Northern Territory of Australia v Ferguson & Anor [2013] NTSC 24

PARTIES:	Northern Territory of Australia v Ferguson, Stephen and Anti-Discrimination Commissioner of the Northern Territory
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	124 of 2012 (21244990)
DELIVERED:	3 MAY 2013
HEARING DATES:	22 APRIL 2013
JUDGMENT OF:	KELLY J

CATCHWORDS:

ADMINISTRATIVE LAW — Complaints — Anti-Discrimination Commission — Online complaint form — Complainant set out conduct complained of including threats t to kill — Complainant ticked ‘trade union membership’ and ‘victimisation’ — Notification of acceptance of complaint referred to ‘trade union membership’ only — Whether one complaint or two — Whether complaint based on ‘victimisation’ rejected — Held one complaint of prohibited conduct only said to contravene two provisions of the *Anti-Discrimination Act* — No evidence that the Anti-Discrimination Commission rejected part of complaint — Complaint accepted — Application refused

Anti-Discrimination Act (NT) s 19, s 23, s 64, s 66, s 67, s 69(a), s 70, s 77

Hofer v Anti-Discrimination Commission [2011] NTSC 20, considered

REPRESENTATION:

Counsel:

Plaintiff:	T Barrett
First Defendant:	M Crawley
Second Defendant:	No appearance

Solicitors:

Plaintiff:	Solicitor for the Northern Territory
First Defendant:	Pipers
Second Defendant:	Anti-Discrimination Commission

Judgment category classification:	B
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Number of pages:	29

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

Northern Territory of Australia v Ferguson & Anor [2013] NTSC 24
No. 124 of 2012 (21244990)

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Plaintiff

AND:

STEPHEN FERGUSON
First Defendant

AND:

ANTI-DISCRIMINATION COMMISSIONER OF THE NORTHERN TERRITORY
Second Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 3 May 2013)

[1] In 2009 the first defendant, Stephen Ferguson, was employed by the plaintiff as a school teacher at Gapuwiyak Community Education Centre. At that time Mr Ferguson was the union representative at the school for the Australian Education Union.

The first complaint

[2] On 30 August 2009 Mr Ferguson lodged a complaint with the Anti-Discrimination Commission ("the Commission") complaining that he had been subjected to discrimination and harassment from the assistant principal of Gapuwiyak Community Education Centre and the regional director of the Department because of his trade union activities ("the first complaint"). The Commission accepted the first complaint pursuant to s 66 of the *Anti-Discrimination Act* ("the Act") and sent a letter to the plaintiff (and presumably the other respondents) on 30 September 2009 pursuant to s 70 of the Act notifying the plaintiff in writing of the substance of the complaint. No issue arises in this proceeding in relation to the first complaint.

The second complaint

[3] On 26 February 2010 Mr Ferguson lodged a further complaint to the Commissioner under the Act ("the second complaint"). The second complaint was lodged on an on-line form provided by the Commission which asks a number of questions and provides a list of choices for the complainant to select from. Question 3 on the form asks:

> "**Question 3**
>
> Why do you think you were treated unfairly?
>
> **3a. Was it because of: (Please tick a box or boxes)**
>
> your race or ethnic origin

your sex

your age

your sexual preference or characteristics (sexuality)

your marital status (married, single, or defacto)

whether you have children or not (parenthood)

your impairment (disability)

you were breastfeeding

your trade union membership or non-membership[1]

your religious beliefs

your political beliefs

your medical or criminal records which are irrelevant to your situation

your pregnancy

your association with someone who has, or is believed to have, one of the above listed attributes

[1] It should be noted that these questions do not accurately set out the attributes on the basis of which discrimination is prohibited by s 19. Section 19(k) refers to "trade union or employer association activity" not "trade union membership or non-membership". However, nothing turns on this mis-description for the purposes of this proceeding.

3b. We also look at complaints where the following things may have happened

	you were sexually harassed
	you were harassed because of your race, impairment, sexuality or parenthood etc.
	you were asked questions about yourself which were unnecessary and upon discrimination might be based
	you have a special need because of your race, sex, impairment, etc, and your special need was not catered for
	you have been treated unfairly because you have a guide or assistance dog
	someone has tried to help someone contravene the Anti-Discrimination Act
	you were treated differently because you had put in a complaint to the Anti-Discrimination Commissioner or you were a witness for someone who put in a complaint to the Anti-Discrimination Commissioner."

[4] In answer to this question Mr Ferguson put a "Y" beside "your trade union membership or non-membership" under 3a. and a "Y" against "you were treated differently because you had put in a complaint to the Anti-

Discrimination Commissioner or you were a witness for someone who put in a complaint to the Anti-Discrimination Commissioner" under 3b.

[5] Question 5 of the on-line form is as follows:

> "**Question 5**
>
> It is important to show that you were treated unfairly <u>because</u> of an attribute you have ticked at questions 3a & 3b. Explain what happened and why you think the way you were treated was based on your attribute. (Unless you already explained this in question 5)." (sic)

[6] Mr Ferguson answered that question as follows:

> "Due to me submitting the current on-going case with your organisation, I was threatened by my Principal, Shirley (who has since been investigated by the Police, served with an Infringement Notice for using 'threatening words in a public place towards your staff' and paid a fine for this). She threatened to "kill me, hang me from a tree and send her family to burn down my house because I had submitted 35 pages of lies about her already" (referring to this case), while I was working in Gapuwiyak Community, due to me submitting this case. My Assistant Principal at that time, Lindall Watson (currently acting Principal at Gapuwiyak CEC), also linked me to this case by telling Shirley at the same time, in front of 2 other witnesses, that "Stephen had already put in that complaint about you and that she would help her get rid of me". I strongly believe this to be a case of victimisation by both of these women due to my current submission to the Anti-Discrimination Commission, of which Shirley has had to answer questions relating to her conduct and my allegations of workplace discrimination due to my union activity at Gapuwiyak CEC while under her authority."

[7] The people complained about in this complaint were the plaintiff, the principal of Gapuwiyak CEC (Ms Shirley Nirrpuranydji) and the assistant principal (Ms Lindall Watson).

[8] On 9 March 2010 the Commissioner's delegate wrote to Mr Ferguson stating:

> "I am writing to inform you that I have accepted your complaint of prohibited conduct, which was received by the Anti-Discrimination Commission ('ADC') on 26 February 2012."

[9] The Commissioner's delegate sent a letter dated 10 March 2010 to the plaintiff (and similar letters to the other respondents) pursuant to s 70 of the Act, in the following terms, notifying the respondents that the complaint had been accepted:

> "I advise that the Anti-Discrimination Commission ('the ADC') has received a complaint under the Anti-Discrimination Act ('the Act') from Mr Stephen Ferguson. Mr Ferguson has made an allegation of victimisation, contrary to section 23 of the Act.
>
> I formally accepted this complaint on 10 March 2010 in my role as delegate of the Anti-Discrimination Commissioner and must now proceed to investigate it."

[10] The full complaint was not enclosed with this letter, only an extract, namely the answer to question 5 set out above. The letter advised that the legal basis of the complaint was victimisation under s 23 of the Act because of the prior complaint. The letter did not mention that the complaint also asserted that the complainant had been treated unfairly because of his trade union membership or non-membership.

[11] From the outset, the Department's response to the second complaint was entirely focused on trying to have it dismissed on technical grounds, rather than dealing with the substance of the complaint. The

Department's initial response to the second complaint was contained in an email from Ms Lee Rayner, the Director Legal Services of the Department of Education and Training, on 23 March 2010 in the following terms:

> "In relation to the victimisation complainant (sic) my only concern is with the time frame because the School Principal Shirley is presently not on duty. I am nearly 100% sure of **why** she made the threats to Stephen (because she thought he had gone to the Union to complain about her borrowing money off people) and it had absolutely nothing with the complaint to the ADC (sic) however naturally I will have to verify that before I put it in writing officially to you. The victimisation complaint has no basis at all."

[12] Ms Rayner confirmed that understanding in her formal response to the second complaint (dated 15 April 2010) in the following terms:

> "Mr Ferguson is claiming that the reason that Ms Nirrpurranydji made threats against him was due to the fact that he had lodged a complaint with the Anti-Discrimination Commissioner (ADC). I can advise after checking with Ms Nirrpurranydji on two separate occasions that Ms Nirrpurranydji made the threats against Mr Ferguson for the following reasons:
>
> 1) Primarily because she believed that Stephen Ferguson had made a complaint to the Union about her borrowing money from staff at Gapuwiyak School.
>
> 2) Due to the intense pressure Ms Nirrpurranydji felt in dealing with Stephen Ferguson. He had already lodged a section 59 grievance against her under the *Public Sector Employment and Management Act*. This had been internally investigated by two departmental staff and Ms Nirrpurraydji felt totally frustrated in dealing with Stephen Ferguson.
>
> The belief on that day that he had gone to the Union to complain about her was the "straw that broke the camel's back". It had absolutely nothing to do with the initial complaint to the ADC and to suggest that the threats were related to the ADC complaint is ridiculous."

She concluded:

> "The Department of Education and Training (DET) denies that it has victimised Mr Ferguson as a consequence of his initial discrimination complaint. DET's position is that:
>
> There is no basis for the complainant's allegation of victimisation.
>
> Any assertion that is (sic) has victimised Mr Ferguson as a consequence of his initial complaint of discrimination is without foundation of fact and should be rejected; and
>
> The Commission should decline to entertain the victimisation complaint on the basis that it is misconceived and/ lacking in proof and/ or does not disclose any contravention of the Act."
> *(punctuation in original)*

[13] To this point, the Department was not aware that Mr Ferguson had alleged in the second complaint that the conduct he complained of amounted to unfair treatment because of union membership as well as victimisation because of the lodging of the first complaint. However, on 17 December 2010 the Commission prepared a report of the investigation of the first and second complaints pursuant to s 77 of the Act and sent it to the parties. The s 77 report enclosed, for the first time, a full copy of the second complaint which ought to have brought to the plaintiff's notice the fact that the second complaint complained of both victimisation and unfair treatment because of trade union membership.

[14] In the mean time, on 11 October 2010, Mr Ferguson requested in writing that both complaints proceed to hearing in accordance with s 84 of the

Act, as the complaints had not been finalised within 6 months of their acceptance.

[15] On 25 January 2011 the Registrar of the Commission made directions for the exchange of statements of issues, facts and areas of disagreement and the exchange of witness statements with a view to progressing the complaints to a hearing.

[16] The Department's response was a technical objection to the form of the report. Ms Rayner wrote to the Commission in the following terms:

> "We refer to the abovementioned matter and in particular the Report under section 77 of the *Anti-Discrimination Act*.
>
> Please be advised that we object to the amalgamation of the two separate complaints made by Mr Stephen Ferguson into the one section 77 report as it presumes that all five of the Respondents are parties to both complaints made by Mr Stephen Ferguson.
>
> We confirm that:
>
> (1) the Department of Education and Training, Shirley Nirrpurranydji and Lindall Watson are only parties to the victimisation complaint; and
>
> (2) the Department of Education and Training, Jennie Birch and Hylton Hayes are only parties to the complaint made on the grounds of discrimination on the basis of trade union activity.
>
> In consideration of the above we seek that the Report under section 77 of the Anti-Discrimination Act be amended and a separate report be provided for each complaint made by Mr Ferguson to reflect the difference in the Respondents.

> Regardless of our request above, please note that we have no difficulties with having the matters listed and heard together.
>
> We look forward to the receipt of the Reports at your earliest convenience but in the meantime if you have any questions please do not hesitate to contact me."

[17] Mr Ferguson was late in filing his statements of issues, facts and areas of disagreement and, on 14 February 2011, Ms Rayner wrote to the Commission complaining of this fact and included in that letter a paragraph in the following terms:

> "In light of the above I respectfully request that the Commission take a proactive measure and put an end to this frivolous compliant (sic) that has no legal substance for lack of prosecution and to prevent any further waste of the Commission's time and resources."

[18] It should be noted that Ms Rayner's characterisation of the complaint as "frivolous" and having "no legal substance" was based solely on the instructions she had received from Ms Nirrpuranydji as to her motivation for threatening Mr Ferguson as, it appears, she admitted doing. At the very least one would have thought that motivation was a matter of disputed fact to be determined by the Commission on a hearing of the matter, even if the complaint had been limited to a victimisation complaint as assumed, at that point, by the plaintiff.

[19] On 18 February 2011 Mr Ferguson's lawyers filed a statement of issues, facts and areas of disagreement which encompassed both complaints albeit under separate headings. The threats made by the principal to Mr Ferguson were included under both headings.

[20] The plaintiff protested and on 16 March Mr Ferguson's lawyers filed two separate statements of issues, facts and areas of disagreement, one relating to each complaint. The threats made by the principal against Mr Ferguson were again included in both complaints.

[21] There followed correspondence between Ms Rayner on behalf of the Department and Mr Piper, the solicitor for Mr Ferguson. On 3 February 2012 Ms Rayner wrote to Mr Piper pointing out that, "Ms Nirrpuranydji made the threats as she believed that Mr Ferguson had gone to the Union to make complaints as to her borrowing money from staff at Gapuwiyak school". Because of that she requested that Mr Ferguson "discontinue his vexatious and misconceived claim of victimisation under section 23 of the *Anti-Discrimination Act*". In that letter Ms Rayner referred to an article in the NT News which referred to admissions by Ms Nirrpuranydji that she had said she would find out who had complained to the teacher's union about her borrowing money and get her family to "kill them", and which contained the following quote from Mr Ferguson:

> "I was the teachers' union representative and a whistleblower. Staff were upset at being pestered for money. The loans weren't really loans – the money was never paid back."

[22] Further correspondence ensued. Mr Piper obtained an order for the production of documents by the plaintiff. In response to those orders Ms Rayner wrote to Mr Piper on 2 April 2012 again urging him to withdraw the victimisation complaint on the ground that Ms Nirrpuranydji made the

threats which she made because of her anger over complaints made to the union in relation to her alleged borrowing of money from another staff member and not because of his earlier complaint to the Commission. It is clear that by this time Ms Rayner had seen a copy of the second complaint, or was at least aware of its contents, as she referred in that letter to Mr Ferguson having 'ticked the box' that refers to union membership and asserted that that was not sufficient.

[23] There followed an exchange of emails between Mr Piper for Mr Ferguson and Ms Rayner for the plaintiff (addressed to the Registrar of the Commission with copies to each other) concerning the ambit of Mr Ferguson's complaints which included the following.

- Mr Piper wrote (on 22 May 2012):

> "There are two complaints –
>
> 1. A 45 page document outlining numerous complaints of discrimination as a consequence of **union activity**, filed with the ADC on 30 August 2009, and given complaint number C20100025-01.
>
> 2. An emailed complaint form dated 23 February 2010 alleging discrimination on the grounds of **union activity AND on the basis of having filed a complaint with the Anti-discrimination Commission**, arising from the events of 16 November 2009, given complaint no C20100094-01.
>
> These were both the subject of a Statement of Facts, Issues and Areas of Disagreement dated 18 February 2011.

However, this Statement was subsequently overtaken by the filing of a separate Statement of Facts, Issues and Areas of Disagreement in respect of each complaint on 17 March 2011.

Please call me if there are any queries." *[emphasis in original]*

- Ms Rayner, for the plaintiff responded (on 24 June 2012):

"There is a real natural justice problem with My (sic) Piper's response below because Mr Ferguson's second complaint is only about 'victimisation' and the document provided by the ADC to the Department on the 10 March 2010 only contained an extract of a document that Mr Ferguson had given the ADC and it refers to the threat to his person. The last sentence in the extract given to the Department refers to union membership in regard to his complaint previously lodged.

Can I trouble to please to look back at what DET was provided with and what we were asked to respond to. (sic) It seems totally unfair to me to expect us to defend a second discrimination complaint on the basis of Union membership when no substance of that complaint has ever been provided as required by section 64 of the Act."

- Mr Piper responded (on 28 June 2012):

"If it is of any assistance, this matter was dealt with in the conference on 29 March 2012.

At that time, Ms Rayner raised this very point. It was noted the original documents given to DET may not have included a relevant page that would have clarified the claim was in respect of union activity, as well as victimization.

My recollection and notes were that the matter was discussed on 29 March, and, for the sake of clarity, it was recorded as a note on the ADC file that – "the second complaint relates to trade union activities as well as victimization".

I acknowledge that Ms Rayner may not have always been of this view, however, the below email cannot serve any purpose in the

context of this case. There are no natural justice issues arising from the complaint that Ms Rayner has.

To the extent the below email is intended to persuade the ADC limit (sic) the scope of the complainant's second complaint, then we obviously would object to that."

- Ms Rayner responded (on 28 June 2012):

"I think this needs to be addressed properly because there has not been specific detail pleaded as to **what** the discrimination in relation to Union membership is with the second complaint. That is all that I am requesting." *[emphasis in original]*

- Ms Rayner sent another email (also on 28 June 2012)saying:

"I should also have added that the details of what the discrimination on the basis of Union membership is (sic) in the second complaint need to be different to what Mr Ferguson has claimed in the second complaint or he is being duplicitous."

[24] The Registrar responded to Mr Piper and Ms Rayner (also on 28 June 2012) (relevantly) in the following terms:

"Dear Mr Piper and Ms Rayner,

Thank you for raising this issue.

I do not see that any further clarification is needed at this stage. The course of conduct alleged in the Complainant's Statement of Facts Issues and Areas of Disagreement (SFIAD) filed 17 Mar 2011 is the touchstone for determining relevance.

It has been apparent for some time that the Complainant wishes to pursue discrimination (trade union) as well as victimisation in relation to his second complaint. This was what he wrote on his complaint form. I believe this was not originally conveyed to DET accurately, however subsequently it was made clear and has been repeated to DET now on several occasions. Section 64 does not

appear to specify any requirements about when and how a complaint is communicated to a respondent. In this case, the initial investigation was abandoned before a decision that required natural justice could be made, due to the application of s 84.

The ADC is not a jurisdiction which requires the precise formulation of technical legal documents at an early stage of the proceedings. Early stages involve investigation of complaints which are often only a narrative. The exact issues to be disputed at hearing often do not become clear until the SFIAD and subsequent witness statements are filed.

...

With respect to duplicity, this is an argument that would need to be had before the Hearing Commissioner when he has been appointed. It strikes me as very strange to require the complainant to elect to pursue only one kind of improper conduct when his claimed facts seem to indicate that both his ADC complaint and his union membership were motivations that contributed to the events of 16 November 2009. If election was required, it would lead to the perverse outcome that DET could suggest that the non-elected ground was in fact the true motivation and thereby escape liability by putting forward a view that its behaviour was contrary to the AD Act in the other respect. If the evidence at hearing ultimately supported a claim of both victimisation and discrimination, then I would think issues of duplicity would arise around the amount of compensation, not whether the claims got over the line. However, I personally do not think this issue needs to be resolved in order to make a decision about the orders to produce: Regardless of which way the duplicity argument goes, evidence that discloses the circumstances of the threat made on 16 November and the reason why it was made is relevant, regardless of whether it has anything to do with union membership or the first ADC complaint. If one of the documents says Ms Nirrpurandyj threatened Mr Ferguson because she slipped on a banana peel that she thought Mr Ferguson had left in the staff room, that would be relevant, because it would be evidence that makes the claim more or less likely (less in that case)."

[25] The Commissioner's delegate produced fresh s 77 reports for each complaint which prompted the following email from Mr Piper to the Registrar (on 21 August 2012):

"The proposed s 77 report in respect of the second complaint appears to leave off that part of the complaint that is in respect of discrimination based on trade union activity.

I agree with the changes to the parties, but not to the continued omission of that aspect of the complaint.

As has previously been discussed, discrimination on the basis of trade union activity was marked on the second complaint as a ground of the complaint. Further, there are particulars relating to that aspect of the complaint in the form. It appears that this was unknown to the respondent's representatives for a period. That fact ought not mean it is no longer part of the complaint. This issue has been the subject of previous communications, and on 29 March 2012, in a conference, you noted on the ADC file that this complaint was in respect of trade union activity as well as victimisation. This was thought to have to resolved the matter once and for all.

The s77 report is consequently misleading to the extent that it makes no reference to that aspect of the complaint and, in my submission, it ought to be amended."

[26] Ms Rayner disagreed in a lengthy email (on 27 August 2012) relevant extracts of which follow.

"Contrary to Mr Piper's assertion, the respondent does not accept that the second "trade union activity" complaint has ever formed part of the complaint accepted by the Commission. A complainant may assert to have been subjected to any number of distinct grounds of discrimination; however, it is the Commission alone that has the jurisdiction, under s 66 of the Act to accept or reject each complaint.

It is abundantly clear from the Commission's acceptance letter of 10 March 2010 that the complaint accepted by the Commission was limited to a complaint of victimisation contrary to section 23 of the Act. Nowhere in that letter is it suggested that the Commission also accepted a complaint of discrimination on the ground of trade union activity.

If the Commission was aware at that acceptance stage that the complainant had also lodged a complaint on the union activity

> ground then it was a matter for the Commission to either accept or reject that complaint at that time. If the Commission did not recognise the existence of the claimed second complaint at that stage it is not appropriate for it to attempt to remedy its error by expanding the complaint, at a later stage, otherwise than by a means permitted by the Act.
>
> In my opinion introducing new claims through the Statement of Issues, Facts and Areas of Disagreement is not a valid means by which a complainant may improve their claim. (sic) .....
>
> In my submission the only valid means by which the complainant may vary his complaint at this stage of the proceeding is by making an application to amend the complaint under s 64(2) of the Act."

The email goes on to argue that leave to amend the complaint ought not to be given.

[27] In a subsequent email (dated 29 August 2012), Ms Rayner went on to assert that the consequence of her earlier submissions was that the complaint of discrimination in the second complaint, having been rejected, had lapsed and that Mr Ferguson was unable to make a further complaint relating to the conduct that was the subject of the complaint.

[28] The Registrar was unconvinced by these submissions. Further lengthy correspondence and extensive written submissions were made along the same lines. Finally, on 27 September 2012, the Hearing Commissioner appointed under s 85 of the Act to hear the complaints wrote an email to the parties saying:

> "2. I am satisfied that ADC did accept the complaint for discrimination as a result of trade union membership (sic) in addition to the victimisation complaint. There is no indication in the letters

> dated 9 March 2010 and 10 March 2010 that ADC rejected the complaint on discrimination for trade union membership. It is clear from the first paragraph of the letter, *"…. I have accepted your complaint of prohibited conduct …. received on 26 February 2010"*, that the ADC intended to accept the complaint filed by the complainant on 23 February 2010. (sic) The complaint filed by the complainant on 23 February 2010 included both discrimination due to trade union membership (part 3a. of the ADC online complaint form) and victimisation (part 3b. of the ADC complaint form).
>
> Section 66 [of the Act] states *"the Commissioner shall …. accept or reject a complaint ."* Where there has been a rejection of the claim, pursuant to section 69(a) of the Act, the Commissioner must provide the Complainant with written reasons. Where written reasons for rejection are provided the complaint lapses – section 69(b).
>
> ADC did not provide any written reasons for rejection of any part of the complaint because there was no intention to reject any part of the complaint. Section 69(b) must be read conjunctively with section 69(a). This means that unless there are written reasons rejecting the complaint in (3a.), it cannot be said to have been rejected and thereby lapsed."

[29] In response Ms Rayner sent an email to the Commission asking for a copy of the complete second complaint, apparently unaware that the plaintiff had already received one in December 2010, following which Mr Barrett, counsel who appeared for the plaintiff in this proceeding, wrote a lengthy letter to the Hearing Commissioner dated 28 September 2012 strenuously disagreeing with his conclusions, "suggesting" that he was in error and that he should re-visit his decision, and requesting him to give an undertaking within 14 days that he would "hear the victimisation complaint, and only the victimisation complaint", failing which he would apply to the Supreme Court for orders "confining him to the relevant

task". The Hearing Commissioner refused, and the plaintiff has brought the present proceeding in which it seeks:

(a) an order in the nature of prohibition restraining the Commissioner from proceeding to hear and determine the second complaint other than in respect of a complaint of victimisation under s 23 of the Act said to have arisen as a consequence of Mr Ferguson filing the first complaint;

(b) a declaration that, in respect of the second complaint, the Commissioner accepted only a complaint of victimisation; and

(c) an injunction in the same terms as the order in the nature of prohibition.

[30] The basis of the plaintiff's claim is that the Hearing Commissioner (who is deemed to be the Commissioner for the purposes of the hearing)[2] only has jurisdiction to hear a complaint that has been accepted under s 66 and the delegate of the Commissioner who scrutinised the second complaint for the purposes of s 66 and s 67 of the Act (and who was not the Hearing Commissioner) did not in fact accept that aspect of the second complaint which related to discrimination because of union membership. Accordingly, it is submitted, the Hearing Commissioner has no jurisdiction to hear the complaint based on discrimination because of trade union membership.

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[2] Section 85(2)

[31] This analysis supposes that the second complaint consists of two separate complaints, one of victimisation under s 23 of the Act, and another of discrimination on the basis of union membership.

[32] The plaintiff argues that I should infer from the fact that the letter of 10 March 2010 notifying the plaintiff that the second complaint had been accepted contained only the extract from the complaint set out above, and made no reference to discrimination, that that part of the complaint which complained of discrimination because of union membership had been rejected. I see no reason to draw any such inference, essentially for the same reasons given by the Hearing Commissioner in his decision of 27 September 2012 set out in paragraph [28] above.

[33] Where a complaint is rejected under s 66, the Commissioner is obliged to notify the complainant of that fact as soon as practicable,[3] and to provide the complainant with written reasons as to why the complaint was rejected.[4] This was not done in relation to the second complaint. Rather, on 10 March 2010, the Commissioner sent a letter to the plaintiff as respondent to the second complaint advising that the complaint had been accepted. Further, the Commissioner's delegate wrote to Mr Ferguson on 9 March 2010 stating:

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3 Section 66

4 Section 69(a)

> "I am writing to inform you that I have accepted your complaint of prohibited conduct, which was received by the Anti-Discrimination Commission ('ADC') on 26 February 2012."

[34] There was nothing in that letter to suggest that some aspect of that complaint had been rejected, and the conclusion seems inescapable that what was accepted under s 66 was "the complaint" in its totality. True it is that, like the letter of 10 March 2010 referred to above, there is no specific reference to discrimination on the basis of trade union activity, and the letter goes on: "I have accepted your complaint of victimisation contrary to s 23 of the *Anti-Discrimination Act*." This is not surprising as the main thrust of the complaint was victimisation. Nevertheless what was accepted was a complaint, the substance of which was that the principal of Gapuwiyak CEC, Shirley Nirrpuranydji, had threatened to kill Mr Ferguson, hang him from a tree and send her family to burn down his house and that the Assistant Principal, Lindall Watson, had said she would help Shirley get rid of him. This was said on the complaint form to be victimisation because of the lodging of the first complaint; it was also asserted to be unfair treatment on the basis of trade union membership.[5]

[35] Contrary to the position adopted by the plaintiff, this does not comprise "two complaints" which had to be considered and either accepted or rejected separately. It is the conduct set out under question 5 in the form which Mr Ferguson complains of. Section 64 of the Act sets out the

[5] The real substance of Mr Ferguson's complaint is harassment on the basis of union activity (and this is prohibited conduct under the Act), but as indicated above, "unfair treatment because of union membership" was the term used by the Commission in the online form in the list from which Mr Ferguson was invited to select.

requirements for a complaint. It must be in writing and it must set out in detail the alleged prohibited conduct, which this complaint does. The Act does not require a complainant to specify the provisions of the Act which it is asserted the prohibited conduct contravenes, or the basis upon which it is said the conduct complained of contravenes the Act, and a complaint which fails to do so is not invalid or liable for that reason alone to be rejected.

[36] Having said that, it is obviously desirable that a complaint should indicate the basis upon which the conduct complained of is said to contravene the Act, for a range of reasons, including to assist the delegate of the Commissioner to ascertain whether the complaint should be rejected as not disclosing any prohibited conduct. The online form encourages this by providing a check list, and Mr Ferguson identified the two categories which he says the conduct he complained about fell into, namely unfair treatment because of trade union membership, and being treated differently because he had put in a complaint to the Commissioner. That does not turn the second complaint into two separate complaints. There was one complaint about the conduct set out in the answer to question 5 which was said to contravene the Act in two ways,[6] and that complaint was accepted.

[6] There is no reason in the Act or in logic why the same conduct cannot amount to contravention of both s 23 and s 19 of the Act, for example where there are mixed motives for the offending conduct. Nor is there any reason in the Act, or in logic, why a complaint cannot specify alternative bases for asserting that the conduct is in contravention of the Act where the motive for that conduct is unclear.

[37] That complaint having been accepted, and the complainant having made a request to the Commissioner to conduct a hearing under s 84, the Hearing Commissioner has jurisdiction to hear the complaint and is not limited to hearing only that aspect of the complaint that asserts that the conduct amounted to victimisation under s 23 of the Act.

[38] The plaintiff mounted a further argument based on the insufficiency of the notice of acceptance of the complaint in the letter of 10 March 2010. Counsel for the plaintiff submitted that the duty to notify the respondent of the substance of the complaint was placed on the Commissioner and could not be satisfied by notice of the basis of the complaint given by the solicitor for the complainant. It was also suggested that to allow the complaint to go to hearing on the ground that the conduct complained of amounted to discrimination because of trade union activity, when that was not set out in the notification of acceptance of the complaint on 10 March 2010, would amount to a denial of natural justice.

[39] I reject these submissions. It is an unfortunate fact that the notice of 10 March 2010 to the plaintiff that the second complaint had been accepted was incomplete because it did not refer to the fact that Mr Ferguson's complaint was that the conduct in question amounted to discrimination on the basis of union activity as well as victimisation under s 23.[7] However, it seems to me that that was remedied when the Commission sent the

[7] The conduct complained of consists of the making of threats, apparently in an attempt to "get rid of" Mr Ferguson. It should be noted that under s 20 of the Act discrimination includes harassment on the basis of an attribute.

plaintiff a full copy of the complaint with the first s 77 report, and in subsequent correspondence, in particular the email from the Registrar to Mr Piper and Ms Rayner on 28 June 2012 referred to in paragraph [24] above.[8] The Act does not prescribe a form of notification of acceptance of a complaint. Section 70 simply requires the Commissioner to notify the respondent in writing of the substance of the complaint as soon as practicable after accepting it. The fact that notice of the full basis of the second complaint was given late, does not deprive the Commissioner of jurisdiction to conduct a hearing into the complaint.

[40] Nor do I think it can be said that there has been any denial of natural justice to the plaintiff as a result of the initial defect in the notification of acceptance of the second complaint. The plaintiff has been aware since receipt of the s 70 notification on 10 March 2010 that the substance of the conduct complained of in the second complaint consisted of the threats by the principal Ms Nirrpuranydji to kill Mr Ferguson, hang him from a tree, and burn down his house, and has been on notice since receipt of the s 77 report in December 2010 that the second complaint asserted that this conduct amounted to his being unfairly treated as a result of his union activity (or at least union membership) as well as victimisation on the basis of having lodged the first complaint. The plaintiff has further been on notice since receipt of the original statement of issues, facts and areas

[8] Ms Rayner deposed in her affidavit that she did not read the complaint that accompanied the s 77 report, but that does not alter the fact that it was communicated to the plaintiff what the complaint was, and that it had been accepted, albeit in a number of separate communications.

of disagreement in February 2011 (reiterated in the statements of issues, facts and areas of disagreement in March 2011) of the precise details of Mr Ferguson's complaint against the Department and the other respondents. There is no overlap in the complaints against the various respondents. It is quite clear what conduct is alleged against which respondent. Further, it is clear that Mr Ferguson claims that the Department is vicariously liable for the conduct of all the other respondents.

[41] The plaintiff further submitted that because the Commissioner did not notify the plaintiff of the acceptance of the discrimination aspect of the second complaint at the time the letter pursuant to s 70 was sent, on 10 March 2010, the Commissioner cannot now do so consistently with the principles in *Hofer v ADC*[9] in which Barr J observed that screening a complaint and considering whether to accept or reject it under s 66, "would usually require some careful consideration in assessment".

[42] I reject this submission by the plaintiff. First, as noted above, the Commissioner (or rather the Commissioner's delegate) has already accepted the second complaint. The error was in not properly notifying the plaintiff of the substance of the complaint. That error has been remedied in the correspondence referred to above. There is no fixed format in the Act for notification of the acceptance of a complaint. Secondly, I see no reason to suppose that the Commissioner's delegate did

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not give careful consideration to the complaint before accepting it under s 66.

[43] As I have said in paragraph [36] above, there has been no jurisdictional error and, therefore, there is no basis for the relief sought. If there had been jurisdictional error demonstrated, I would nevertheless have been inclined to refuse to intervene on discretionary grounds.

[44] Even if the second complaint had made no reference to discrimination on the basis of union activity, it would have been open to the Commissioner (or delegate) to allow Mr Ferguson to amend the second complaint to include a claim that the conduct in question amounted to discrimination on that ground. It is open to the Commissioner to allow a complaint to be amended at any time.[10] There is no prescribed form of application for an amendment, and no prescribed format for an amended complaint. As the Registrar said in her email of 28 June 2012 referred to in paragraph [24] above, the Commission is not a jurisdiction which requires the precise formulation of technical legal documents at an early stage of the proceedings.[11] Early stages involve investigation of complaints which are often only a narrative. If, during an investigation, fresh instances of prohibited conduct (or prohibited conduct of a different nature to that initially alleged) come to light, there is no reason why the Commissioner

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10 Section 64(2)

11 See, for example s 90(b) which provides that in the conduct of proceedings under the Act, the Commissioner shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

ought not to allow the complainant to amend the complaint to include that conduct.[12]

[45] In this case, the plaintiff has not denied that threats were made to Mr Ferguson. However, the plaintiff says that the threats were made as a consequence of Mr Ferguson (who was the union representative for the school) making complaints to the union about the principal borrowing money from staff members. Arguably that would amount to harassment on the basis of union activity, which is prohibited conduct under the Act. If Mr Ferguson had not included "discrimination on the basis of union membership" as one of the grounds for his complaint, then, when that explanation came to light, it would have been perfectly proper for the Commissioner (or delegate) to allow Mr Ferguson to amend his complaint to include such an allegation.

[46] The plaintiff contended that, if that were to occur, then the whole process would have to begin again with fresh consideration of the amended complaint under s 66 and fresh notification to the respondents to the complaint under s 70. I see no warrant in the Act for this contention. Section 64 provides that an amendment can be made "at any time". That would include during the final hearing if necessary, provided the

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12 See also s 74(2) which provides that the Commissioner may carry out an investigation under if, during the course of carrying out his or her functions, it appears that prohibited conduct has occurred. Under s 74(3) such an investigation shall be deemed to be an investigation of a complaint for all purposes, including the holding of a hearing if it becomes appropriate.

respondent was accorded sufficient opportunity to answer any fresh allegations including an adjournment if necessary to ensure procedural fairness.

[47] It has become the practice for the Registrar to direct the exchange of statements of issues facts and areas of disagreement after the respondent has responded to the complaint and there has perhaps been further clarification by the complainant which has in turn been responded to by the respondent. The purpose of these documents, as I understand it, is to define the issues for hearing if the matter is not successfully conciliated. Contrary to the strongly expressed views of counsel for the plaintiff in correspondence to the Commission, I see no reason why the Commissioner or his delegate ought not to allow a complainant to amend a complaint by means of those documents, again provided steps are taken to ensure procedural fairness to the respondent to the complaint.

[48] As the Registrar pointed out in her correspondence to the parties on 28 June 2012, it would lead to a perverse outcome if the plaintiff could assert that the conduct complained of by Mr Ferguson was not victimisation for lodging the first complaint but discrimination (in the sense of harassment) because of Mr Ferguson's union activity, and then restrain the Commissioner from hearing the claim for discrimination on that ground: yet that, essentially, is what the plaintiff is attempting to do in this proceeding.

[49] The plaintiff’s claim is dismissed.