

# AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

**CITATION: MICHAEL FIRESTONE AND AUSTRALIAN  
NATIONAL UNIVERSITY**

**DT 405/2003 and DT 418/2005**

**Catchwords:** Discrimination – interpretation of the Act -  
impairment – unfavourable treatment – causal link  
– standard of proof - discrimination in education –  
discrimination in employment – discrimination in  
access to premises – discrimination in the  
provisions of goods, services and facilities –  
Victimisation – accessorial liability

## **Provisions considered**

*Discrimination Act 1991* (Republications 11  
and 19), ss 5AA, 8, 10, 18, 19, 20, 21, 22, 23, 68,  
108H and 108I.

## **List of cases cited**

*ACT Department of Education & Training v  
Prendergast* [2000] ACTDT 6  
*Almassey and Omari and ACT Multicultural Council  
Inc* [2008] ACTDT 2  
*Briginshaw v Briginshaw* [\[1938\] HCA 34;](#)  
[\(1938\) 60 CLR 336](#).  
*Edgley v Federal Capital Press of Australia Pty Ltd*  
[2001] FCA 379  
*Harrison v ACT Housing* [2002] ACTDT 3  
*Judith Edgley v Federal Capital Press of Australia  
Pty Limited* [1999] ACTSC 95  
*Kwesius and ACT Health* [2008] ACTDT 3  
*McCormack and Charles Sturt University*  
[2008] ACTDT 4  
*Lewin v ACT Health & Community Care Service*  
[2002] ACTDT 2  
*Prezzi and Discrimination Commissioner*  
[1996] ACTAAT 132  
*Rich v Harrington* [2007] FCA 1987

*Telstra Corporation Limited v Minister for  
Communications, Information Technology and the  
Arts (No. 2) [2007] FCA 1445*

AUSTRALIAN CAPITAL TERRITORY )  
DISCRIMINATION TRIBUNAL )

NO: DT 405/2003  
and  
DT 418/2005

RE: **MICHAEL FIRESTONE**  
Complainant

AND: **AUSTRALIAN NATIONAL  
UNIVERSITY**  
Respondent

**ORDER**

Tribunal : R J Cahill, President

Date : 9 June 2009

**THE TRIBUNAL ORDERS:**

That the complaints be dismissed, pursuant to section 102(2) of the *Discrimination Act 1991* (as it stood at the time the complaints were made), on the ground that the complaints have not been substantiated.

.....  
President

AUSTRALIAN CAPITAL TERRITORY )  
 DISCRIMINATION TRIBUNAL )

NO: DT 405/2003  
 and  
 DT 418/2005

RE: **MICHAEL FIRESTONE**  
 Complainant

AND: **AUSTRALIAN NATIONAL  
 UNIVERSITY**  
 Respondent

### REASONS

R J Cahill, President

9 June 2009

1. This case concerns two complaints made by Mr Michael Firestone (the complainant) against the Australian National University (ANU) (the respondent), under the *Discrimination Act 1991* (also referred to as "the Act").
2. At the request of the complainant, the ACT Discrimination Commissioner, of the then Human Rights Office (now it is known as the Human Rights Commission), referred the first complaint to this Tribunal in November 2003 under section 87 of the Discrimination Act (as it stood at that time). This matter is numbered DT 405/2003. The complaint identified incidents of discrimination during the period 1998 to 2003.
3. The complainant alleged that he was discriminated against by the respondent on the ground of disability (namely, depression) in the areas of education; employment; accommodation; access to premises; engagement or employment as a contract worker; provision of goods, services and facilities; and request for information. He also alleged victimisation because of making or supporting a complaint of discrimination.
4. In September 2005, the ACT Human Rights and Discrimination Commissioner of the then Human Rights Office, referred the second complaint, at the request of the complainant, to this Tribunal in accordance with section 87 of the Discrimination Act (as it stood at that time). This matter is numbered DT 418/2005. The complaint to the Commissioner related to unfavourable treatment from mid-February 1995 to the date of the complaint and mostly in 2004. The allegation was that the respondent discriminated against the

complainant on the ground of disability (namely, depression) in the areas of employment; education; access to premises; provision of goods, services and facilities; and accommodation. The complainant also alleged that he believed he was victimised because he made a discrimination complaint.

5. Since the grounds for both complaints are similar and are against the same respondent, this Tribunal took the view that evidence relating to the complaints could overlap and that, therefore, if the matters were heard together it would be convenient for the parties in terms of their time, effort and identification of issues. For this reason, the Tribunal has decided to deal with matters DT 405/2003 and DT 418/2005 together.

6. It is noted that the Discrimination Act was amended during the interval of nearly two years from the time the complainant made his first complaint to the Human Rights Office in May 2003 to the time when he made his second complaint to that Office in February 2005. Hence, provisions of the Act as they stood at the point in time of the respective complaints are relevant for this case. Accordingly, the Tribunal proposed to consider the provisions as they stood at the time the first complaint was made (namely, Republication no. 11, effective 28 March 2003). It also considered any changes in the legislation that are relevant in relation to the second referral (namely, changes reflected in Republication no.19, effective 10 January 2005 to 10 January 2006). I will refer to the provisions of the 2003 version of the Act in my decision and, where appropriate, to changes provided in the 2005 version. The relevant provisions considered by this Tribunal remained the same in both versions.

### **Procedural History**

7. The matter DT 405/2003 was first called over at the Tribunal on 21 November 2003. On 11 March 2004, the Tribunal made an order that the complainant file a Basis of Claim (Statement of Claim) by close of business 30 March 2004 alleging discrimination, identify sections of the Discrimination Act to back up alleged discrimination, remedy sought, proofs of evidence, and witness statements and, serve a copy on the respondent; the respondent file a reply to the complainant's particulars by close of 23 May 2004; and the complainant file any response to the respondent's reply by close of business 7 May 2004.

8. In May 2004, the complainant requested the Tribunal to issue summons on the respondent to produce documents relating to the complainant's dealing with the respondent's Equity and Diversity Unit, and documents exempted by the respondent's freedom of information officer in response to the complainant's freedom of information request of 16 January 2003. On 31 May 2004, the

Tribunal made an order that the respondent provide a number of documents to the complainant and file an affidavit to support its claim for privilege of the documents. On 2 July 2004, an order was made to require the complainant to lodge submission in regard to the respondent's claim of client legal privilege by close of business on 2 August 2004.

9. On 2 September 2004, the complainant filed a request for an interim order under section 100 of the Discrimination Act on the ground that the order was necessary to establish and preserve the status quo between the parties and/or the rights of the parties. At the Tribunal hearing on 10 September 2004, I indicated that I made a ruling in relation to the respondent's claim of client legal privilege and that documents were now available for the complainant to examine. As the complainant did not establish that his status was not clear or there was any urgency for making an order, I rejected his application for interim order. In the same proceedings, I had provided some guidance to the complainant as to preparing his Statement of Claim.

10. On 10 September 2004, the Tribunal order asked the complainant to file his Basis of Claim, in the same terms as in its order of 11 March 2004, by close of business 6 October 2004. On 8 November 2004, the Tribunal office provided the complainant with sample documents and information with a view to helping him to prepare his Statement of Claim and advised that time was given to him to file his particulars by 3 December 2004. On 8 November 2004, the complainant lodged an overview of his claim listing alleged violations of the Discrimination Act.

11. On 3 December 2004, the complainant lodged his Statement of Claim with the Tribunal. On 8 March 2005, the complainant filed a revised Statement of Claim of 52 pages but there was no particularisation of the claim. The document was incomplete and listed a number of persons whose actions the complainant considered amounted to discrimination against him. The complainant filed a number of revised versions of his Statement of Claim on different dates, for example on 22 February 2005, 8 March 2005, 22 April 2005 and 12 August 2005, but he had not particularised his claim. I note that on 11 August 2005, the respondent filed its statement of facts, issues and contentions.

12. On 7 November 2005 and 27 January 2006, the complainant submitted revised Statements of Claim for both matters DT 405/2003 and DT 418/2005 combined. On 1 February 2006, the respondent filed its statement of facts, issues and contentions for matter DT 418/2005.

13. The numerous versions of the documents which the complainant called his Statements of Claim did not adequately

particularise the claim. At some stage, he referred to more than 200 incidents as involving discriminatory conduct on the part of the respondent in relation to both matters DT 405/2003 and DT 418/2005.

14. In 2005 and 2006, the matters were listed a number of times, including for directions hearing and dealing with the complainant's request for information and documents.

15. In May 2006, the complainant summonsed the respondent to produce a number of information and documents listed on a 10 page attachment. From mid-2006, the respondent raised the claim of client legal privilege in relation to several files and documents, while waiving the privilege in relation to some and producing the others. The Tribunal examined the summonsed documents and agreed with the respondent's claim for legal professional privilege relating to a number of them. In making its decision on the claim of privilege, the Tribunal relied on the decisions of *Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No. 2)* [2007] FCA 1445 and *Rich v Harrington* [2007] FCA 1987. Accordingly, the claim for privilege applied to communications which were made for the dominant purpose of giving legal advice to clients.

16. At the proceedings of 18 April 2008, I heard the respondent on its Strike Out application and then, proceeded to provide guidance to the complainant on how to prepare his Statement of Claim. I made directions that the complainant file and serve a refined statement of case, that the complainant arrange with the respondent's solicitor to examine documents and that the respondent lodge a final detailed Strike Out application. The complainant refined his Statement of Claim and submitted it on 26 May 2008. This document now covered 26 incidents, with 22 incidents (from October 1995 to April 2003) to support the claim in relation to DT 405/2003 and four incidents (from February 2004 to November 2004) to support the claim in relation to DT 418/2005.

17. Consequent upon the complainant's latest statement of 26 May 2008, the Tribunal made an order on 4 July 2008 that the respondent lodge and file request for particulars and additional information from complainant by 18 July 2008, and for the complainant to provide particulars and information requested by the respondent by 1 August 2008. The lawyers for the respondent, Blake Dawson, served a questionnaire dated 18 July 2008 on the complainant. The questions in that document covered six incidents referred to in the complainant's statement of claim of 26 May 2008.

### **Alleged discriminatory incidents**

18. I have elected on the evidence to clearly adopt the analysis and approach of the respondent to the matter in dealing with detailed issues here. The basis for the respondent's lawyers choosing six incidents is set out in its application dated 6 June 2008 to strike out the complaints. In this application, the respondent asked that 20 incidents listed in the complainant's statement of 26 May 2008 should be struck out. The various grounds for the request to strike out different complaints were briefly as follows:

- (1) Complaints against parties other than the respondent were not part of the complaint originally made to the Human Rights Office and including them would be contrary to the limits on Tribunal's jurisdiction under section 77 of the Discrimination Act (that is, section 91 of the 2003 version of the Act), and contrary to natural justice.
- (2) Complaints against persons who are not part of the respondent or against individuals acting in their private capacity rather than as agents of the respondent should be struck out.
- (3) Complaints relating to an act more than 12 months prior to the lodgement of the complaints with the Human Rights Office should be dismissed without further consideration. [Section 81(2)(c) of the 2003 and 2005 versions of the Discrimination Act provides that the Commissioner should decline the complaint if it relates to an act, or the last in a series of acts, that took place more than 12 months before the lodgement of the complaint.]
- (4) Complaints relating to incidents that were not referred to the Tribunal by the Human Rights Office are beyond the jurisdiction of the Tribunal and should be struck out. (See, section 91(1)(b) of the 2003 version of the Discrimination Act, which was section 77(1)(a) of the 2008 version of the Act referred to by the respondent.)
- (5) Complaints which could not constitute breaches of the Discrimination Act should be struck out.

19. On 2 September 2008, the Tribunal ordered that the complainant provide full answers to particulars sought by the respondent by 26 September 2008. After seeking extension of time, the complainant filed his answers on 29 September 2008. He refined this document and lodged it again on 29 October 2008.

20. The complainant has the onus of establishing discrimination in all its manifestations. His Statements of Claim contained a list of incidents, names of persons involved in the incidents, and references to the legislative provisions and, attached copies of evidentiary material. The Tribunal was not helped by the Statements because

they were not drafted in a way to inform the Tribunal of the particulars of the claim. Even though the complainant's Statement of 26 May 2008 and the document of 29 October 2008 do not particularise his complaint, the Tribunal is of the view that what the complainant produced as his documents is how he puts the case.

21. I make the obvious comment in relation to the difficulty for self-represented litigants in this complex jurisdiction as detailed below (see, paragraph 25). In this case, more than five years have elapsed since the first referral was made to the Tribunal. It is important that this matter should not remain unresolved any longer. The Tribunal has been all along trying to guide the complainant about particularising his claim and appreciates his efforts to revise and refine his Statement of Claim. There was also a considerably involved process to determine the respondent's claim for client legal privilege in relation to files and documents that could be made available to the complainant for examination. The outcome of the cooperation between the parties and the Tribunal is that there is now material before the Tribunal on which to make its decision in this matter.

22. It could be gathered from the complainant's latest documents, in particular, his Statement of 29 October 2008, that he was prepared to proceed on the basis of the six incidents which were identified in the respondent's strike out application of 6 June 2008. The Tribunal is satisfied that these six incidents are sufficient for making its decision in relation to the claim.

23. Previously, in *ACT Department of Education & Training v Prendergast* [2000] ACTDT 6, where the complainant in that case expanded his allegations to include a large amount of material, this Tribunal limited its inquiry only to the original complaints and evidence to support them. In considering the six incidents, I have given the complainant's evidence the highest in its favour, and even more so I have given due consideration to the fact that the documents lodged with the Tribunal were the way in which the complainant was able to present his claim, in particular, when he was not legally represented.

24. My approach to the complainant's claims has been that which was adopted in *McCormack and Charles Sturt University* [2008] ACTDT 4 (at paragraph 41), namely, "[i]n order for the complaint to be substantiated there would need to be some evidence favourable to the complainant's contentions which, taken at their highest in favour of those contentions, would render them seriously arguable (see Legal Aid Commissioner (ACT) & Ors v Grundy [1999] ACTSC 318)."

25. As noted by this Tribunal in *Prendergast*, "a number of ...pitfalls that commonly attend the efforts of self represented litigants to

present their case". I also find that following position taken by the Tribunal in that matter applies in the matter before me, namely:

In *Field v Human Rights & Equal Opportunity Commission*[2], North J described the approach to be taken by a Court in like situations. In North J's view, [at 46] "where one party is unrepresented the role of the Court is to "assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy", *Neil v Nott* [1994] HCA 23; (1994) 121 ALR 148, 150. Further, "the Court will ... be careful to examine what is put to it by a party in person to ensure that he has not, because of the lack of legal skill, failed to claim rights or to put forward arguments which otherwise he might have done", *Rajski v Scitec Corporation Pty Ltd*, (Butterworths unreported judgments, 16 June 1986, NSW CA and per Mahoney JA at 27).

Where one party to the litigation is unrepresented and the other is represented the Courts have warned that judges must avoid compromising the stance of neutrality by unfairly assisting the unrepresented litigant to the disadvantage of the represented litigant: *Minogue v Human Rights and Equal Opportunity Commission* [1999] FCA 85; (1999) 84 FCR 438 at 445-6.' (paragraphs 46-47).

26. Again, the Tribunal in *Prendergast* said that "One important way in which the Court can assist an unrepresented litigant in an effort to ascertain the rights of the litigant, is to utilise the flexibility available in the procedure of the Court", which approach I have adopted in relation to the present matter by giving opportunities to the complainant to refine his Statement of Claim, treating the material presented by the complainant as the way he puts his case and giving the highest in favour of his evidence.

27. While the Discrimination Tribunal must give recognition to relevant related decisions of the Magistrates Court and the Supreme Court, the issues here must be determined within the parameters of the Discrimination Act. There were three hearings on this matter, namely on 10 September 2004, 18 April 2008 and 29 October 2008. In the last hearing, I said that I did not propose to get the Tribunal together again orally.

### **Facts leading to the making of complaints**

28. By perusing the numerous papers submitted in this case, the Tribunal finds that the following events seemed to have led the complainant to make his original complaints:

- (1) Between April 2002 and April 2003, the complainant was enrolled at the ANU as a student in a Master of Philosophy – Linguistics program with the Research School of Pacific and Asian Studies (RSPAS). In April 2003, he was excluded as a student of the University as a result of a decision made at the inquiry held under the University Disciplinary Rules into his conduct. The alleged conduct included harassment of students and staff of the University, and people external to the University.

Subsequently, on an application being made by the ANU, the Magistrates Court issued an Interim Personal Protection (Workplace) Order in May 2003 against the complainant. In June 2003, the Magistrate issued a Personal Protection (Workplace) Order, effective for a period of one year. The Orders were made in view of the complainant's harassing and threatening conduct and, prohibited him, among other things, from entering the specified areas of the premises of the ANU and contacting ANU staff.

It appears that the complainant made his first complaint (relating to DT 405/2003) to the Human Rights Office in May 2003 soon after the University's decision to exclude him as a student.

- (2) The complainant's appeal from the decision at the disciplinary inquiry was heard by an Appeals Committee the ANU set up under its Disciplinary Rules. In May 2004, the Appeals Committee made a decision to permit the complainant to enrol as a candidate for the degree of Master of Philosophy. The enrolment conditions included that the complainant should not come into the University campus, and should not contact staff. Off-campus arrangements for his study were to be made. The complainant also made applications for employment with the University during the period May 2003 to July 2004. The respondent declined to process them because it had regard to the protection order which prohibited the complainant from entering the campus.

It appears that following these events, the complainant made the second discrimination complaint to the Human Rights Office in February 2005 to the Human Rights Office. This complaint is the referral matter DT 418/2005.

## The Legislative scheme – Discrimination

29. Section 8 of the Discrimination Act defines discrimination:

### “8 What constitutes discrimination

- (1) For the purposes of this Act, a person discriminates against another person if—
  - (a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7; or
  - (b) the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging persons because they have an attribute referred to in section 7.
- (2) Subsection (1) (b) does not apply to a condition or requirement that is reasonable in the circumstances.
- (3) In determining whether a condition or requirement is reasonable in the circumstances, the matters to be taken into account include—
  - (a) the nature and extent of the resultant disadvantage; and
  - (b) the feasibility of overcoming or mitigating the disadvantage; and
  - (c) whether the disadvantage is disproportionate to the result sought by the person who imposes or proposes to impose the condition or requirement.”

30. From the number of documents that the complainant stated to be his Statement of Claim, it is evident that the attribute on which he claims the respondent treated him unfavourably was ‘impairment’. Impairment is defined in section 5AA of the 2003 version of the Act as follows:

### “5AA Meaning of *impairment*

- (1) In this Act:
 

***impairment*** means—

  - (a) total or partial loss of a bodily function; or
  - (b) total or partial loss of a part of the body; or
  - (c) malfunction of a part of the body; or
  - (d) malformation or disfigurement of a part of the body; or
  - (e) the presence in the body of organisms that cause or are capable of causing disease; or
  - (f) an illness or condition which impairs a person’s thought processes, perception of reality, emotions

or judgment or which results in disturbed behaviour; or

- (g) an intellectual disability or developmental delay.
- (2) Except in section 49 (Work related discrimination) and section 50 (Discrimination by qualifying bodies etc), **impairment** includes an impairment—
  - (a) that the person has, or is thought to have (whether or not the person in fact has the impairment); or
  - (b) that the person had in the past, or is thought to have had in the past (whether or not the person in fact had the impairment); or
  - (c) that the person will have in the future, or is thought will have in the future (whether or not the person in fact will have the impairment).”

31. It is unlawful to unfavourably treat a person in the areas covered in Part 3 of the Act. The relevant areas to consider here are work (section 10), education (section 18), access to premises (section 19), goods, services and facilities (section 20), accommodation (section 21), and clubs (section 22). The provisions dealing with discrimination in relevant public areas are as follows (This Tribunal did not have to consider sections 21 and 22 because they were not relevant with regard to the six incidents it dealt with.):

**“10 Applicants and employees**

- (1) It is unlawful for an employer to discriminate against a person—
  - (a) in the arrangements made for the purpose of determining who should be offered employment; or
  - (b) in determining who should be offered employment; or
  - (c) in the terms or conditions on which employment is offered.
- (2) It is unlawful for an employer to discriminate against an employee—
  - (a) in the terms or conditions of employment that the employer affords the employee; or
  - (b) by denying the employee access, or limiting the employee’s access, to opportunities for promotion, transfer or training or to any other benefit associated with employment; or
  - (c) by dismissing the employee; or
  - (d) by subjecting the employee to any other detriment.”

**18 Education**

- (1) It is unlawful for an educational authority to discriminate against a person—
- (a) by refusing or failing to accept the person's application for admission as a student; or
  - (b) in the terms or conditions on which it is prepared to admit the person as a student.
- (2) It is unlawful for an educational authority to discriminate against a student—
- (a) by denying the student access, or limiting the student's access, to any benefit provided by the authority; or
  - (b) by expelling the student; or
  - (c) by subjecting the student to any other detriment.

**19 Access to premises**

It is unlawful for a person to discriminate against another person—

- (a) by refusing to allow the other person access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not); or
- (b) in the terms or conditions on which the discriminator is prepared to allow the other person access to, or the use of, any such premises; or
- (c) in relation to the provision of means of access to such premises; or
- (d) by refusing to allow the other person the use of any facilities in such premises that the public or a section of the public is entitled or allowed to use (whether for payment or not); or
- (e) in the terms or conditions on which the discriminator is prepared to allow the other person the use of any such facilities; or
- (f) by requiring the other person to leave such premises or cease to use such facilities.

**20 Goods, services and facilities**

It is unlawful for a person who (whether for payment or not) provides goods or services, or makes facilities available, to discriminate against another person—

- (a) by refusing to provide those goods or services or make those facilities available to the other person; or

- (b) in the terms or conditions on which the firstmentioned person provides those goods or services or makes those facilities available to the other person; or
- (c) in the manner in which the firstmentioned person provides those goods or services or makes those facilities available to the other person.

## **21 Accommodation**

- (1) It is unlawful for a person (whether as principal or agent) to discriminate against another person—
  - (a) by refusing the other person's application for accommodation; or
  - (b) in the terms or conditions on which accommodation is offered to the other person; or
  - (c) by deferring the other person's application for accommodation or according to the other person a lower order of precedence in any list of applicants for that accommodation.
- (2) It is unlawful for a person (whether as principal or agent) to discriminate against another person—
  - (a) by denying the other person access, or limiting the other person's access, to any benefit associated with accommodation occupied by the other person; or
  - (b) by evicting the other person from accommodation occupied by the other person; or
  - (c) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person.

## **22 Clubs**

- (1) It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to discriminate against a person who is not a member of the club—
  - (a) by refusing or failing to accept the person's application for membership; or
  - (b) in the terms or conditions on which the club is prepared to admit the person to membership.
- (2) It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to discriminate against a member of the club—
  - (a) in the terms or conditions of membership that are afforded to the member; or

- (b) by refusing or failing to accept the member's application for a particular class or type of membership; or
- (c) by denying the member access, or limiting the member's access, to any benefit provided by the club; or
- (d) by depriving the member of membership or varying the terms of membership; or
- (e) by subjecting the member to any other detriment.

### **23 Requests etc for information**

It is unlawful for a person to discriminate against another person by requesting or requiring information (whether by way of completing a form or otherwise) in connection with, or for the purpose of performing, an act that is or would be unlawful under any other provision of this part or under part 5, 6 or 7."

32. Section 68 of the Act defines victimisation as follows:

#### **"68 Victimisation**

- (1) It is unlawful for a person to subject another person to any detriment on the ground that the other person has—
  - (a) made a complaint under this Act; or
  - (b) instituted proceedings against any person under this Act; or
  - (c) given information or produced a document to a person exercising a function or power under or in relation to this Act; or
  - (d) given information, produced a document or answered a question when required to do so under this Act; or
  - (e) reasonably asserted any rights that a person (including that other person) has under this Act; or
  - (f) alleged that a person has committed an act which is unlawful under this Act;
 or on the ground that the firstmentioned person believes that the other person proposes to do such an act.
- (2) Subsection (1) (f) does not apply in relation to an allegation that is false and is not made in good faith."

### **Interpretation of the Act**

33. The Discrimination Act must be regarded as remedial in the same way as anti-discrimination legislation of other jurisdictions. I agree with the view of Miles CJ in *Judith Edgley v Federal Capital*

*Press of Australia Pty Limited [1999] ACTSC 95* (paragraph 15), when he said that,

“In general terms the High Court has made it clear that such legislation is to be regarded as "remedial": *I W v City of Perth* (1997) 191 CLR 1, per Kirby J at 58, and should be given an interpretation which is "fair, large and liberal", per Brennan CJ and McHugh J at 12, and not "narrow or pernicky", per Kirby J at 58. The aim and function of the Act being educative rather than pecunitive or compensatory, courts and tribunals should be astute to see that proceedings taken in accordance with it do not "misfire" in the circumstances of a particular case: *I W v Perth*, per Kirby J at 52.”

34. As exhorted by Miles CJ in *Judith Edgley's* case (in paragraph 20), I have approached the complainant's allegations of discrimination “in such a way as the objects of the Act may be achieved and the procedures taken pursuant to the Act do not “misfire” by any “narrow and pernicky” interpretation of the provisions of the Act or to the findings of facts and process of reasoning carried out in accordance with such interpretation.” It is a quite a stressful task to apply this principle in this case mainly because claims were not particularised even after the Tribunal had repeatedly given the complainant time to do so on numerous occasions during the period stretching for five years.

35. This Tribunal has given due consideration to the broader objectives of the Act and the difficulties the complainant might have had in refining his claims, and has given every opportunity to the complainant to present his information to the Tribunal. It has also endeavoured to make the parties to identify a number of incidents which amounted to conduct that should finally be examined for determining the complaints.

36. The outcome was, as I mentioned above in paragraphs 18 and 22, the relevant incidents that the Tribunal had to consider were reduced to six. What needs to be observed here is that not all acts that a person believes unfavourable treatment of him or her that should be made the subject of an inquiry in the Tribunal. It is sufficient if few acts that could substantiate the unlawful discrimination in different public areas are brought up for examination.

### **Unfavourable treatment**

37. Section 8 of the Act explains what a discriminating act is. Subsection 8(1)(a) deals with direct discrimination and provides that it

is a discriminatory act for a person to treat or proposing to treat another person unfavourably because of the other person's attribute referred to in section 7. Subsection 8(1)(b) deals with indirect discrimination and provides that an act is discriminatory where a person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging the other person because of that person's attribute.

38. The attribute relevant in relation to the complainant's claim is disability. The 2003 version of the Act refers to disability as impairment. By an amendment made by Act No. 41 of 2003 the reference to impairment was replaced with disability. It is appropriate for me to use the term disability as it is well understood currently by everyone dealing with the Act.

39. There is no definition of unfavourable treatment in the Act. I agree with the following definitions of "treatment" and "unfavourable" given by the Federal Court of Australia in *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379 (which is an appeal from the decision of Supreme Court of the ACT under the Discrimination Act):

"There is no special statutory definition of the verb "treat" and it is not a term of art. Its primary dictionary definition is "1. To act or behave towards in some specified way: (e.g.) to treat someone with respect" (*Macquarie Dictionary*). That definition seems apposite here. Again, as noted in *Prezzi*, above, the adverb "unfavourably" appears to have its ordinary meaning. The dictionary definitions of the adjective "unfavourable" include "adverse", and this seems appropriate here. In other words, s 8(1)(a) is directed at adverse behaviour towards a person, because of an attribute. I emphasise that the conduct must be aimed at, or towards, the person complaining of discrimination." (paragraph 54).

40. The Federal Court went on to say that, "that s 8(1)(a) conduct is *per se* (i.e. of itself, whether reasonable or not) deemed to be discriminatory; whereas, by contrast, s 8(1)(b) conduct will be regarded as discriminatory only if it [is] unreasonable." Section 8(2) of the Discrimination Act provides that section 8(1)(b) does not apply if a condition or requirement is reasonable in the circumstances. Therefore, the complainant has to establish direct discrimination because of his disability, and does not have to prove that the respondent's conduct was unreasonable. The ACT Supreme Court took the view in *Judith Edgely v Federal Capital Press* (1999) ACTSC 124 (paragraph 57) that the onus of proving that a condition is unreasonable was on the complainant. The Federal Court in *Edgley* (paragraph 89) quoted Deane J's observation in *Waters v Public Transport Corporation* [1992] 173 CLR 349 that a determination of

“reasonableness” involves “an element of wide discretionary judgement”.

41. Unlike most other anti-discrimination legislation, the definition of “discrimination” “does not involve any concept of differentiation or distinction in the consequences of the impugned treatment as between persons with different characteristics or attributes” (*Prezzi and Discrimination Commissioner* [1996] ACTAAT 132 (paragraph 20)). Such a broad scope is consistent with treating the Act as “remedial” and giving its relevant provisions an interpretation that is “fair, large and liberal”.

### **Causal link**

42. The term “because” in section 8(1) of the Act imports a requirement for a causal link between the impugned conduct and the attribute of the person subject to the conduct. The meaning of “because” is affected by subsection 4(3) of the Act which is:

“A reference in this Act to the doing of an act by reason of a particular matter shall be read as including a reference to the doing of such an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act.” (see, *Almassey and Omari and ACT Multicultural Council Inc* [2008] ACTDT 2 (paragraph 19) in relation to current section 4A(2), which is similar to subsection 4(3) of the 2003 version of the Act.)

43. A complainant would need only to prove that that the conduct complained of has a consequence that is unfavourable to him or her because of the attribute he or she has, had or presumed to have. The attribute includes a characteristic that persons with that attribute generally have or generally presumed to have. The Administrative Appeals Tribunal in *Prezzi* case stated very forcefully that,

“All that is required is an examination of the treatment accorded the aggrieved person or the conditions upon which the aggrieved person is or is proposed to be dealt with. If the consequence for the aggrieved person of the treatment is unfavourable to that person, or if the conditions imposed or proposed would disadvantage that person there is discrimination where the treatment is given or the condition is imposed because of the relevant attribute possessed by the aggrieved person.” (paragraph 22)

44. With regard to a discriminatory act of imposing of a condition or requirement that has, or is likely to have, the effect of disadvantaging

a person because of his or her attribute, the reference to “disadvantage” does not imply comparison. The Tribunal in *Prezzi* made it clear that the term does not necessarily require comparison and that “it may also be used in a context where comparison is absent”.

45. In view of the availability of a liberal interpretational benefit, a complainant would need only to show that the consequences of “the dealing with the complainant are.....adverse to the complainant’s interests,” and “the dealing has occurred because of a relevant attribute of the complainant”. (see, *Prezzi*, paragraph 24)

46. As stated in *Harrison v ACT Housing* [2002] ACTDT 3 (paragraph 37), “It is necessary,.....,to seek out the true basis of the respondent’s conduct insofar as it may be found to constitute unfavourable treatment. It is unnecessary, however, to establish that the conduct complained of was intended or motivated by a discriminatory attitude.”

47. The evidence needed to establish a causal link between the conduct of the respondent and the adverse consequences on the complainant should be “sufficiently robust to justify the conclusion”. In this connection, this Tribunal agrees with the following statement in its earlier decision in *Kwesius and ACT Health* [2008] ACTDT 3 (paragraph 75):

“In proceedings before the Tribunal the allegations of discrimination made by the complainant are required to be proved to a proper standard based upon proper evidentiary material (see *De Domenico v Marshall* (unreported) [1999] ACTSC 1 (3 February 1999)). It is not necessary that the allegations be proved beyond reasonable doubt but there must be a comfortable degree of satisfaction that they have been proved by evidence which is sufficiently robust to justify the conclusion arrived at rather than inexact proofs, indefinite testimony or indirect inferences (see *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336).” (per M H Peedom, Deputy President)

48. Unfavourable treatment would be established if the respondent had done the discriminatory act advertently and with knowledge of the complainant’s disability. In *Prezzi* case, the Administrative Appeals Tribunal said:

“..... if the respondent to a complaint is aware that a complainant suffers an impairment and the alleged discriminatory act is done advertently and with knowledge of the impairment, the act is unlawful if it results in the complainant being treated unfavourably. It is not necessary to

show that the respondent intended to treat the complainant unfavourably. If the respondent's action is advertent and is taken because of the necessary manifestations of an impairment then it is open to find that the action is unlawful even though the respondent did not know of the existence of the impairment.” (paragraph 39)

### **Disability of the complainant**

49. Evidence produced to the Tribunal makes it clear that the complainant had a disability (namely, depression) within the meaning of the Discrimination Act. In 2001, the ANU Health Clinic referred the complainant to the ACT Mental Health Services, reporting depressive features and suicidal ideation. Dr Valmai Kingham of the Department of Health and Community Care, who was a medical officer in psychiatry, in her letter of 21 December 2001, said that when she saw the complainant, he was feeling cheerful and the depression had completely lifted. She thought that the combination of support he received and the sertraline 150mg was the reason. In her view the depressive episodes often “seem to be precipitated by a perceive rejection or criticism”.

50. Earlier, Dr Kingham stated in her letter of 15 May 1995 to Dr Greg Gladman of the ANU’s University Health service that her impression of the complainant when she first met him was that he suffered from dysthymia with chronic suicidal preoccupation. A case summary relating to the complainant made in February 1995 by the psychiatry unit of the Calvary Hospital, copied to Dr Gladman, also suggested that he had schizoid personality and psychopathic traits.

51. In her letter dated 3 May 2004 to the Chair of the Appeals Committee of the respondent, Dr Kingham advised that she had been treating the complainant since 2000 for a recurrent depressive illness.

52. Therefore, from as early as 1995 up to the time the complainant made his second complaint to the Human Rights Office in 2005, it is evident from the material I am presented with that he had a recurrent disability, mainly depression.

53. The communication between the medical adviser to the complainant and the relevant areas of the respondent indicate that the respondent knew, or was aware, that the complainant had illness.

54. It is important that I must be satisfied that the respondent acted not only with the knowledge that the complainant had a disability but also advertently to it. It is evident that the respondent’s actions that were unfavourable to the complainant were because of his harassing conduct but I will need to examine whether such actions could also be because of the complainant’s disability which was believed to have

manifested as the harassing conduct. If the respondent's actions had been advertent and was taken because of the necessary manifestations of the complainant's disability, they would be unlawful under the Discrimination Act. However, I am not convinced that an action taken on the ground of the complainant's harassing conduct would, by itself, be an action taken because of his disability unless it is proved that the respondent's action was advertent to the link between the harassing conduct and the disability.

55. Evidence presented to the Tribunal indicates that, in relation to relevant actions, the respondent was careful to narrowly focus on the complainant's harassing conduct and to avoid the reference to his disability. Professor Malcolm Gillies' letter dated 23 April 2003 advising the complainant about the outcome of the disciplinary action noted that the complainant had stated that he suffered from "depression". Professor did not give importance to it on the basis that the inquiry was not presented with evidence of its diagnosis. It would appear that the Appeals Committee which decided to allow the complainant a conditional re-enrolment in studies did have regard to the complainant's harassing conduct, in addition to the Personal Protection (Workplace) Order against him, but not to his disability.

56. Nevertheless, in a letter dated 13 November 2002, the then Deputy Vice-Chancellor noting the complainant's harassing conduct acknowledged that the complainant's behaviour might be as a result of his medical condition and advised urgent medical assistance. This letter shows the knowledge the Deputy Vice-Chancellor had about the complainant's disability but that knowledge did not have a causative link to an action against the complainant. In fact, the Deputy Vice-Chancellor wished that the complainant continue his studies with the respondent.

### **Incidents alleged to involve discrimination**

57. As I mentioned before, I have taken the six incidents listed by the complainant as discriminatory conduct of the respondent for my examination. For convenience, I will list them by following the numbering given to them in the complainant's Statement of Claim (both in the version dated 26 May 2008 and in the version dated 29 October 2008).

*Incident 13: August 2002 – Bruce Moore withdrew from Michael Firestone's Supervisory Panel.*

*Incident 17: November/2002 – John Richards sought to have Michael Firestone disciplined.*

*Incident 20: January/February 2003 – Bruce Moore rejected Michael Firestone's application for job.*

*Incident 22: April/-2003- Malcolm Gillies took steps in relation to Michael Firestone's exclusion.*

Incident 24: May/October 2004 – ‘Appeals Committee’ took steps in relation to Michael Firestone’s appeal.

Incident 25: July/-2004 – Ken Grime interfered with Michael Firestone’s Job Applications.

58. When I considered the Statement of Claim of 29 October 2008, I had also considered the relevant information that I gathered from the Statement of Claim of 26 May 2008. In his document of 26 May 2008, the complainant alleges direct discrimination (pursuant to section 8(1)(a) of the Act) and indirect discrimination (pursuant to section 8(1)(b) of the Act) in the following areas of public life in respect of the above incidents:

<u>Education</u> –	Incidents 13, 17, 22 and 24.
<u>Employment</u> –	Incidents 20 and 25.
<u>Access to premises</u> –	Incidents 22, 24 and 25.
<u>Goods, Services or Facilities</u> –	Incidents 13, 24 and 25.

### **Issues**

59. Issues that I have to decide in relation to these incidents are:

- (1) whether any of these incidents constitute direct or indirect discrimination of the complainant in the relevant public area, and
- (2) whether any of them involved victimisation of the complainant.

### **Issue (1): Direct or indirect discrimination**

#### **Discrimination in the area of education**

60. I will first examine the complainant’s allegation that the respondent discriminated against him in the area of education by incidents 13, 17, 22 and 24.

#### **Incident 13 – direct discrimination (education)**

61. Incident 13 is - *August 2002 – Bruce Moore withdrew from Michael Firestone’s Supervisory Panel.* In relation to this incident, the complainant’s Statement of 26 May 2008 specified discrimination in the area of education and referred to sections 18(2)(a) and (c) of the Act. Sections 18(2)(a) relates to denial of access to benefit. I do not consider it relevant in relation to this incident. However, I find that section 18(2) (c) of the Act which provides that it is unlawful for an educational authority to discriminate a student by subjecting the student to any other detriment, is relevant.

62. The complainant alleged that the respondent's following actions were direct discrimination of the complainant under section 8(1)(a) of the Discrimination Act:

- "13. August-2002 Bruce Moore *withdrew* from MF's Supervisory Panel.  
 13.2. Bruce Moore indicated that he wished no contact with me again.  
 13.3. Andrew Pawley (my supervisor) did not replace him with another academic.  
 13.4. I complained about Bruce Moore's withdrawal to Janelle Chalker.  
 13.5. Andrew Pawley defended Bruce Moore's withdrawal and criticised me."  
 ["MF" refers to Michael Firestone, the complainant.]

63. The complainant also alleged that each action was done because of his having the disability of mental illness and/or depression.

64. The complainant was enrolled in the Master of Philosophy – Linguistics program at the ANU. Dr Moore and Professor Pawley were appointed co-supervisors of the complainant. In August 2002, Dr Moore withdrew because he considered the complainant's conduct to be harassing and apprehended that a conflict of interest arose out of the complaints the complainant made against Dr Moore to the Equity and Diversity Unit of the respondent. Professor Pawley continued as the complainant's supervisor.

65. There is sufficient material before the Tribunal to show that the complainant had been in the habit of sending harassing email, making persistent telephone calls and using inappropriate remarks, to staff, including Dr Moore. Dr Moore was Director of ANDC, where the complainant was working in a part-time job, and did not renew the complainant's job. It is evident that Dr Moore did feel that there would not be a workable relationship with the complainant, which was needed for the effective supervision of the complainant's performance in the program.

66. In his email dated 15 March 2002 to Adam Shoemaker, Dr Moore indicated that he had been tolerant of the complainant over the past three years "because of his psychological condition". He also stated in that document that "In the past the problem seemed to be mainly depression, but it now seems we are dealing with paranoid schizophrenia."

67. There is no doubt that Dr Moore knew or was aware of the complainant's disability. The issue is whether his action of resigning from the supervisory panel is direct discrimination of the complainant by the respondent because of the complainant's disability.

68. If Dr Moore's action was discriminatory of the complainant, the respondent, being Dr Moore's employer, would be vicariously liable under section 108I of the Discrimination Act.

69. In her message of 31 October 2002 to Professor Pawley, Ms Janelle Chalker, Human Resources, RSPAS of the respondent, advised that the complainant discussed his concern about Dr Moore's withdrawal with her and that she had told him that "no change would have been approved if there was any hint of discrimination".

70. According to the respondent's submission dated 25 June 2003 to the ACT Discrimination Commissioner, its Equity and Diversity Unit determined that Dr Moore's withdrawal was not disadvantageous to the complainant "on the basis that no substantial work had been completed by that time on the thesis, and that there were other people available to be co-supervisor if necessary".

71. This is supported by Professor Pawley's message of 31 October 2002 to Ms Chalker, which stated as follows:

"Michael knows perfectly well what has happened here and, as I've told him more than once, he should let matters drop.... I have discussed with Michael possible new co-supervisors and have told him we'll take the matter further once he has some progressed beyond his current outline notes to showing me some substantial chapter drafts. He still has to prove he can produce these. He agreed."

72. The relationship between the complainant and respondent indicates that the respondent had accommodated the complainant in the area of education even though the complainant had a history of harassing staff with emails and telephone calls and, even after the respondent had obtained a protection order against the complainant.

73. The complainant's expression of "disgust at Dr Bruce Moore's withdrawing" from the panel seems to suggest his personal dislike of Dr Moore. The complainant's feeling towards Dr Moore, in addition to the complainant's previous harassing conduct towards staff and Dr Moore, tends to justify Dr Moore's belief that he could not have a workable relationship with the complainant in regard to supervising the latter's study.

74. I cannot find evidence to suggest that the respondent was not willing to accommodate the complainant to proceed with his studies even after Dr Moore's withdrawal from the panel. Hence, it cannot be said that, with regard to Dr Moore's action, the complainant was subjected to any detriment or that the respondent had treated the complainant unfavourably because of his disability.

75. Knowledge or awareness Dr Moore and the respondent had about the complainant's disability, did not seem to have caused the action complained of.

76. I am of the view that actions numbered 13.2 to 13.5 seem to be actions that happened soon after Dr Moore's withdrawal and the complainant seemed to believe they were connected with Dr Moore's action. My consideration of these actions does not make me believe that any inquiry in relation to them would be relevant for the purpose of deciding the issue of whether or not Dr Moore's withdrawal was a discriminatory action.

77. The complainant had also alleged that by incident 13 the respondent discriminated against him on the ground of his being thought to have a disability. From the analysis of material presented to this Tribunal, I am satisfied that Dr Bruce's action of withdrawing from the supervisory panel was because he believed he could not have a workable relationship with the complainant and his concern about the possible conflict of interest, but not because he thought that the complainant had a disability. That Dr Moore initially agreed to be a co-supervisor, even after knowing that the complainant had a disability, supports the conclusion that his later withdrawal was not because the complainant was thought to have had a disability. Apart from Dr Moore's name, the complainant refers to the respondent and three staff members as persons who thought that the complainant had a disability. I do not find any material to support that Dr Moore's action, stated as incident 13, was because of what these persons thought that the complainant had a disability.

78. Given Dr Moore's knowledge of the complainant's mental illness and/or depression and awareness that the complainant's harassing conduct could be related to the complainant's mental illness or depression, there is some weight in arguing that Dr Moore's withdrawal was because he and the respondent thought that the complainant had a disability. However, considering that the respondent was prepared to accommodate the complainant in his pursuit of studies and the reasons for justifying Dr Moore's withdrawal, I am not satisfied that the complainant was discriminated against on the ground that he was thought to have a disability.

*Incident 13 – indirect discrimination (education)*

79. The complainant also alleged that, by incident 13 and actions listed from 13.2 to 13.5, the respondent had also indirectly discriminated against him under section 8(1)(b) of the Discrimination Act on the ground that the action was likely to have the effect of disadvantaging him because of his having the disability of mental illness and/or depression. The facts and actions this Tribunal

considered in paragraphs 64 - 78 above in relation to direct discrimination are relevant also in relation to the issue of indirect discrimination in the area of education.

80. Section 8(1)(b) provides that it is discrimination if a person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging persons because they have a disability. The complainant had not elicited proof in relation to his allegation that the respondent indirectly discriminated him in the area of education because of his mental illness and/or depression. Neither incident 13 nor actions 13.2 to 13.5 are conditions or requirements imposed on the complainant. In any event, I have given the highest in favour of the material presented to the Tribunal by the complainant to support his claim in relation to them. Even assuming they were conditions or requirements, I could find them neither disadvantaging or likely to disadvantage, the complainant nor unreasonable. On the other hand, the facts are that Professor Pawley continued to be the complainant's supervisor and that the respondent was willing to consider a co-supervisor once the complainant had completed substantial work on his draft thesis.

Incident 17 – direct discrimination (education)

81. Incident 17 is - *November 2002 – John Richards sought to have Michael Firestone disciplined*. In relation to incident 17, the complainant alleged that the respondent's following actions were direct discrimination of the complainant in the area of education:

- “17.1. John Richards sought to have me disciplined, in addition to the litigation.
- 17.2. Protection Order Affidavits became statements in the disciplinary proceedings.
- 17.3. Malcolm Gillies was appointed to investigate the charges against me.
- 17.4. Malcolm Gillies noted that I suffered from mental health problems.
- 17.5. Malcolm Gillies fined me \$500.”

82. The complainant also alleged that each action was done because of his having the disability of mental illness and/or depression. The complainant referred to section 18(2) of the Act and its paragraphs (a), (b) and (c). I consider that the relevant provision should be section 18(2)(c).

83. Mr Richards, the then Deputy Vice-Chancellor of the respondent wrote to the complainant on 13 November 2002 in relation to reports he received from his staff in ANDC and elsewhere that the complainant had been sending them unsolicited emails persistently, including emails that refer to a “declaration of war”. The letter also

stated that the complainant had “also contacted people by telephone at home including staff of the University and other persons who have dealings with the ANDC, such as staff at Oxford University Press. In some cases this has been persistent contact.”

84. The letter advised that the complainant’s association with the University was as a post-graduate student and that there was no need for him to contact those people to make progress in his studies.

85. The Deputy Vice-Chancellor further stated as follows in his letter:

“The measures may include referring your conduct to the Vice-Chancellor for him to consider whether student disciplinary action is required or seeking a formal Protection Order from the Magistrates Court to restrain your behaviour.

Michael, I sincerely trust that neither of those measures will be necessary, and I would be grateful if you would cease all contact immediately with the staff and associates of the ANDC.

I acknowledge that elements of your behaviour may be as a result of your medical condition. It would be my advice that you seek urgent assistance from your treating doctor to enable you to fulfil my direction above.”

86. The reference in the letter to the complainant’s medical condition was because of the respondent’s knowledge about the complainant’s mental health problems and, the complainant’s acknowledgement at the disciplinary inquiry referred to in the listed actions, that his behaviour had been affected by the disability he suffered. Professor Malcolm Gillies’ letter to the complainant dated 17 January 2003 informing him of the decision from the disciplinary inquiry noted this acknowledgement.

87. It is evident that the purpose of Mr Richard’s letter was to discharge the respondent’s responsibility to warn the complainant about his harassing behaviour and to ensure protection of staff. Given this purpose and the content and tone of letter, I am not satisfied that the reference to the complainant’s medical condition in what appears to be a helpful advice could make the action as being motivated by the complainant’s disability. The disciplinary inquiry found there was insufficient evidence for two charges in relation to which, according to Professor Gillies, the complainant acknowledged that his behaviour had been affected by the disability he suffered. The finding relating to these charges support the position that the respondent’s action did not advert to the complainant’s disability.

88. I also note that the Deputy Vice-Chancellor wished that the complainant continue his studies in the University.

89. The disciplining action complained of does not appear to be any different to an action which the respondent would take in a similar situation with regard to a post-graduate student who did not have a disability.

90. As the respondent actually knew or was aware of the complainant's disability at the time of this incident, the question of whether the complainant was treated unfavourably because he was thought to have a disability does not arise.

91. The behaviour of the complainant that was the subject of the letter from the Deputy Vice-Chancellor could have been manifestations of the disability the complainant had at the relevant time. Nevertheless, it cannot be said that the respondent's action was done advertently in relation to that disability. Even though the consequence was unfavourable to the complainant, it cannot be said that the action was because of the attribute he had. The Tribunal is satisfied that, in regard to this incident, the respondent had clearly treated the complainant as its post-graduate student as it would any other post-graduate student.

92. There is no evidence on how and why actions listed 17.2 to 17.5 could themselves amount to direct discrimination of the complainant or make incident 17 to be discriminatory. However, I have considered these actions and am not satisfied that they are of any relevance for the purpose of the Tribunal's inquiry.

*Incident 17 – indirect discrimination (education)*

93. The complainant alleged that incident 17 and actions listed under it were an indirect discrimination under section 8(1)(b) of the Discrimination Act. The outcome of the disciplinary process in this incident was a reprimand and the imposition of a fine of \$500. The complainant had the responsibility to prove that the imposition of a condition or requirement had, or was likely to have, the effect of disadvantaging him because he had mental health problems.

94. The disciplinary penalty, by its very nature, was imposing a condition or requirement that had, or was likely to have the effect of disadvantaging the complainant. Nevertheless, there has been no evidence that the complainant was disadvantaged in the area of education. On the contrary, as noted in paragraph 88 above, the respondent wished that the complainant continue his studies with it.

95. There is also no evidence, as I have indicated in relation to the issue of direct discrimination, that the incident was done because of

the complainant's mental condition. In paragraph 89 above, I stated that the disciplining action complained of did not appear to be any different to an action which the respondent would be expected to take in a similar situation with regard to a post-graduate student who did not have a disability.

96. I am satisfied, in view of these factors, that incident 17 was not indirectly discriminatory of the complainant in the area of education.

97. I have considered actions listed 17.2 to 17.5 and do not find evidence to support that they themselves or in connection with incident 17, amounted to indirect discrimination. Nor am I satisfied that incident 17 had the effect of indirect discrimination of the complainant because of any connection it may be considered to have had with the listed actions.

Incident 20 – direct discrimination and indirect discrimination  
(education)

98. Incident 20 in the complainant's statement of case is - *January/February 2003 – Bruce Moore rejected Michael Firestone's application for job.*

99. In relation to this incident, the complainant alleged that the respondent's following actions were direct and indirect discrimination of the complainant in the area of education:

- “20.1. I applied for a job at the ANDC.
- 20.2. I suspected that the job had been unofficially promised to Mark Gwynn already.
- 20.3. Bruce Moore wrote to me, rejecting my application for the job.
- 20.4. I was ranked 3<sup>rd</sup> out of 5, with only the top 2 being shortlisted for interview.
- 20.5. I complained to John Richards, who rejected my complaint.”

100. I see no reason why this incident or actions listed under it would involve direct or indirect discrimination of the complainant in the area of education.

Incident 22 – direct and indirect discrimination (education)

101. Incident 22 in the complainant's Statement of Claim is: *April 2003- Malcolm Gillies took steps in relation to Michael Firestone's exclusion.* The complainant alleges direct and indirect discrimination against him in relation to this incident. From his Statement of 26 May 2008, it seems, the complainant considers that by this incident the respondent discriminated him in the area of education. He referred to section 18(a), (b) and (c) of the Act.

102. Actions he has specified in relation to this incident are as follows:

- “22.1. John Richards sought to have me disciplined yet again.
- 22.2. Malcolm Gillies was appointed to hold another inquiry.
- 22.3. Malcolm Gillies wrote to me a letter, saying I was to be ‘excluded’ from the ANU.
- 22.4. The ANU Legal Office used the letter to deny me access to the ANU.”

103. Professor Gillies conducted a disciplinary inquiry against the complainant in April 2003, and advised him by his letter dated 23 April 2003 that the following charges were sustained:

- conduct that unreasonably hinders other persons in the pursuit of their studies in the University or in participation in the life of the University;
- conduct that is otherwise reprehensible in a member of the University; and
- behaving in an intimidating manner to another person or creating a hostile working or studying environment.

104. The letter also advised that a penalty of exclusion from the University was imposed on the complainant and that he could appeal within 14 days. The complainant appealed from the decision and an Appeals Committee was constituted by the respondent to hear the appeal.

105. The claimant’s reference to his disability was dealt with in Professor Gillies’ letter as follows:

‘While you have statements about depression, and even at the summary inquiry produced literature relating to the subject, you have not provided any material to support diagnosis of depression in you or document its effect upon your behaviour. At the summary inquiry you have lucidly described how you “react” to situations that you do not like (for instance, when someone does not respond to your communications) by engaging in behaviour, and have indicated that it is likely to recur while your behaviour is influenced by an unspecified “depression”’.

106. He went to say, in the letter, that, ‘That behaviour is, however, equally able to be explained as rational behaviour bent upon exacting a form of retribution or revenge.....Whether or not your behaviour has some medical link, I find that you have had ample opportunity to regulate your behaviour....’

107. Arguably, the disciplinary measures could subject the complainant to detriment, and were also technically “expelling” him. However, for such outcomes to amount to an unlawful act under

section 18 of the Act, the ‘true reason’ for the acts should be the disability the complainant had. Evidence before me does not warrant making such a conclusion.

108. Professor Gillies’ inquiry was not influenced by the complainant’s claim of disability. Consequently, I find that holding a disciplinary inquiry or imposition of a penalty of exclusion was not unfavourable treatment of the complainant because of his disability. There is no evidence to suggest that the listed actions are relevant to prove the complainant’s claim for direct or indirect discrimination in the area of education.

Incident 24 – direct discrimination (education)

109. Incident 24 in the complainant’s statement of case is - *May/October 2004 – ‘Appeals Committee’ took steps in relation to Michael Firestone’s appeal.*

110. In relation to this incident, the complainant alleged that the respondent’s following actions were direct and indirect discrimination of the complainant in the area of education:

- “24.1. The Appeals Committee (Chair: Thena Kyprianou) took months over my appeal.  
 24.2. Ian Chubb wrote a long letter to the Appeals Committee.  
 24.3. The ANU Legal Office seemed to advise the Appeals Committee in my absence.  
 24.4. The Appeals Committee imposed strict conditions of (re-)enrolment on me.  
 24.5. The conditions were ‘non-negotiable’, but I accepted. Re-enrolment took months.”

111. The complainant also alleged that each action was done because of his having the disability of mental illness and/or depression, and also because he was thought to have the disability. He refers to sections 18(1)(a), (b) and (c), and 18(2)(a), (b) and (c). An unlawful act or omission under these provisions will depend on the causal link to the complainant’s disability.

112. By her letter dated 11 May 2004 to the complainant, Dr Patricia Miller, Secretary to the Appeals Committee of the respondent, informed the Committee’s decision to permit the complainant to enrol as a candidate for the degree of Master of Philosophy subject to certain conditions, including, that (1) he was not permitted to enter the campus, and (2) any contact with staff or students must be made via one or other of his supervisors. He was to be provided a computer and internet access off-campus. The letter also informed that evidence of harassment of any persons by the complainant would

result in termination of his candidature and reimposition of exclusion orders.

113. I find that this Tribunal has jurisdiction to inquire into the listed actions if they are discriminatory of the complainant within the meaning of the Discrimination Act. Nevertheless, none of these actions adverted to the complainant's disability although the complainant would seem to suspect that the actions were intended to treat him unfavourably. What is relevant to consider is whether the Appeals Committee imposed conditions on the complainant's re-enrolment because of the complainant's disability. From the number of communications which is in evidence, I find that the Appeals Committee and others involved in the above actions were aware of the medical condition of the complainant. The complainant also made a submission to the Committee about his disability. In paragraph 51 above, I noted that Dr Kingham's letter dated 3 May 2004 to the Chair of the Appeals Committee advised that she had been treating the complainant since 2000 for a recurrent depressive illness.

114. It is noted that, in imposing the conditions, the Committee took care not to be in breach of the Personal Protection (Workplace) Order that the respondent had taken against the complainant, and took into account the history of harassment of staff by the complainant. As I said in *Almassey* (paragraph 24) the test of discrimination is an objective one. Applying this test, I am not satisfied that the complainant's disability played a causative part in any of the actions specified by the complainant for Incident 24. The complainant's act of volunteering to remind, or making known to, the Committee about his disability should not be taken to taint the Committee decision with discrimination because of the complainant's disability, unless there is evidence otherwise.

115. With regard to whether incident 24 and listed actions were done because the complainant was thought to have a disability, the complainant has not presented evidence to support it. As I mentioned before, and as is shown by the facts before me, the Appeals Committee's decision was taken with care not to breach the Personal Protection (Workplace) Order against the complainant and in view of the history of harassment of staff by him.

116. I suspect that the complainant would expect the Tribunal to believe that the harassing conduct that formed the basis for the Order and the imposing of re-enrolment conditions by the Appeals Committee, was the manifestation of his mental health problem and therefore, because of his disability. I am not convinced that such belief is justifiable. I am satisfied that the Appeals Committee's decision to permit the complainant to re-enrol, albeit subject to conditions, was because the respondent wanted to accommodate the

complainant. Therefore, I find no substance in the allegation that the respondent's action was because the complainant was thought to have a disability.

117. The ACT Human Rights and Discrimination Commissioner's decision which was conveyed to the complainant by her letter dated 16 March 2003 was consistent with this conclusion. The Commissioner stated in that letter that.

“..... that you are unhappy with the requirements and conditions of your enrolment at the University. However, it appears from the University's correspondence with you that staff involved in seeking to facilitate your return to the University are endeavouring to work with you to enable you to successfully complete your studies and that they, like you, are required to work within the parameters of the conditions of enrolment which the Appeals Committee has imposed.”

118. The respondent denied that the complainant was treated unfavourably by the decision of the Appeals Committee and contended, in the alternative, that the decision was a decision made under the authority of the *Australian National University Act 1991* (Cth), and that section 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) displaces the effect of any Territory law to the extent of inconsistency with the Commonwealth Act or any determination made under that Act. The implication of this argument is that the Discrimination Act must give way to a decision made under the authority of the Commonwealth Act. I am not satisfied that any such inconsistency is established. I also find that this contention is not relevant, particularly because I have found that the Appeals Committee's decision was not directly or indirectly discriminatory of the complainant.

*Incident 24 – indirect discrimination* (education)

119. The complainant alleges that incident 24 and the actions he has listed in relation to the incident were likely to have the effect of disadvantaging him in the area of education because of the disability he had.

120. It may be said that the conditions of re-enrolment were likely to have the effect of disadvantaging the complainant but the complainant has not submitted evidence that the decision to impose them had a causative link with his disability. I believe these conditions were the way in which the respondent could, in the circumstances, help the complainant to pursue with his studies.

121. Nevertheless, it would seem that if the causal link was established, I would have had the opportunity to find in favour of the complainant's claim.

**Discrimination in the area of employment**

122. The complainant alleged that in relation to incidents 20 and 25 the respondent discriminated against him directly and indirectly in the area of employment. He also referred to section 10(1)(a), (b) and (c) of the Act.

Incident 20 – direct discrimination and indirect discrimination (employment)

123. In paragraphs 98 - 99 above, I referred to incident 20 in relation to the complainant's claim of discrimination in the area of education. The incident is stated as - *January/February 2003 – Bruce Moore rejected Michael Firestone's application for job.*

124. In relation to this incident, the complainant alleged that the respondent's following actions were direct and indirect discrimination of the complainant in the area of employment:

- “20.1. I applied for a job at the ANDC.
- 20.2. I suspected that the job had been unofficially promised to Mark Gwynn already.
- 20.3. Bruce Moore wrote to me, rejecting my application for the job.
- 20.4. I was ranked 3<sup>rd</sup> out of 5, with only the top 2 being shortlisted for interview.
- 20.5. I complained to John Richards, who rejected my complaint.”

125. The complainant also alleged that each action was done because of his having the disability of mental illness and/or depression. With regard to indirect discrimination, he alleged that they were likely to have the effect of disadvantaging him because of the disability he had.

126. The selection committee of the respondent for the position of Research Assistant in its ANDC had gone through the selection process and found that the complainant had not met two of the five criteria. On this basis, the complainant was not shortlisted. By letter dated 3 March 2003, Dr Moore, as Chair of the selection committee, informed the complainant that his application was unsuccessful.

The views of the ACT Discrimination Commissioner

127. In regard to this incident, I would like to quote below the views of the ACT Discrimination Commissioner:

It is also apparent that your relationship with the Director of the ANDC, Dr Moore, and other ANDC staff had been difficult for some time. You had lodged complaints against Dr Moore and at least one other member of the ANDC staff with the Equity and Diversity Unit at the University. The information provided by the University also alleges that you engaged in significant harassing conduct towards various members of the ANDC.

In an e-mail to Lorraine Wellings, Business and Development Manager, Faculty of Arts, on 16 April 2002, you alleged that Dr Moore had made a number of comments to you including, *“With a personality like yours, you’re bound to annoy someone sometime”* and *“If I do things which trigger your depression, then I don’t want the responsibility of having you around. Because I’m not going to treat you differently.”* Neither the University nor Dr Moore have commented on the content of this e-mail.

.....  
 In light of the alleged comment by Dr Moore and the deterioration in your relationship with Dr Moore and staff at the ANDC, based on your behaviour, it seems to me that your disability may have been another factor in not offering you an interview.’ (ACT Discrimination Commissioner’s letter dated 21 July 2003 addressed to the complainant, p.7)

128. The views of the Discrimination Commissioner do not bind this Tribunal and as such, are not relevant to my deliberations. Nevertheless, I propose to deal with some of the issues raised by her. I note that the Commissioner’s comment arose in the course of her investigation of the complaint and was not a conclusion after an inquiry. She appeared to suspect that the complainant’s disability may have been another factor in not selecting him, in addition to the reason that the complainant had not met two selection criteria.

129. That the relationship between the complainant and staff, in particular, Dr Moore, had been difficult is very clear. That this situation had been brought about mainly by the harassing conduct of the complainant is also borne out from the prolific correspondence exchanged at that time between the complainant and the respondent’s staff members.

130. The complainant had not denied his harassing conduct and, instead, had attempted to volunteer information that that conduct was due to his disability. The Commissioner found that the respondent was aware that the harassing conduct of the complainant was contributed to by his disability. In my view, on the contrary, the respondent was careful to distinguish the complainant’s disability as the basis for the course of conduct the respondent pursued.

131. The Discrimination Commissioner's letter to the complainant referred to the employment contract the respondent had with the complainant from May 2002 to July/August 2002. She formed a view that by including special conditions in that contract, the respondent appeared to recognise that the complainant's conduct was contributed to by his disability.

132. I find the contrary to this inference (see, paragraph 130 above and paragraphs 138 and 139 below.). Again, I reiterate that the Discrimination Tribunal is not bound by the Discrimination Commissioner's decision. The contract of employment contained special conditions of employment [including] that Mr Firestone's work was based at the National Library of Australia. One of the special conditions in the contract was that the complainant must continue to receive regular treatment from his treating psychiatrist. My inference is that the Commissioner appeared to believe that the respondent's knowledge that the complainant's harassing conduct was contributed to by his disability might have influenced the selection committee's decision.

Section 10(1) of the Discrimination Act

133. Section 10(1)(a) of the Discrimination Act provides that it is unlawful for an employer to discriminate against a person in the arrangements made for the purpose of determining who should be offered employment, and section 10(1)(b) prohibits discrimination of a person in determining who should be offered employment. Section 10(1) (c) makes it unlawful for an employer to discriminate against a person in the terms and conditions on which the employment is offered.

134. The issue in relation to incident 20 is whether, in not short listing the complainant for an interview or selecting him for the position, the respondent had treated the complainant unfavourably because of his disability.

135. The selection process was competitive unless there is evidence otherwise. The selection committee did not simply reject the complainant's application but considered it and found that the complainant had not met two criteria, namely, the criterion for proven ability to successfully carry out the instructions of a team leader and the criterion for proven ability to work harmoniously as a member of a team. The selection committee members were aware of the complainant's harassing conduct. In coming to this conclusion they were apparently also aware that the complainant's harassing conduct was contributed to by his disability.

136. Incident 20 was an unfavourable treatment of the respondent. It would be discriminatory of the complainant if it was done

advertently by the respondent with the knowledge of the complainant's disability (*Prezzi*). It is not necessary to show that the respondent intended to treat the complainant unfavourably (*Prezzi*). However, the evidence needed to establish a causal link between the respondent's conduct and the adverse consequences on the complainant should be sufficiently robust to justify the conclusion to be arrived at (*Kwesius*). The standard of proof required for this purpose is the civil standard of the balance of probabilities.

137. In view of the evidence that the respondent acted with knowledge of the complainant's disability and harassing conduct, I will need to consider whether the harassing conduct of the complainant or the disability that apparently gave rise to the harassing conduct, which was the 'true reason' for the respondent's action.

138. The material before me suggests that the committee's decision in relation to the complainant was on the basis of the evidence presented in his application. Applying the objective standard, I do not find that the committee's decision in relation to the complainant was because of his disability.

139. In these circumstances, it is difficult for the complainant to prove that the decision was due to factors which were otherwise than objectively ascertainable. Simply pointing to the environment within the respondent University in which the respondent had knowledge about the complainant's disability is insufficient to warrant going beyond the objective evidence. The onus is on the complainant to satisfy this Tribunal about the need to go beyond the objective evidence, by proving that the respondent's knowledge about the complainant's disability had a causative link to the committee's decision. The complainant has not discharged this onus. Hence, I am not able to find that incident 20 was unlawful under section 10(1)(a), (b) or (c) of the Act.

*Incident 25 – direct discrimination and indirect discrimination*

140. Incident 25 referred to the complainant's statement of case is - *July 2004 – Ken Grime interfered with Michael Firestone's Job Applications.*

141. In relation to this incident, the complainant alleged that the respondent's following actions were direct and indirect discrimination of the complainant in the area of employment:

- “25.2. On seeing my application, Ken Grime told Human Resources I couldn't apply.
- 25.4. Mark Clisby refused to treat my expressed concerns as a complaint.

25.5. I was not allowed to pursue my complaint through the Equity and Diversity Unit.”

[I assume that in numbering the actions, the complainant had omitted actions 25.1 and 25.3 as not relevant. They appear in his Statement of 26 May 2008.]

142. The complainant also alleged that each action was done because of his having the disability of mental illness and/or depression, and also because he was thought to have the disability. With regard to indirect discrimination, he appeared to allege that they had, or were likely to have, the effect of disadvantaging him because of the disability he had.

143. In the Tribunal proceedings of 10 September 2004, when the issue of employment application for the complainant was taken up, Mr Ken Grime, University Solicitor for the respondent, told the complainant that the Appeals Committee decided that the complainant was not permitted on campus and the complainant was pushing the University in all the directions by applying for jobs. The Appeals Committee decision is the subject of actions listed in incident 24. The decision was related to education but the condition in it not to permit the complainant on campus was a relevant consideration in the respondent not being able to offer employment to the complainant because employment with the respondent required working on campus.

144. In those proceedings, I addressed the complainant to the effect that the letter dated 18 August 2004 from Mr Ken Grime to the complainant said that the decision of the Appeals Committee tightly regulated the complainant’s involvement with the. I also said that “Writing to the university to seeking employment, or seeking employment, otherwise than on the terms imposed, is a breach of the requirements set out in the [A]ppeals [C]ommittee governing your continued relationship with the [U]niversity.”

145. I note Mr Grime advised the complainant on the same terms in his letter of 18 August 2004, which he wrote to the complainant in relation to his application for a position at the University in the Defence Studies Centre at RSPAS. The complainant seemed to take the position that the view taken by the University Solicitor that the Appeals Committee decision prohibited him applying for, or seeking, employment with the respondent was a misinterpretation of the decision. Mr Grime’s letter emphasised that the Appeals Committee decision was for the sole purpose of permitting the complainant 12 months in which to complete his masters program and did not permit him to undertake employment at the University nor to enrol in any other course.

146. Even after giving the complainant's evidence the highest in its favour in relation to the issue of any misinterpretation of the terms of the Appeal Committee, and taking such misinterpretation as having prevented the complainant making a job application, I still find that he has not established that the action was because of his disability.

147. The complainant wrote to Mr Mark Clisby, who was Director Human Resources, of the respondent, that he wanted to make a complaint about the above misinterpretation of the Appeals Committee decision. Mr Clisby confirmed the advice given by the University Solicitor and advised that there was "no requirement on the University to take action in relation to this matter". I do not find that this action was advertent to the complainant's disability. The complainant has also not established action numbered 25.5.

148. From the evidence available before me, I am not satisfied that in relation to incident 25 the respondent had treated the complainant unfavourably because of his disability or because he was thought to have a disability, or any effect of disadvantage that a condition or requirement under incident 25 had, or was likely to have, on the complainant was because of his disability.

#### **Discrimination in relation to access to premises**

149. The complainant has not particularised his claims for the respondent's discrimination of him in the area of access to premises. His statement of 26 May 2008 refers to discrimination in relation to access to premises, with regard to incident 22 (*April 2003- Malcolm Gillies took steps in relation to Michael Firestone's exclusion*), incident 24 (*May/October 2004 - 'Appeals Committee' took steps in relation to Michael Firestone's appeal*) and incident 25 (*July 2004 - Ken Grime interfered with Michael Firestone's Job Applications*). Section 19 relates to unlawful discrimination in the area of access to premises.

150. In relation to access to premises, I consider that what the complainant was trying to impress upon me was that these incidents had connection with, or the consequence of, excluding the complainant from the University campus and, hence, were discriminatory because of his disability.

151. In relation to other areas in which I examined these incidents, I formed the view that they were not unfavourable treatment of the complainant because of his disability. I have no reason to depart from that position in considering these incidents in the public area of access to premise.

**Discrimination in the area of goods, services and facilities**

152. From the complainant's statement of 26 May 2008, it appears that he considers that incidents 13, 24 and 25 involve direct and indirect discrimination against him in the area of goods, services and facilities, although his statement of claim dated 29 October 2008 did not particularise it.

153. Section 20 of the Discrimination Act which deals with discrimination in the area of goods, services and facilities is set out before under the heading "**The Legislative Scheme – Discrimination**".

154. The Discrimination Act does not define "goods" or "facilities". Its definition of "services" in section 4 is broad and "includes—

- (a) services relating to banking, insurance or the provision of grants, loans, credit or finance; and
- (b) services relating to entertainment, recreation or refreshment; and
- (c) services relating to transport or travel; and
- (d) services of any profession, trade or business; and
- (e) services provided by a government, a government authority, a local government body or a company or other body corporate in which a government has a controlling interest; and
- (f) the provision of scholarships, prizes or awards."

155. It is understandable that a University staff member or student, by reason of their capacity as such, is entitled to, or eligible for, the use and benefit of goods, services and facilities available within the respondent's campus, whether free or on fee, in accordance with the University rules and practices.

156. I have already examined incident 13 (that is, *August 2002 – Bruce Moore withdrew from Michael Firestone's Supervisory Panel*) and incident 24 (that is, *May/October 2004 – 'Appeals Committee' took steps in relation to Michael Firestone's appeal*) when I dealt with the issue of discrimination in the area of education, and incident 25 (that is, *July 2004 – Ken Grime interfered with Michael Firestone's Job Applications*) in relation to the issue of discrimination in the area of employment.

157. For the actions of the respondent to be unlawful under the Discrimination Act, there should be discrimination against the complainant in refusing to provide goods or services to him or make facilities available to him, or in the terms or conditions on which to

provide goods or services or make facilities available to him, or in the manner of providing or making them available to him.

158. It appears to me that the complainant claims he was denied the provision of goods, services and facilities because he was not accorded a status like other students and staff.

159. There are two issues that will need to be addressed here. The first is establishing discrimination does not require comparison (see, *Prezzi*). The second is whether an act or omission not discriminatory in an area of education or employment, as is the case with the above incidents, could yet amount to discriminatory in the area of provision of goods or services or making available facilities.

160. In relation to incidents 13, 24 and 25, both issues are interdependent. I found that incidents 13 and 24 were not discrimination in the area of education, and that incident 25 was not discrimination in the area of employment. The 'true' reason for Dr Moore's withdrawal from the supervisory panel was the complainant's harassing conduct towards him and the possible issue of conflict of interest. The respondent could not consider the complainant for employment and therefore, the complainant could not seek employment with the respondent, because of the Appeals Committee's decision to exclude him from campus, the exclusion itself owes its origin to the Personal Protection (Workplace) Order obtained in the Magistrates Court in June 2003 (even though the Order expired in June 2004, soon after the Committee's decision). Essentially, the events had treated the complainant in the area of education and employment differently to other staff or students.

161. I note that the respondent offered goods, services and facilities off-campus, such as a lap top computer and access to study materials, to enable the complainant to complete his master's program. This indicates that the respondent was willing to provide goods, services or facilities to the complainant, which were relevant to the extent of the limited relationship it had with him.

162. I find that the respondent should not be forced to provide the complainant goods, services and facilities that it makes available to its staff and students, when the complainant was not able to be the recipient of them because of lawful exclusion and restrictions placed on him. By reason of the fact of being excluded from campus, the complainant could not be expected to be provided with goods, services and facilities that are available to others on campus. Even though, compared to others, the complainant was placed unfavourably in relation to the provision of goods, services and facilities, I am not satisfied that this treatment was because of his disability.

**Issue (2): Victimisation**

163. The complainant claims that the respondent also victimised him by the six incidents that I considered above.

164. Section 68 of the Discrimination Act has been amended recently. As I mentioned in the early part of this decision it is the Republications 11 and 19 that are applicable to the matters before me. Section 68 in both Republications is the same and is relevant for me to consider in its application to the complainant's claim of victimisation.

165. What struck me as glaring in the claim and the evidence produced was that there is nothing to substantiate victimisation of the complainant by the respondent.

166. For the complainant to be victimised, the respondent must have subjected him to detriment on the grounds specified under section 68, namely,

- that he had made a complaint under the Discrimination Act;
- that he had instituted proceedings under the Act;
- that he had given information or produced a document to a person exercising a function or power under the Act;
- that he had given information, produced a document or answered a question when required to do so under the Act;
- that he had reasonably asserted his rights under the Act;
- that he had alleged that a person had committed an act which is unlawful under the Act; or
- that he had proposed to do any of the above acts.

167. The onus is on the complainant to establish victimisation. He cannot simply rely on his allegation without substantiating the claim. However, I have the duty to give his evidence the highest in its favour. From the evidence relating to the incidents I have examined, it is clear that the 'true' reasons for the measures the respondent had taken in relation to the complainant, including actions to exclude him from campus or impose conditions for his re-enrolment, were for reasons other than his disability. I cannot find evidence of any act of victimisation of the complainant within the meaning of section 68. I am not satisfied that the complainant has proved this claim .

**Decision on issues**

168. I now revert to the issues I referred to in paragraph 59 above. In light of the findings I have made, I conclude that the evidence available to this Tribunal does not substantiate the issues in the complainant's favour. Therefore, I find that none of the six incidents constituted direct or indirect discrimination of the complainant by the

respondent, and that there was no evidence that the respondent had victimised the complainant in relation to those incidents.

### **Accessorial liability**

169. It is generally justified to make the assumption that all actions by various officers of the ANU were performed on behalf of, or as agents of, the respondent. The complainant has alleged accessorial liability of a number of persons he has referred to in his Statement of Claim of 29 October 2008 in relation to actions he claims to be unlawful discrimination and victimisation of him. It appears that all the persons referred to by the complainant were staff members of the respondent during the relevant period.

170. Section 108H of the Act (now it is section 73 (with some changes)) provides as follows:

**“108H Aiding etc unlawful acts**

A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under part 3, 5 or 7 or section 66 shall, for the purposes of this Act, be taken also to have done the act.”

171. Part 3 of the Act deals with unlawful discrimination in the areas of education, employment, access to premises, accommodation, clubs, request for information, and goods, services and facilities. Part 7 deals with other unlawful acts, including victimisation. [Part 5 (Sexual Harassment) and section 66 (Racial vilification – unlawful) are not relevant for my inquiry.]

172. As I indicated in the course of my reasons for the decision, I am not satisfied that the complainant has substantiated his claims of unlawful discrimination and victimisation. For this reason, the issue of accessorial liability of persons other than the respondent is not relevant for me to consider, simply because there was no unlawful act on which to consider such liability.

### **Conclusion**

173. The voluminous evidence presented to the Tribunal did not establish that the respondent’s conduct was advertent to the disability suffered by the complainant. The ‘true reason’ that can be discerned from the relevant evidence was that the alleged conduct of the respondent was for reasons other than the complainant’s disability. In the end, the complainant has not established that he was discriminated against by the respondent or persons who, he alleged, had accessorial liability. In particular, he has not satisfied this Tribunal about the relevance of a significant amount of the evidentiary material he produced.

174. I repeat the statement I quoted in paragraph 47 above from *Kwesius* (paragraph 75), which is as follows:

“In proceedings before the Tribunal the allegations of discrimination made by the complainant are required to be proved to a proper standard based upon proper evidentiary material (see *De Domenico v Marshall* (unreported) [1999] ACTSC 1 (3 February 1999)). It is not necessary that the allegations be proved beyond reasonable doubt but there must be a comfortable degree of satisfaction that they have been proved by evidence which is sufficiently robust to justify the conclusion arrived at rather than inexact proofs, indefinite testimony or indirect inferences.”

175. Regrettably, the allegations in this matter were not “proved to a proper standard based upon proper evidentiary material”, and the evidence available to me was not “sufficiently robust enough” to make a decision in favour of the complainant.

176. I would also like to quote the statement from Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361-363, which this Tribunal has always applied. Dixon J said that,

*“The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; . . . . . reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. . . . . "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. . . . .”*

177. It is not always easy to prove discrimination on the ground of disability within the meaning of the Act to the “reasonable satisfaction” of this Tribunal, in particular, with the requirement to establish the causal link between the alleged act or omission and the disability. While it is very difficult to know the intention or motive of a person who is alleged to have unlawfully discriminated against another, the Tribunal has the responsibility to find the true reason principally on the basis of the objectively ascertainable evidence presented to it.

178. The factors that have contributed to the complexity of this matter include:

- the sheer size of evidentiary material presented to this Tribunal from time to time,
- examination of that material,
- the absence of particularisation of claims in spite of many versions of the complainant's Statement,
- the inquiry into whether or not summonsed documents were subject to the client legal privilege,
- the need to give consideration to the fact that the complainant was not legally represented, and
- the requirement to comply with procedural fairness, and in particular, the need to give the complainant's evidence the highest in its favour without compromising the stance of neutrality to the disadvantage of the respondent.

179. The mere coincidence of the complainant's disability and an adverse result about which he or she complains, does not automatically result in discrimination or victimisation pursuant to the Discrimination Act. However, this Tribunal has carefully examined the material before it and the parties' contentions, and found that a causal link between the acts or omissions of the respondent and the disability suffered by the complainant was not established to its "reasonable satisfaction".

### **Finding**

180. Both complaints are not substantiated and are, therefore, dismissed.

