

CITATION: *Kennedy & Bath v Anti-Discrimination Commission & Northern Territory Government & Territory Housing* [2010] NTMC 002

PARTIES: ROBERT EDWARD KENNEDY
&
SHEILA MAUREEN BATH
v
ANTI-DISCRIMINATION COMMISSION
&
NORTHERN TERRITORY GOVERNMENT
&
TERRITORY HOUSING

TITLE OF COURT: Local Court

JURISDICTION: Darwin

FILE NO(s): 20923919

DELIVERED ON: 19 January 2010

DELIVERED AT: Darwin

HEARING DATE(s): 23 October 2009

JUDGMENT OF: Ms Melanie Little SM

CATCHWORDS:

Local Court Appeal - *Anti-Discrimination Act* appeal

REPRESENTATION:

Counsel:

1 st Appellant:	In person
2 nd Appellant:	In person
1 st Respondent:	Ms Keys
2 nd & 3 rd Respondents:	Ms McAlister

Solicitors:

1st Appellant:

In person

2nd Appellant:

In person

1st Respondent:

Anti Discrimination Commission

2nd & 3rd Respondents:

Solicitor for the Northern Territory

Judgment category classification:

C

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[2010] NTMC 002

Number of paragraphs:

33

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

No. 20923919

[2010] NTMC 002

BETWEEN:

ROBERT EDWARD KENNEDY
First Appellant

&

SHEILA MAUREEN BATH
Second Appellant

AND:

**ANTI-DISCRIMINATION
COMMISSION**
First Respondent

**NORTHERN TERRITORY
GOVERNMENT**
Second Respondent

TERRITORY HOUSING
Third Respondent

REASONS FOR DECISION

(Delivered 19 January 2010)

Ms Melanie Little SM:

1. The first and second appellants have both appealed decisions of the delegate to the Anti-Discrimination Commissioner made on 10 and 30 June 2009. Their appeals were heard together. The first and second appellants were unrepresented and each made submissions on their own behalf. The grounds of appeal and orders sought are identical. The first respondent is the Anti-Discrimination Commission and they advised they would abide the decision of the Court and not make submissions on the appeal, though they provided

the Court with some case law and applied to amend the appeal book. The second and third respondents, the Northern Territory of Australia and Territory Housing, were represented by the same counsel. Submissions on the merits of the appeal were made by the second and third respondents.

2. The appeal is pursuant to s 106 of the *Anti-Discrimination Act NT* (“the Act”), and was filed on 17 July 2009. Decisions of the first respondent were sent to the appellants on 10 and 30 June 2009. This complicates the appeal process as far as relevant dates are concerned. I will proceed on the basis that the appeals are in time. The appeal is made in accordance with the *Local Court Rules*.
3. The Local Court may affirm or vary a decision or order appealed against, quash the decision or order appealed against and substitute any decision or order that the Commissioner may make under the Act, remit the matter to the Commissioner for further hearing or consideration, or for rehearing and/or make such other orders (including as to costs) as the Court considers appropriate (s 107 of the Act). The appeal was heard and I reserved decision in the matter. This is now the decision in the matter.
4. An appeal book had been prepared by the first respondent, the Office of the Anti-Discrimination Commission (ADC). The documents in the appeal book were relied upon in the appeal. No further evidence was called in the appeal.
5. At the commencement of the appeal, the first respondent (the ADC) sought to amend the appeal book by substituting a copy of a decision which had been sent to the first appellant on 10 June 2009. As it transpired, two versions of the Delegate’s decision were sent to the first appellant on 10 June 2009. The Court was shown the two original documents which the first appellant received. There is no doubt that the first appellant received two different versions of a decision from the ADC’s Office, both decisions are dated 10 June 2009. The ADC sought leave of the Court to amend the

appeal book by removing what they say was the first decision and placing what they say was the second decision into the appeal book. They submitted that the second decision was in fact the final decision and that the first decision had been sent to the first appellant in error. I accept that.

However, that does not change the fact that the first appellant received two decisions from the ADC dated 10 June 2009. The first decision which was sent to the first appellant upheld more of his complaint than the second version. Given that the first appellant received both copies of the decision, it was my view that the decision most favourable to the first appellant was the one which he should be able to rely upon. Further, the appeal book was filed with the court in September 2009 and the application to amend the appeal book was not made until the day of the hearing (23 October 2009). The first appellant had prepared his case based upon the appeal book. Issues of fairness meant that I declined to amend the appeal book.

6. A later decision of 30 June 2009 was made purporting to reject the first appellant's complaint of failure to accommodate a special need on the basis of age. The letter of 30 June 2009 has had the effect of completely undermining the complaint process, given the fact that two versions of the decision were sent to the first appellant, with the first decision accepting the complaint on the failure to accommodate a special need on the basis of age. The first appellant was placed into a very difficult position and he responded to the ADC's second decision, where he was asked to submit further material on the complaint with respect to failure to accommodate a special need on the basis of age. I do not think he should be estopped from relying upon the first decision, on the basis that he responded to the second decision of 10 June 2009. He was an unrepresented complainant. In my view, the ADC has accepted this aspect of the first appellant's complaint by virtue of the first letter the ADC sent to him. The ADC cannot then rely upon a later decision to reject a complaint they have already accepted. The first decision of 10 June 2009 accepting the first appellant's complaint on

the basis of failing to accommodate a special need (age) is taken to be the decision of the first respondent. That complaint is accepted and is not the subject of the appeal process. That is now to go to the investigation stage.

7. There was no similar application by the ADC with respect to the second appellant as the version of the letter in the appeal book was the second decision. The second appellant was of the view that she also had received two versions of the decision. That is certainly possible, however, she was not able to show the Court the two different versions of the decision dated 10 June 2009. The decision in the appeal book is the one which will be considered on appeal. Accordingly, her appeal is a wider appeal than that with respect to the first appellant, in that her complaint on the basis of failing to accommodate a special need (age) has been rejected.
8. The appellants set out the following grounds of appeal and these are reproduced directly from the notices of appeal:
 - “1. The Delegate was erroneously stringent towards the complainants by fragmenting in-seperatable combinations of “aged couples” {married} persons and “complex” housing accommodation “set aside” by Northern Territory Government for “aged couples” attributes. The Delegate was erroneously stringent and “wrong” by taking each factor and “attribute” singularly as if the others of the combination did not exist and bear upon each other. As the Northern Territory Government had declared were “joined” attributes.
 2. No mediation between parties that might resolve this discrepancy was provided by the Anti-Discrimination Commission.
 3. The Delegate was erroneously excessively generous towards the respondent because the respondent is the “current” The Northern Territory Government. That does not properly control their staff to maintain the previous Northern Territory Government “supplied” and “qualified” protection of the attributes of “married couples” in this “complex” that Government set aside for “aged couples”. The Delegate ignored the “continuity of responsibility” across Government’s

as to the attributes of “aged couples” still resident still being replaced in the same “complex”.

4. The appellants therefore suffer unexpected and irregular benefits and denials of protection out of the negligence of the Northern Territory Government on specifically legislated attributes The Anti-Discrimination Act provides such qualifying citizens. Protections The Delegated failed to maintain for the “aged couple” in the “latterly” created ambiguous circumstances by Northern Territory Government’s “managerial” negligence to not maintain the “complex’s” able and “set aside” capacity to protect these occupying residents bearing the said attributes. In accommodation “allegedly” still protecting these but in fact latterly failing no longer protecting these attributes.”
9. The grounds of appeal were prepared by unrepresented appellants. They do not directly address the complaints the appellants made to the first respondent, or the decisions made by the first respondent. Counsel for the second and third respondents indicated a difficulty in preparing submissions, however counsel did not ask for the appeals to be struck out on the basis of the way the grounds of appeal were drafted. Submissions made by all parties on appeal were primarily directed at considering whether the various complaints of discrimination should have been rejected. That approach will be taken in this decision, save and except with respect to grounds two and four which will be directly addressed.
10. The orders sought on appeal are:
 - “1. The Court quashes the decision of the Delegate.
 2. The Court makes a substitute determination.
 3. That such orders remove the existing ambiguity within Northern Territory Government and Territory Housing as to “complex” designed accommodation for the attributes of aged couples. And that such qualifying residents entitlements once mutually accepted remain the landlords “continuing” responsibility to protect. When that landlord {Northern Territory Government} caused the residents to accept occupancy of the said premises of the “complex” at 10 Wright

Crescent, Gray by “holding out” that the landlord would protect their attributes of “aged couples” in the uniform standard of the said “aged couples complex”. Viz by “offering” “This complex is for aged couples” and making “mutual” acceptance between this and various other similarly qualifying other “aged couples”.”

11. I have looked carefully at the powers under s 107 of the *Anti-Discrimination Act* and I can see no power to make the order as sought in paragraph 3 of the appeal. The orders sought in paragraphs one and two are in accordance with powers granted to the Local Court on an appeal pursuant to s 107 of the *Anti-Discrimination Act*.
12. The powers of the Local Court on appeal set out in s 107 of the Act include the power to “substitute any decision or order that the Commissioner may make under this Act” (s107(b)). In my view, that power should be read as any decision or order that the Commissioner may make under the Act *at the relevant stage of the proceedings* (my emphasis). This case is at the acceptance or rejection stage.
13. The complaint made to the ADC relates to the first and second appellants’ accommodation. They are a married couple. The first appellant is 73 years of age. The second appellant is 67 years of age. They reside in a Territory Housing rental property, in a unit complex in Gray. The third respondent is their landlord. The properties around them are also Northern Territory Housing Commission properties, tenanted by the third respondent.
14. When they first moved to the complex approximately 12 years ago, the appellants say they were advised by Territory Housing officers that units in this complex would only be allocated to elderly married couples. In recent years single persons and younger persons have been allocated housing in the same complex.
15. It is apparent that the appellants have experienced significant interference with their lifestyle as a consequence of the behaviour of some tenants who

reside in the same complex. Complaints of noise and unlawful activity have been made by the appellants to the third respondent and other agencies.

16. It would seem that the appellants have a legitimate grievance. The appellants are in search of a remedy. Their lives are interfered with by neighbours who apparently show no respect towards them. They are subjected to noise and unlawful activity. They consider themselves to be aged and want to live without this type of activity impacting negatively upon their daily life. This is not an unreasonable desire. Most people want to live in same way. Indeed, quite incredibly, I have at times heard from those who engage in unlawful activity say that they want their children and family members to be quarantined from such behaviour. As tenants, the appellants cannot have any direct control over who is allocated to live in their immediate vicinity including their direct neighbours.
17. In their search for a remedy, the first and second appellants lodged complaints with the ADC. Their complaints relate to the area of accommodation pursuant to s 38 of the Act. In particular, s 38(1)(e) of the Act – in the terms and conditions of which accommodation is offered. There is a four stage process after a complaint is made – acceptance (or rejection), investigation, conciliation and if the complaint is not resolved after conciliation there is an adjudication of the complaint through a hearing process. Acceptance of a complaint means an investigation will take place. The appellants' complaints have been accepted in part. They appeal that part of their complaint that has been rejected.
18. The first appellant's complaint has been accepted on the basis of marital status and failure to accommodate a special need (age). His complaint in respect to special needs has been rejected. Accordingly his appeal is limited to that issue. His complaints on the basis of marital status and failure to accommodate a special need (age) will proceed to the investigation stage pursuant to s 74 of the Act.

19. The second appellant has had her complaint with respect to marital status accepted. She has had her complaint with respect to special needs and failure to accommodate special needs on the basis of age rejected. Accordingly her appeal relates to these two rejected aspect of the complaints. Her accepted complaint on the basis of marital status will proceed to investigation pursuant to s 74 of the Act.

20. Following the investigation stage a complaint is either dismissed or, if the ADC is satisfied there is *prima facie* evidence to substantiate an allegation of prohibited conduct, the matter proceeds to conciliation (or if the Commission believes it cannot be resolved by conciliation, it proceeds directly to hearing).

21. **Ground 2 of the Appeal**

Ground 2 of the grounds of appeal complains there was no mediation between the parties. By the word mediation, I take that to mean alternative dispute resolution. Under the Act, that is conciliation. While voluntary conciliation may occur at any stage, the first respondent has limited powers to require parties to attend conciliation. The Act sets out that, to the extent there is any power to *require* conciliation, the conciliation stage is after any *prima facie* finding is made. That is, after the investigation stage. These complaints have not gone past the acceptance stage. This ground of appeal is not made out. Ground 2 of the appeal is dismissed with respect to both appellants.

22. **Ground 4 of the Appeal**

Ground 4 of the grounds of appeal does not disclose a question to be decided. It is more in the form of a statement of complaint directed at government officials. Ground 4 of the appeal is dismissed with respect to both appellants.

23. **Consideration of the Merits of the Appeal Generally**

The appellants have had their complaints accepted on the basis of marital status. Those complaints will now be investigated by the first respondent. The first appellant has also had his complaint accepted with respect to fail to accommodate a special need, namely age. That part of his complaint will also be investigated.

24. **Failure to Accommodate Special Need – Second Appellant**

It is submitted by the second appellant that the claim of failure to accommodate a special need (namely age) should not have been rejected.

25. Section 24 of the Act reads follows:

24 Failure to accommodate special need

- (1) A person shall not fail or refuse to accommodate a special need that another person has because of an attribute.
- (2) For the purposes of subsection (1):
 - (a) a failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need; and
 - (b) a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute.
- (3) Whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including, but not limited to:
 - (a) the nature of the special need;
 - (b) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged;
 - (c) the financial circumstances of the person;

- (d) the disruption that accommodating the special need may cause;
and
- (e) the nature of any benefit or detriment to all persons concerned.

26. The issues raised by the appellants relate to the impact the behaviour of adjoining tenants is having upon them. The first appellant's complaint has been accepted and no reasons were given in the letter of 10 June 2009 as to why the complaints with respect to either marital status or failure to accommodate the special need (age) were accepted. In the rejection of the second appellant's complaint with respect to failing to accommodate a special need, the first respondent has set out that no special need was set out in the complaint made by the second appellant. It was stated that there must be some material going to the question of need, as opposed to a preference or a desire, to have all the tenants come from a similar age group. Despite this statement, the second appellant's complaint was rejected on the basis that she had not "established" such a need. I do not believe that that is the appropriate test at this stage of a complaint. On the face of the written complaint, there must be raised a question of possible failure to accommodate a special need (in this case, based on age). It is too high a test for the second appellant to have "established" such a need at this stage of the complaint process.
27. The joint complaints of discrimination lodged by the appellants (in correspondence dated 13 March and 20 May 2009), assert there has been age discrimination. The main basis of the issues raised by both appellants in this matter is their age. In my view, that is the most significant aspect of their complaint. Their complaint on the basis of the grounds of marital status has been accepted. No reasons were given by the first respondent why this ground was accepted.
28. Given that both appellants lodged the one complaint relating to the same subject matter and one has been accepted on this basis and the other rejected based upon what I regard as too high a test, the appeal by the second

appellant with respect to this aspect of the complaint is allowed. Further, given that there will already be an investigation with respect to the complaint based upon marital status with respect to both appellants and an investigation with respect to the failure to accommodate a special need (age) with respect to the first appellant, it would seem that to investigate this aspect of the complaint with respect to the second appellant will not greatly increase the scope of the investigation. Even if it does, on the basis of fairness to the second appellant, it is my view that this aspect of the complaint should be accepted and investigated. The decision of the first respondent with respect to the second appellant with respect to failure to accommodate a special need (age) is quashed and in substitution, that complaint is accepted.

29. **Special Measures**

The question of special measures relates to both the appellants on appeal. Section 57 of the *Anti-Discrimination Act* sets out as follows:

57 Special measures

(1) A person may discriminate against a person in a program, plan or arrangement designed to promote equality of opportunity for a group of people who are disadvantaged or have a special need because of an attribute.

(2) Subsection (1) applies only until equality of opportunity has been achieved.

30. This complaint relies upon the allegation that there was originally a special measure implemented designed to promote the quality of opportunity for a group of people who are disadvantaged or who have a special need because of an attribute. In this case, the appellants allege that the attribute was age.
31. The appellants primary submission on appeal was that, as these matters are all inter-related, all matters should proceed to the investigation stage. To

some extent, there is some merit in that argument. Nevertheless in my view the question of special measures is a separate issue.

32. This aspect of the complaint has been rejected on the basis that even if there is a special measure, it can be withdrawn at any time without the need for explanation. It was found that such a move could not be considered “less favourable treatment” sufficient to constitute discrimination under the Act.
33. I am of the view that the decision of the first respondent with respect to this question is correct. That aspect of the appeal is dismissed.

Dated this 19th day of January 2010.

Melanie Little
STIPENDIARY MAGISTRATE