Hofer v Anti-Discrimination Commissioner [2011] NTSC 20

PARTIES:	BERTRAM HOFER v ANTI-DISCRIMINATION COMMISSIONER
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	1 of 2011 (21100428)
DELIVERED:	11 March 2011
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JUDGMENT OF:	BARR J

CATCHWORDS:

ADMINISTRATIVE LAW – Judicial Review – *Anti Discrimination Act* (NT) – Commissioner to accept or reject complaint within time limit – whether acceptance of complaint in breach of provision invalid – test to be applied – purpose of legislation – acceptance of complaint not invalid.

ADMINISTRATIVE LAW – Judicial Review – *Anti Discrimination Act* (NT) – Commissioner to reject frivolous or vexatious complaint – meaning of vexatious – productive of serious and unjustified trouble and harassment.

ADMINISTRATIVE LAW – Judicial Review – *Anti Discrimination Act* (NT) – Commissioner to reject frivolous or vexatious complaint – mandatory considerations – whether failure to expressly consider renders decision invalid – consideration implied – plaintiff unable to discharge onus of proof as to Commissioner's failure to consider.

Anti-Discrimination Act (NT) s 22(2), s 64, s 65, s 66, s 67, s 68, s 70, s 74(1)(b), s 75(3), s 76(1), s 83(b), s 88(1)(b), s 88(3), s 141
Native Title Act (NT) s 63, s 66

Greg Gedling v Anti Discrimination Commission & Charles Darwin University [2004] NTMC 34; *Lambe v Anti-Discrimination Commission and Commissioner of Police* [2001] NTMC 54; *McDonnell Shire Council v Miller & Ors* [2009] NTSC 46; *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; *Re Waanyi People's Native Title Application* (1994) 129 ALR 100, referred to

Martin v McGowan, McCue and Anti-Discrimination Commissioner [2001] NTMC 63; *State of Queensland v Walters and Anor* [2007] QSC 12, considered

Oceanic Sun Line Special Shipping Company Inc v Fay (1988) 165 CLR 197
Project Blue Sky v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355, followed

REPRESENTATION:

Counsel:

Plaintiff:	L Silvester
Defendant:	M Grant QC

Solicitors:

Plaintiff:	The Northern Territory Police Association
Defendant:	Solicitor for the Northern Territory

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

Hofer v Anti-Discrimination Commissioner [2011] NTSC 20
No 1 of 2011 (21100428)

BETWEEN:

BERTRAM HOFER
Plaintiff

AND:

ANTI-DISCRIMINATION COMMISSIONER
Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 11 March 2011)

Introduction

[1] The plaintiff seeks an order in the nature of certiorari setting aside the decision of the defendant (by his delegate) purporting to accept a complaint of discrimination and harassment made against the plaintiff under the *Anti-Discrimination Act* (NT), and an order in the nature of prohibition preventing the defendant from further considering the complaint. The grounds are that the decision to accept the complaint was beyond the defendant's power, and/or that the decision was invalid by reason of the asserted failure on the part of the defendant to consider whether the complaint was vexatious.

[2] There is no issue as to the validity of the delegation of functions and powers in this proceeding and so, where I state the facts, my references to “the Commissioner” should be read as referring to the delegate of the Commissioner as appropriate.

[3] The plaintiff was formerly a member of the Northern Territory Police Force. In 2008 and 2009 he was stationed at Alice Springs and held the rank of Commander with overall control of the Southern Command. In the period 4 February 2008 to 18 June 2009, Susan Williams worked as the plaintiff’s personal assistant. On or about 18 June 2009, Ms Williams made a formal complaint of improper conduct against the plaintiff relating to his behaviour in the workplace. A Northern Territory Police internal investigation took place. The plaintiff admitted some of the allegations made by Ms Williams. Subsequently, the plaintiff was demoted to the rank of Superintendent and transferred to Darwin. On or about 16 April 2010, he resigned from the Northern Territory Police Force.

[4] On 13 April 2010, Ms Williams made a formal complaint against the plaintiff to the Northern Territory Anti-Discrimination Commission ("the Commission"). It is unnecessary at this stage to set out the detail of the complaint, save that there were two categories of “prohibited conduct” complained of: discrimination and sexual harassment. The alleged sexual harassment involved the making of very inappropriate and degrading

comments[1] during the whole of the time Ms Williams worked as the plaintiff's personal assistant.

[5] The sexual harassment complained of by Ms Williams came to an end on or about 18 June 2009 when Ms Williams' work relationship with the plaintiff ended. Ms Williams' complaint to the Commission in April 2010 was therefore made out of time, in that it was made more than six months after the alleged prohibited conduct took place.[2]

Summary of legislative provisions

[6] It would be useful at this stage to refer to aspects of the scheme established under the *Anti-Discrimination Act* (NT). A complaint is required to be in writing and to set out in detail the prohibited conduct alleged.[3] A complaint is to be made not later than 6 months after the alleged prohibited conduct took place.[4] The Commissioner must reject a complaint if the Commissioner reasonably believes that the complaint is frivolous or vexatious; trivial; misconceived or lacking in substance; or that it fails to disclose any prohibited conduct.[5] The Commissioner may reject or stay a complaint if there are concurrent proceedings in any court or tribunal in relation to the same prohibited conduct alleged in the complaint.[6] The Commissioner is

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1 See s 22(2) *Anti-Discrimination Act*; also the answer to question 5, page 3 of the 5-page online complaint document dated 13 April 2010, part of annexure "C" to the plaintiff's affidavit affirmed 31 December 2010.

2 S 65 *Anti-Discrimination Act* specifies "a complaint shall be made not later than 6 months after the alleged prohibited conduct took place", but permits the Commissioner to accept a complaint after that time "if the Commissioner is satisfied it is appropriate to do so".

3 S 64 *Anti-Discrimination Act*.

4 S 65 *Anti-Discrimination Act.*

5 S 67 *Anti-Discrimination Act.*

6 S 68 *Anti-Discrimination Act.*

required to accept or reject a complaint not later than 60 days after receipt of the complaint, and to then notify the complainant of the decision to accept/reject as soon as practicable.[7] If the complaint is accepted, the Commissioner must notify the respondent of the substance of the complaint.[8]

[7] Acceptance of the complaint then requires the Commissioner to carry out an investigation of the prohibited conduct alleged.[9] The Commissioner is required to "make a thorough examination of all matters relevant to the investigation" and, where appropriate, to ensure that each party to the investigation is given a reasonable opportunity to present his or her case.[10] After completing the investigation, if the Commissioner is satisfied that there is "prima facie evidence to substantiate the allegation of prohibited conduct", the Commissioner must either proceed to conciliation, or (if the Commissioner believes the complaint cannot be resolved by conciliation) proceed to a hearing.[11]

[8] Even if the Commissioner proceeds to conciliation, a hearing must still be conducted if conciliation does not result in a resolution of the complaint.[12]

[9] It can thus be seen that for a complaint to be ultimately substantiated, it must pass through at least three and possibly four stages: acceptance, investigation, conciliation (possibly), and hearing.

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7 S 66 *Anti-Discrimination Act.*
8 S 70 *Anti-Discrimination Act.*
9 S 74(1)(b) *Anti-Discrimination Act.*
10 S 75(3) *Anti-Discrimination Act.*
11 S 76(1) *Anti-Discrimination Act*. The Commissioner also has power to dismiss the complaint, presumably if he is not satisfied that there is prima facie evidence to substantiate the allegation of discrimination or prohibited conduct made in the complaint.
12 S 83(b) *Anti-Discrimination Act.*

The acceptance stage

[10] The nature of the acceptance stage under s 66 of the Act has been considered by the Local Court in several appeals from the Anti-Discrimination Commission. In one such appeal, *Martin v McGowan, McCue and Anti-Discrimination Commissioner,*[13] Mr Luppino SM (as he then was) described a three-stage process with acceptance as the first stage:-

> "The determination of a complaint under the *Anti-Discrimination Act* is essentially a three stage process. The first stage is designed to screen out unmeritorious complaints and to ensure that only matters worthy of investigation proceed further. The second stage requires the Commissioner to fully investigate a complaint. The third stage is the determination of a complaint once the Commissioner, having fully investigated the complaint, decides that it is appropriate to proceed further to a full hearing."

[11] That is a useful summary, provided it is understood that, in the first stage, "unmeritorious" refers not to some assessment of the general merits of complaints, but to the fact that the complaints may be assessed within s 67 of the Act as frivolous or vexatious, trivial, misconceived or lacking in substance, or as failing to disclose any prohibited conduct.

[12] In two other appeals to the Local Court from the Anti-Discrimination Commission[14], Mr Trigg SM referred to the acceptance stage as a "low level screening test". In characterizing the acceptance process in that way, the learned magistrate adopted the description applied by President French J to

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[13] [2001] NTMC 63.

[14] *Lambe v Anti-Discrimination Commission and Commissioner of Police* [2001] NTMC 54 at [16]; *Greg Gedling v Anti Discrimination Commission & Charles Darwin University* [2004] NTMC 34 at [36] - [37].

s 63 *Native Title Act* (Cth) in *Re Waanyi People's Native Title Application*[15]:-

> "Section 63 of the Act applies, to the process of acceptance of an application by the registrar, a low level negative screening test."[16]

[13] It is correct that both s 63 *Native Title Act* (Cth) and s 66 *Anti-Discrimination Act* (NT) establish preliminary screening processes. There are clear similarities between the two provisions: the obvious one being the reference in both to "frivolous or vexatious" as a factor requiring non-acceptance or rejection of an application or complaint as the case may be. However, in my view there are significant differences. The *Anti-Discrimination Act* (NT) s 67 contains four categories of grounds on which the complaint must be rejected. These would usually require some careful consideration in assessment. In addition to mandatory rejection under s 67, the *Anti-Discrimination Act* (NT) s 68 provides for discretionary rejection or stay in the event of concurrent proceedings in relation to the prohibited conduct complained of. The exercise of that discretion would also usually require careful consideration. The considerations described could also be complicated, as they were in the present case, by the fact that the complaint was made outside the 6-month time limit specified in s 65, thus requiring the

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15 (1994) 129 ALR 100 at 112.

16 President French J continued, by way of explanation: "It favours the acceptance of applications. It does not contemplate any resolution by the registrar of contested questions of fact or arguable questions of law. But the Act is concerned with the recognition and protection of native title. That means native title that subsists. It does not provide for the recognition of native title which has been lost or which has been extinguished by valid past acts. For the registrar to accept an application which, on the face of it, or in the light of the kind of investigations to which I have referred, could not succeed would be a waste of the time and resources of the tribunal. It would encourage ambit claims which would undermine the spirit of the legislation and discredit the processes of the tribunal to the detriment of those who have genuine cases to advance."

Commissioner to consider whether it would be appropriate to accept the complaint out of time.

[14] Another important difference between s 63 *Native Title Act* (Cth) and s 66 *Anti-Discrimination Act* (NT) is that the Native Title Registrar under the Commonwealth legislation has no power to reject an application, even if of the opinion that the application is frivolous or vexatious, or that prima facie the claim cannot be made out. In such a case, the application must be referred to a presidential member of the National Native Title Tribunal who has to then give the applicant reasonable opportunity to satisfy the presidential member that the application is not frivolous or vexatious, or that a prima facie claim can be made out, as the case requires. Thus, the 'screening decision' to reject is always made by a presidential member. Under the *Anti-Discrimination Act* (NT), the decision to reject is that of the Commissioner, who must then give written reasons to the complainant.

[15] In my opinion, with great respect to Mr Trigg SM, it is incorrect to characterize the acceptance stage under the *Anti-Discrimination Act* (NT) as a "low level" screening test. Preliminary the screening process may be, but "low level" it is not. The decision-making power is vested in the Commissioner.[17] There is no 'filtering' by a lesser officer with the statutory obligation to refer to the Commissioner for confirmation of rejection. Moreover, the Commissioner's considerations are not merely as to formal or regulatory compliance. They involve or may well involve quite difficult

[17] although the power may be delegated under s 15(1) of the Act.

assessments, the drawing of conclusions, the making of judgments and the exercise of one or more discretions.

[16] My observations in this respect do not have crucial significance in the present case, but could have greater relevance in other matters.

[17] I turn to the attack upon acceptance of the complaint in this case.

The plaintiff's grounds for relief – invalid acceptance

[18] The first ground was based on the interpretation of s 66 *Anti-Discrimination Act* (NT) contended for by the plaintiff. The section reads as follows:-

> "66. Commissioner to accept or reject complaint
>
> The Commissioner shall, not later than 60 days after receiving a complaint, accept or reject the complaint and shall, as soon as practicable thereafter, notify the complainant of the decision."

[19] The complaint was made on 13 April 2010. The Commissioner accepted the complaint (as to sexual harassment under s 22 and sexual discrimination in the workplace under s 31) on 1 November 2010, well outside the 60 days provided.

[20] The plaintiff argues that s 66 of the Act precludes the Commissioner from further investigating or otherwise dealing with the complaint in this case because the complaint was not accepted within 60 days after its receipt. The plaintiff argues further that any investigating or dealing with the complaint after the 60 days would be invalid.

[21] The plaintiff relies on the decision of the High Court in *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355, at [93] per McHugh, Gummow, Kirby and Hayne JJ:-

> [93] " .... a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. ...".

[22] The plaintiff says that s 66 *Anti-Discrimination Act* (NT) gives effect to the presumed intention (1) that prohibited conduct may be the subject of a complaint; (2) that the complaint should be made quickly; and (3) that the complaint should be dealt with quickly, fairly balancing the rights of both the complainant and the respondent. The respondent to a complaint is generally unaware of the making of the complaint when it is made[18], and does not learn about the complaint unless and until it is accepted and the substance notified under s 70. Therefore, if s 66 does not impose a compliance date for all purposes, binding on all parties, a respondent is increasingly disadvantaged in terms of memory of events, preservation of documents, obtaining information from relevant witnesses and generally preparing a 'defence' as more and more time lapses after the 60 days provided for in s 66.

[18] The present case was an exception because the Commissioner's Delegate sought a response from the respondent (the within plaintiff) as to receipt of the complaint outside the time limit specified in s 65(1) of the Act.

[23] On the plaintiff's argument, therefore, the presumed purpose of s.66 and the words "not later than 60 days after receiving a complaint" is that acceptance after 60 days of receipt, in breach of the provision, should be invalid.

[24] The defendant argues that the purpose of the provision is not such that compliance with the time limit is a condition precedent to the exercise of statutory authority to investigate a complaint. If the provision operated in that way, the defendant argues, it would potentially work an injustice in that a complainant might be deprived of the right to prosecute a complaint by default on the part of the Commissioner, rather than some defect in the complaint or dilatory conduct on the part of the complainant. A complaint would not be dealt with on its merits.

[25] I would add my own observation at this point. It would be inexplicably inconsistent with the statutory purpose of providing remedies for persons subjected to discrimination or other prohibited conduct if a complaint made on the very day on which prohibited conduct occurred could become 'dead' if not accepted by the Commissioner within 60 days of its receipt, whereas a complaint as to the same prohibited conduct made at the very end of the 6-month period following the occurrence of the prohibited conduct would remain 'alive' if accepted within a further 60 days. Inconsistency becomes more problematic in that the Commissioner may grant an extension of time under s 65(2), which would further postpone valid acceptance of the complaint. Therefore the objective suggested by the plaintiff that complaints should be dealt with quickly (fairly balancing the rights of both

complainant and respondent) would not be achieved in a generally consistent way if non-compliance by the Commissioner with s 66 put an end to a complaint.

[26] On the defendant's case the real purpose of the provision is to set a procedural benchmark for the exercise of the Commissioner's function to accept or reject a complaint. In the event that the Commissioner does not make that determination within the stipulated period, either the complainant or respondent would have grounds on which to seek an order in the nature of mandamus compelling the Commissioner to do so; but the Commissioner would not be precluded from doing so and, in the event of an acceptance, proceeding to deal with the complaint. The defendant modified its position slightly in the course of argument before the Court to argue that s 66 regulates interactions between complainant and Commissioner. The complainant (rather than the respondent) is more likely to be the party to seek an order in the nature of mandamus against the Commissioner, for the reason that the respondent to a complaint is generally unaware of the making of the complaint before it is accepted.

[27] I accept the interpretation contended for by the defendant. Section 66 sets a compliance date for expeditious handling of a complaint by the Commissioner. Its purpose is to regulate interactions between complainant and the Commissioner. It does not set a compliance date for all purposes, so as to permanently affect the rights of a complainant and respondent in the event of non-compliance by the Commissioner.

[28] It follows that the answer to the question arising from the above cited extract from *Project Blue Sky* is 'no': it was not a purpose of the legislation that acceptance outside of the 60-day period specified in s 66 should be invalid. The plaintiff's arguments on the first ground should be rejected.

[29] My view is reinforced by my reading of the decision of Douglas J in *State of Queensland v Walters and anor*[19] in relation to a substantially similar Queensland legislative provision[20]:-

> "[18] Section 141(1) requires the Commissioner to decide whether to accept or reject a complaint within 28 days of receiving the complaint. In this case, the first respondent made no decision either to accept or to reject the complaint within that 28 day period but eventually decided to accept it out of time. That failure to apply s 141(1) in its strict terms should not require any conclusion that further dealing with the complaint by the second respondent was invalid. Her continued dealing with the complaint is not precluded by the Act, in my view, particularly because of the terms of s 138(2) permitting the acceptance of a complaint more than a year after the alleged contravention if the complainant shows good cause. In construing the Act to try to ensure that its provisions "give effect to harmonious goals" it seems to me to be legitimate for the Commissioner not to accept or reject a complaint within the 28 day period, at least if the issue whether good cause has been shown for accepting the complaint out of time is also alive; see, generally, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-382, [70] - [71], 389-390 [92] - [93] and *Peldan v Anderson* (2006) 229 ALR 432; (2006) 80 ALJR 1588;[2006] HCA 48 at [40]."

[30] The words "… at least if the issue whether good cause has been shown for accepting the complaint out of time is also alive" might suggest some

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[19] *State of Qld (through the Qld Police Service) v Walters (in her capacity as Delegate of the Anti-Discrimination Commission Qld) & Anor* [2007] QSC 12 at [18].

[20] S 141 of the *Anti-Discrimination Act 1991* (Queensland) reads as follows:-
"141 Time limit on acceptance or rejection of complaints
(1) The commissioner must decide whether to accept or reject a complaint within 28 days of receiving the complaint.
(2) The commissioner must promptly notify the complainant of the decision."

qualification or implied limitation. However, in relation to s 66 *Anti-Discrimination Act* (NT), I would not qualify the validity of the Commissioner's dealing with the complaint outside the 60-day period by any implied condition or limitation that the Commissioner would need to be in the process of considering accepting the complaint out of time.

Vexatious complaint

[31] The plaintiff's second ground for relief is the asserted failure on the part of the defendant to consider whether the complaint was vexatious.

[32] Section 67 *Anti-Discrimination Act* (NT) reads as follows:-

> 67. Commissioner to reject frivolous, &c., complaint
>
> The Commissioner shall reject a complaint if the Commissioner reasonably believes that the complaint is:
>
> (a) frivolous or vexatious; or
>
> (b) trivial; or
>
> (c) misconceived or lacking in substance; or
>
> (d) fails to disclose any prohibited conduct.

[33] The plaintiff's contention is not that the complaint was both frivolous and vexatious, but that it was vexatious. Counsel for both parties agreed that it would be appropriate for me to interpret the word "vexatious" in the context "frivolous or vexatious" in s 67 *Anti-Discrimination Act* (NT) in the same

way in which Deane J interpreted “vexatious” in the context "vexatious or oppressive" in *Oceanic Sun Line v Fay* [21], where his Honour said:-

> “If the plaintiff is not acting bona fide or in pursuit of a legitimate advantage in pursuing the proceedings in the legal system of this country, that will, of course, make it much easier for a continuation of the proceedings to be characterized as vexatious or oppressive, since there will be little if anything to put into the balance against the inconvenience which would be sustained by the defendant. On that approach, “oppressive” should, in this context, be understood as meaning seriously and unfairly burdensome, prejudicial or damaging while “vexatious” should be understood as meaning productive of serious and unjustified trouble and harassment.” [emphasis added)]

[34] The plaintiff argues that the complainant’s suggested motivation in making the complaint is relevant in a consideration as to whether the complaint was vexatious. I disagree. If I accept and apply the definition of “vexatious” stated by Deane J in *Oceanic Sun* and in particular the words “productive of”, it is the effect and not the motivation which is relevant. The situation is analogous to that in which the Supreme Court has inherent jurisdiction to stay proceedings which are an abuse of process. Proceedings brought for an improper purpose are an abuse of process if the purpose is to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond that which the law offers. However, the existence of an ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the action is successful.[22] A simple example is that it would not be an abuse of process for a creditor to seek to bankrupt a debtor with the

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[21] *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 per Deane J at 247.7.
[22] See *MacDonnell Shire Council v Miller & Ors* [2009] NTSC 46 at [12] per Mildren J.

intention of causing that debtor personal misery if indeed the relevant act of bankruptcy could be established and the creditor were legally entitled to the making of a sequestration order.

[35] In the present case, I conclude that the complainant's motivation in making the complaint is irrelevant to the question as to whether the complaint was vexatious. The relevant issue is whether the complaint was productive of serious and unjustified trouble and harassment. In a consideration of the consequences for the plaintiff (as respondent to the complaint), seriousness is not in doubt, and so the essential question becomes whether the complaint was productive of *unjustified* trouble or harassment for the plaintiff. In my view, the consequences were not 'unjustified' in the legal sense. The allegations made by the complainant were serious matters of their kind.[23] Any 'trouble' (or 'harassment') caused to the plaintiff was 'justified', in that it was caused for the purpose of the complainant pursuing, and obtaining if ultimately successful, a remedy available to her under the Act. The remedy could include compensation for damage caused by the prohibited conduct, where 'damage' as defined includes offence, embarrassment and humiliation.[24]

[36] I turn to consider the plaintiff's argument that the Commissioner failed to consider whether the complaint was vexatious, in circumstances where (it was put) possible vexation was a necessary consideration enlivened by the

[23] See paragraph [4] above and footnote 1.
[24] S 88(1)(b) and s 88(3) *Anti-Discrimination Act.*

facts of the case. The plaintiff relied on the absence of express reference to vexation to argue that no consideration had been given to that issue:-

> "Plainly, it is at least possible that the real reason why Ms Williams complained to the ADC was that she was dissatisfied with the outcome of the police investigation. It is also clear she was or should have been expected to be aware of her right to make a complaint under the Act, but chose not to, in favour of pursuing Mr Hofer internally. It is submitted this renders her complaint to the ADC arguably vexatious and accordingly consideration by the ADC under s.67 of the Act was enlivened. It is also abundantly clear that no consideration was given to this question. ….".[25]

[37] With respect, I cannot see how the matters referred to could render the complaint vexatious. The fact (if it were the case) that the complainant's motivation to make the complaint was her dissatisfaction with an earlier internal investigation does not in my view enliven the need to consider whether the complaint was vexatious. As explained in par [34] above, it is effect and not motivation which is relevant. The fact (if it were the case) that the complainant had made a complaint to her employer about the plaintiff's conduct when she was fully aware of her additional right to make a complaint under the *Anti-Discrimination Act* (NT) might have been relevant to the Commissioner's consideration as to whether to accept the complaint out of time, but is irrelevant to whether the complaint was vexatious in the sense explained above.

[38] I have concluded that, if vexation needed to be enlivened as a necessary consideration, it was not enlivened in the facts of the present case.

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[25] Plaintiff's written submissions, par 70.

[39] However, I consider that all the s 67 matters have to be considered by the Commissioner in respect of every complaint. Although s 67 *Anti-Discrimination Act* (NT) does not expressly require the Commissioner to consider the various grounds for mandatory rejection of a complaint (rather it is drafted in terms which require the Commissioner to reject a complaint on the basis of reasonable belief as to one or more of the s 67 matters), there is nonetheless an implied obligation on the part of the Commissioner to consider in every case whether an application is any of the things specified in s 67, including whether it is frivolous or vexatious. This obligation is implied as a matter of logic and commonsense: if the Commissioner did not consider all of the s 67 matters, the Commissioner could overlook a matter which, if considered, would lead to mandatory rejection of a complaint. The "reasonable belief" referred to must be reasonable belief after consideration of the possibility that an application may be each one or all of the things specified in s 67.

[40] If my view of the legislation is correct, then the requirement to consider whether a complaint is vexatious[26] is required in every case. The requirement to consider is not enlivened by the facts of each complaint; it is always there.

[41] In the present case, there was no express mention of vexation having been considered by the Commissioner.

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[26] or any one of the other things specified in s 67.

[42] Nonetheless, it is clear from the Commissioner's statements in the letter to the complainant dated 1 November 2010[27] that the seriousness of the subject matter of the complaint and the ability of the complainant to seek redress elsewhere were both considered. In considering the allegations made by the complainant, the Commissioner referred to the alleged sexual harassment having been aggravated because of the power imbalance between the complainant and the plaintiff in the hierarchical organisation in which they both worked, and because of its ongoing persistent nature. The Commissioner also filtered out and rejected that part of the complaint alleging discrimination on the ground of association with race, on the basis of insufficient weight and the alleged conduct not being ongoing.

[43] Although there was no express mention of vexation, the matters referred to in the previous paragraph are inconsistent with the Commissioner not having considered whether the complaint was vexatious. It can therefore be implied that the Commissioner concluded that the complaint was not vexatious, or "frivolous or vexatious". It follows that the Commissioner could not have been of the reasonable belief that the complaint was vexatious.

[44] The Court's common law supervisory jurisdiction invoked in this case is limited to reviewing the legality of the administrative action to accept the

[27] Part of annexure "E" to the plaintiff's affidavit affirmed 31 December 2010.

complaint. It would be inappropriate to enter upon a consideration of the factual merits of the Commissioner's decision.[28]

[45] The plaintiff has failed to establish on the balance of probabilities that the Commissioner's decision is invalidated by the Commissioner having failed to consider whether the complaint was vexatious.

Conclusion

[46] It follows from my rejection of both grounds argued by the plaintiff that the proceeding must be dismissed.

[47] I will hear the parties as to the formal orders I should make, including orders as to costs.

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[28] See, for example, *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [73].