with a person of the same race need not be the sole or dominant reason for the less favourable treatment but need only be one of the reasons. She referred to a passage from the decision at p 14:

> "…to establish race discrimination there would need to be evidence that the complainant was not re-employed solely on the grounds of an attribute, namely race".

50. I agree that this was an error by the First Respondent. Section 20(3) of the Act makes it quite clear that for discrimination to take place, it is not necessary that the attribute is the sole or dominant ground for the less favourable treatment.

51. I do not think that this error has affected the validity of the decision as a whole. Had the First Respondent found that there was some evidence of discrimination on the basis of race or been able to draw some inference in

that regard, but rejected a finding in her favour because she had thought there were also other reasons that she was not offered a further contract or was being harassed by her Head of School, as she alleged, it would be appropriate to quash the First Respondent's findings. However that is not the case. There is **no** evidence to support the complaint of racial discrimination. The First Respondent's error of law has not therefore affected its decision.

**Racial Motive May Be Unconscious and Not Intended**

52. The Appellant correctly identifies that she does not have to show that the Second Respondent intended to discriminate against the Appellant on the basis of race. Likewise, she has correctly identified that the motive of the person who is alleged to have discriminated against another is irrelevant.

53. The Appellant points to a memorandum from the Head of School to the Director of Human Resources dated 29 July 2006, in which the following paragraph appears:

> "… if she [Ms Acklin] felt discriminated against, it was not my intention".

54. That short quote appears in a paragraph in a memorandum which runs to three pages and which extensively outlines to the Director of Human Resources, the history of Ms Acklin's employment as a Senior Lecturer and the performance of her duties. The full paragraph which contains the passage to which the Appellant has referred is as follows:

> "As Head of School, decisions have to be made within time frames and at times, not all staff members will be pleased with the decision. Ms Acklin was supported throughout her contract and if she felt discriminated against, it was not my intention. I apologise unreservedly if this was her perception. I attempted to meet with Ms Acklin on several occasions to resolve the complaint she made, however she did not avail herself of the meetings organised".

55. In my view, the words referred to are not an admission of non-intentional discriminatory conduct, but rather an apology for any perception by Ms Acklin that she may have been treated in this way. The comment needs to be considered in the entire context of the memorandum.

**Apparent Biased and Prejudicial Assertions**

56. The Appellant submits that the First Respondent erred by making a prejudicial assertion based on an apparent and unfounded biased, in that she found that "it seems highly unlikely that an institution such as the BIITE which exists to advance Indigenous Australians through learning, would not (if the Appellant's performance had been satisfactory) have renewed the Appellant's contract simply because she is Aboriginal" (p 12 Decision).

57. The Second Respondent says that the assertion is far from unfounded and the stated objective is a statutory requirement of the organisation provided for in s 7 of the *Batchelor Institute of Indigenous Tertiary Education Act.*

58. Again, the Appellant has not provided in her submissions the full context in which the quote above appears. The preceding words are these:

> "In contemplating what might have happened if the Complainant had completed all the tasks as directed by her Supervisor …".

59. In my view, the inference drawn by the First Respondent was an available and reasonable inference, that is, that had the Appellant fully and satisfactorily performed her duties as a Senior Lecturer, it would be highly unlikely that an institute, such as the Second Respondent, with the statutory functions, as set out in the legislation governing the institution, would not have renewed her contract.

60. The Appellant also contends that the First Respondent erred in the same fashion, that is making a prejudicial assertion based on an apparent and unfounded bias, when stating at page 14:

> "… it seems likely, in this case, that Ms Acklin was unwilling or unable to recognise the short comings of her performance".

61. Again, it is necessary to look at the entire context in which this quotation appears. The paragraph is as follows:

> "Despite the lack of evidence to support the complainant's allegation of race discrimination, I do not believe this complaint to be frivolous and vexatious (as alleged by the respondent). Ms Acklin's distress about BIITE's decision not to extend her contract appears genuine and she clearly feels aggrieved by the circumstances relating to the decision. In some circumstances it is easy and perhaps more palatable, to focus on the actions of others rather than recognise one's own contribution to a situation and it seems likely, in this case, that Ms Acklin was unwilling or unable to recognise the short comings in her performance".

62. In my view, this paragraph illustrates that the First Respondent:

- Accepted the complaint as a genuine one, that is, one in which the complainant held a genuine belief that she has been discriminated against;
- Found that there was no evidence to support the complaint of racial discrimination;
- Found that there was evidence in the materials considered by the First Respondent that the reason for not offering Ms Acklin any further employment was her performance as a Senior Lecturer.

63. Having considered all the materials considered by the First Respondent, it is my view that the paragraph very accurately summarises the proper conclusion to be drawn from the material considered by the First Respondent.

**Consideration of Direct Discrimination Allegations Only**

64. The Appellant submits that the First Respondent erred by failing to consider that there was indirect discrimination or harassment. The passages that she refers to in her submission do not, in my view, support her contention.

65. Evidence that might support a claim of indirect discrimination in the circumstances in question might be that the Second Respondent only offered further employment contracts to non Indigenous staff members and that the employment contracts of all Indigenous staff members were not renewed. Whilst on the face of decisions not to offer further contracts to individual staff members, an inference of discrimination would not arise, if it could be shown that those actions were taken in respect of particular classes of employees (Indigenous vs Non-Indigenous) an inference of indirect discrimination would arise. However, there is no evidence to suggest that this is the case. The Second Respondent, in its reply to the complaint said that of the three staff members which the Appellant also alleged had been discriminated against, one had resigned her position and another remained in their employment. There is nothing in the material that contradicts that assertion.

66. There is nothing in my view on the materials considered by the First Respondent from which it could properly draw a conclusion that there was prima facie evidence of either direct or indirect discrimination.

**Implicit Admission of Unlawful Discrimination**

67. This submission is a reiteration of the submission in relation to the memorandum passing between the Head of School and the Director of Human Resources that has been referred to above. I do not need to revisit it.

**Conclusion**

68. It is my view that the First Respondent's decision does not display any errors of law, other than the one that I have mentioned in relation to the necessity for discrimination to be the sole ground and its failure to identify to the area of activity under consideration. Neither of these matters have affected the correctness of the decision. The decision is not against the weight of the evidence. In my view, there is nothing in the materials

provided by either the Appellant or the Second Respondent to the First Respondent that would give rise to prima facie evidence of either discrimination or harassment on the basis of the Appellant's race or her association with others of the same race. There is nothing to suggest that she was treated differently because of her race or for any other reason in the management of her performance. Rather, I think the position is abundantly clear that the Head of School, in which the Appellant was employed as a Senior Lecturer, became increasingly frustrated at her inability to get the Appellant to properly perform her duties, particularly in relation to the accreditation process for the Bachelor of Nursing. As observed by the First Respondent, I have no doubt that the Appellant's distress and belief as to racial discrimination is genuine, however, in my view, the proper conclusion is that she failed to meet the proper standards for the performance of her duties as a Senior Lecturer and her conduct with staff, including her responses to the Head of School, was questionable.

69. The second respondent sought costs of the appeal in the event that the appellant was unsuccessful. The general rule in these appeals is that each party should bear its own costs unless there exist sufficient circumstances to warrant a departure from that rule (*McDermott v Lawrie & Windler* [2001] NTMC 62). In *McDermott* His Honour, Dr Lowndes SM set out the type of circumstances that would justify a departure noting that they are not closed categories. As I have noted, the appellant's view that she was discriminated against is a genuine though not tenable belief. The grounds of appeal were not frivolous and although some issues raised lacked substance it could not be said that overall that the appeal had no tenable basis in fact or law. I see no reason to depart therefore from the general rule.

70. The orders are:

    (a) The appeal is dismissed and the decision of the First Respondent to dismiss the complaint is affirmed;

(b) Each party is to bear their own costs of this appeal.

Dated this 30th day of April 2008.

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**Sue Oliver**
STIPENDIARY MAGISTRATE