ACT CIVIL & ADMINISTRATIVE TRIBUNAL

MACCA v AUSTRALIAN CAPITAL TERRITORY REPRESENTED BY EMERGENCY SERVICES AGENCY (Discrimination) [2017] ACAT 19

DT 10/2016

Catchwords: **DISCRIMINATION** – sex – strike-out application – equal opportunity policy – special measure – standing – sufficient interest – whether application should be dismissed for failure to provide an address – want of prosecution

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* ss 3, 6, 7, 9, 32, 39, 42, 56, 71, 74
Discrimination Act 1991 ss 27, 37
Human Rights Commission Act 2005 ss 43, 44, 53A

Cases cited: *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313
CIC Australia Ltd v ACT Planning and Land Authority, Mainore Pty Ltd and ACT Civil and Administrative Tribunal [2013] ACTSC 96
Commissioner for Social Housing in the ACT v Massey [2013] ACAT 41
Director of Housing v Sudi [2011] VSCA 266
Hocking v Medical Board of Australia [2015] ACAT 22
Humble v Constructions Occupation Registrar and Ors [2011] ACAT 17
Minister for Immigration and Multicultural Affairs v Bhardwaj [2002] HCA 11

Tribunal: Senior Member H Robinson

Date of Orders: 24 March 2017
Date of Reasons for Decision: 24 March 2017

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) DT 10/2016

BETWEEN:

PHIL MACCA
Applicant

AND:

AUSTRALIAN CAPITAL TERRITORY REPRESENTED BY EMERGENCY SERVICES AGENCY
Respondent

TRIBUNAL: Senior Member H Robinson

DATE: 24 March 2017

ORDER

The Tribunal orders that:

1. The interim application is dismissed.

2. Directions 3 through 6 of 16 January 2016 are vacated.

3. The applicant is to file any further material and/or submissions on or before 7 April 2017.

4. The respondent to file any further material and/or submissions by 21 April 2017.

5. The applicant to file any material in reply by 28 April 2017.

6. The Tribunal will thereafter determine this matter without an oral hearing.

……..
Senior Member H Robinson

REASONS FOR DECISION

1. By way of this interim application, the respondent sought orders dismissing the applicant's application under:

   (a) section 56(2) of the *ACT Civil and Administrative Tribunal Act 2008* (**the ACAT Act**) and section 43(1)(f) of the *Human Rights Commission Act 2005* (**HRC Act**) on the ground that the applicant lacks standing to bring this application; or

   (b) sections 32, 56 or 74(2)(b) of the ACAT Act on the ground that the applicant has:

      (i) failed to prosecute his application, and/or

      (ii) failed without reasonable excuse to comply with orders of the Tribunal.

2. The respondent also seeks an order that the applicant pay the respondent's costs in relation to this strike-out application.

Background

3. The substantive application arises from a complaint (**the complaint**) referred to the Tribunal by the ACT Human Rights Commission (**the HRC**) under section 53A of the *Human Rights Commission Act 2005* (**the HRC Act**).

4. The complaint relates to the policy adopted by ACT Fire & Rescue (**ACTF&R**) in its 2016 recruitment round that eight out of the sixteen new fire-fighter positions were to be allocated to female applicants (**the equal opportunity policy**).

5. On 12 July 2016, the applicant complained to the HRC that the equal opportunity policy unlawfully discriminated against men in the area of employment.

6. On 2 August 2016, the HRC wrote to the applicant advising that it was considering closing his complaint as lacking in substance, because the equal opportunity policy would constitute a special measure under section 27 of the

Discrimination Act 1991 (**Discrimination Act**). The HRC invited him to provide further information to support his complaint.

7. The applicant apparently provided further information on 17 August 2016 by way of email.

8. On 20 September 2016, the HRC closed the complaint under section 78(2) of the HRC Act on the basis that the complaint lacked substance because the equal opportunity policy would amount to a special measure. It notified the applicant of this by way of a letter of the same date.

9. On 19 November 2016, the applicant requested that the HRC refer his complaint to the tribunal.

10. On 30 November 2016, the HRC referred the complaint to the Tribunal pursuant to section 53A of the HRC Act and notified the parties accordingly. The Tribunal received the complaint on 5 December 2016 (**the Application**). A referral made to the tribunal is considered an application to the tribunal for the purposes of the ACAT Act.[1]

11. When a complaint is referred to the Tribunal, the Tribunal receives copies of the written complaint, if any, and key correspondence. The Tribunal does not necessarily receive a full copy of the correspondence between the applicant and the HRC. In this case, the Tribunal does not, for example, have a copy of the email of 17 August 2016. The significance of this is considered below.

12. The first directions hearing for the application was set for 9 January 2017 and notified to the parties well before that date. On 22 December 2016, the applicant emailed the Tribunal and indicated that work commitments would not permit him to attend, and nor could the Tribunal telephone him. At the applicant's request, the Tribunal registry took the unusual step of providing him with the telephone number for the hearing room so that he could telephone in.

13. On 8 January 2017, the applicant emailed the Tribunal and indicated that work commitments would prevent him from telephoning in. In the same email he "put

[1] ACAT Act section 3, Dictionary

forward" his "case in writing" – this involved a submission of several pages that appeared to summarise the argument he would have put to the Tribunal had he been able to attend.

14. At the directions hearing on 9 January 2017, the Tribunal proceeded to make ex parte orders and directions listing the matter for mediation on 19 January 2017. The directions further provided that, if the applicant did not wish to attend the mediation, he was to notify the Tribunal accordingly by 16 January 2017, and the mediation date would then be vacated and directions made in chambers for the matter to be determined "on the papers" and without an oral hearing.

15. On 11 January 2017, the applicant notified the Tribunal that he was unable to attend mediation on 19 January 2017. In his correspondence to the Tribunal, he indicated he may be able to attend on another day, but did not nominate a date, and also indicated that, even if an alternative date was set, he may have to cancel on short notice due to work commitments.

16. On 11 January 2017, the respondent's solicitor, the ACT Government Solicitor, emailed the applicant and, referring to section 43(1)(f) the HRC Act, contended that he must have a "sufficient interest" in the complaint, and asked him whether he had ever applied for a position with the ACTF&R. The applicant did not immediately respond to this email.

17. On 16 January 2017, the respondent filed with the Tribunal, and served on the applicant by email, its preliminary outline of submissions, which formally raised the issue of the applicant's standing.

18. On 16 January 2017, the Tribunal made orders in Chambers vacating the mediation date. The Tribunal also directed the applicant to file submissions addressing the alleged discrimination and his standing to bring the application by 6 February 2017.

19. On 3 February 2017, at the respondent's request, the Tribunal issued a subpoena requiring the applicant to produce documents relating to any involvement he had with ACTF&R during the past five years, including any applications for employment. The applicant was required to comply with the subpoena by

14 February 2017. Leave was granted to serve the subpoena by email, as neither the respondent nor the Tribunal had any other contact information for him.

20. The applicant did not produce any documents in response to the subpoena, and did not attend the return of subpoena hearing on 14 February 2017. The Tribunal adjourned the date for compliance with the subpoena to 21 February 2017.

21. Correspondence sent by the applicant to the Tribunal and the respondent indicated that he may have been confused about the interaction between the directions made for hearing on 16 January 2017, and the requirement to produce documents relevant to the hearing in accordance with the subpoena. Accordingly, to clear up any doubt, on 15 February 2017, the Registrar wrote to the applicant and advised that he was required to comply with both the orders of 16 January 2017 and the subpoena issued on 3 February 2017.

22. The applicant again failed to respond to the subpoena by 21 February 2017.

23. On 24 February 2017, the respondent filed an application to strike out the complaint and served it by email on the applicant.

24. On 1 March 2017, the applicant emailed the Tribunal and the respondent indicating that he was not prepared to provide his full name or other particulars for fear it may disadvantage him in any future applications for employment with ACTF&R.

25. On 2 March 2017, the Tribunal listed the respondent's strike-out application for hearing on 10 March 2017.

26. On 9 March 2017, the applicant sent an email to the registry that outlined his arguments in reply to the strike-out application.

27. The strike-out application was heard on 10 March 2017. Ms Smyth from the ACT Government Solicitor appeared for the respondent. The applicant did not appear, either in person or by telephone.

The substantive case

28. The Tribunal does not have the benefit of either party's full case. Nonetheless, on the basis of the information before the Tribunal, it appears that the arguments that the parties will make, should the matter proceed to hearing, are as follows:

    (a) the respondent will contend that the equal opportunity policy is a 'special measure' intended to achieve equality of opportunity for women wishing to be fire-fighters, and is therefore authorised under section 37(1) of the Discrimination Act; and

    (b) the applicant will contend that the equal opportunity policy is discriminatory and is not a reasonable means to achieve equal of opportunity for women, and section 37 of the Discrimination Act does not operate to make the policy lawful.

The issue of the applicant's standing

29. In its written submissions, the respondent states:

> *Section 43 of the HRC Act provides the standing requirement for discrimination complaints under Territory law. Relevantly, section 43(1)(f) provides that a discrimination complaint may only be made by a person has a 'sufficient interest' in the complaint.*

30. Drawing upon this provision, the respondent contends that, if a complainant lacks standing to make a complaint under section 43 of the HRC Act, then the Tribunal must also lack jurisdiction to determine any application resulting from that complaint.

31. *Prima facie*, the respondent's contention on the operation of section 43 is not contentious – the first step in any proceeding under the HRC Act is a complaint to the HRC, and, consequently, if there is no valid complaint, there can be no valid proceedings. However, on closer analysis, the argument presents two difficult questions: Firstly, how can the Tribunal make a determination about section 43 of the HRC Act? Secondly, assuming it can make such a determination, should it?

32. The starting point must be to consider section 43(1)(f) of the HRC in the context of the section as a whole. This section provides, relevantly, that:

> ***43 Who may make a complaint under this Act?***
> *(1) A complaint about an act or service may be made to the commission under this Act by—*
>
> *(a) a person (the aggrieved person) aggrieved by the act or service; or*
> *...*
> *(f) if the complaint is a discrimination complaint—a person who has a sufficient interest in the complaint; or*
>
> *...*
> *(2) For subsection (1) (f), a person has a sufficient interest in a complaint if the conduct complained about is a matter of a genuine concern to the person because of the way conduct of that kind adversely affects, or has the potential to adversely affect, the interests of the person or interests or welfare of anyone the person represents.*

33. The opening words are significant: section 43(1) deals with *who may make a complaint to the HRC*. It does not deal with standing to make an application to the Tribunal.

34. The basis upon which a dispute comes before the tribunal is dealt with separately, in section 53A of the HRC Act, which provides:

> *(1) This section applies if—*
> *(a) either—*
> *(i) a complainant is given a discrimination referral statement under section 45 (2) (d); or*
> *(ii) a statement under section 82 (1) is included in a final report in relation to a complaint; and*
>
> *(b) within 60 days after the statement is given, the complainant requires the commission to refer the complaint to the ACAT.*
>
> *(2) The commission must—*
> *(a) refer the complaint to the ACAT; and*
> *(b) tell the complainant and the person complained about in writing about the referral.*
>
> *Note The commissioner must also close the complaint (see s 78 (2) (d)).*

35. The Tribunal is a creature of statute, with no inherent jurisdiction. Section 9 of the ACAT Act limits the tribunal to hearing applications that are identified in an authorising law. In the context of discrimination complaints, the 'authorising laws' are found in Division 4.2A of the HRC Act, which sets several provisions governing how complaints may be referred to the Tribunal by the HRC. Section 53A is one such provision.

36. Once a complaint has been referred to the ACAT, section 53E of the HRC Act sets out the remedies available for unlawful acts under the Discrimination Act. Section 53E provides, relevantly, that:

> *(1) This section applies if—*
>
> *(a) the commission refers a complaint to the ACAT under this division; and*
>
> *(b) the ACAT is satisfied that the person complained about engaged in an unlawful act.*
>
> *(2) The ACAT must make 1 or more of the following orders:*
>
> *(a) that the person complained about not repeat or continue the unlawful act;*
>
> *(b) that the person complained about perform a stated reasonable act to redress any loss or damage suffered by a person because of the unlawful act;*
>
> *(c) unless the complaint has been dealt with as a representative complaint—that the person complained about pay to a person a stated amount by way of compensation for any loss or damage suffered by the person because of the unlawful act.*

37. In effect, section 53E provides that, if a complaint is referred to the Tribunal by the HRC, and the Tribunal is satisfied that the person complained about has done an unlawful act, the Tribunal *must* order one of the available remedies. Importantly, the power conferred on the Tribunal by section 53E is not a power to undertake a review of the actions of the HRC. Rather, it is an obligation to undertake a hearing as to whether the person complained about has engaged in an unlawful act in breach of the HRC Act[2], and an obligation to grant a remedy if the person in fact has.

38. But what happens in a circumstance where a party questions whether the original complaint was validly made? Does the language of sections 53A and 53E oblige or permit the Tribunal to hear an application referred to it under

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[2] There is also capacity for an complainant to apply directly to the ACAT under section 53B (late application in exceptional circumstances), but the section is not relevant to these proceedings, and in any case it is the statement issued by the HRC under section 45(2)(d) or 82(1) that are necessary perquisite steps

section 53E, even where there is some doubt as to the legitimately of the underlying complaint?

39. The respondent's contention is that it does not:

> *...the referral mechanism in s 53A of the HRC Act is not properly enlivened where the complaint fails to meet the requirement of s 43 of the HRC Act ...[the] complaint to the Commission is not validly made and cannot be validly referred to the Tribunal.*

40. I accept this submission as far as it goes – it may be that an invalid complaint leads to an invalid referral and an invalid application. However, what is not clear from the respondent's submissions is how the Tribunal is granted authority to make findings about the validity of the complaint.

41. In support of the contention that it was open to the Tribunal to review the applicant's standing to make a complaint to the HRC, the respondent referred to the case of *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 (***Hervey Bay***). This case dealt with the provisions of the then *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (**HREOC Act**)[3], but the complaint and referral scheme to that Act is substantively similar to the one in the HRC Act. In *Hervey Bay*, Justice Collier of the Federal Court determined that the mere fact that a complaint has been terminated by the investigating Commonwealth Human Rights and Equal Opportunity Commission was not sufficient to give the complainant standing before the Court. Justice Collier accepted that submissions of HREOC's counsel that:

> *a. the jurisdiction of the Court is enlivened under s 46PO(1) HREOC Act where a "complaint" has been terminated by the President of HREOC*
> *b. the complaint must have been a valid complaint for the purposes of s 46P HREOC Act, namely that the complaint was lodged by or on behalf of a "person aggrieved" by the alleged unlawful discrimination*
> *c. in accepting the complaint under s 46P, HREOC is not making a determination which is binding on this Court as to whether the complainant is a "person aggrieved" for the purposes of s 46P. As Brennan J observed in Re Adams and the Tax Agents' Board (1976) 12 ALR 239 at 242 "It is the court's judgment and not the administrative body's opinion which defines the extent of...its statutory authority"*

[3] Now the *Australian Human Rights Commission Act 1986* (Cth)

> *d. it is not the case that whether a complainant is a "person aggrieved" can only be addressed by judicial review of the decision of HREOC to accept the complaint. This is inconsistent with Parliament's intention to create a process for handling discrimination complaints which would be efficient and unburdened by technicality (Human Rights Legislation Amendment Bill 1998 (Cth) Second Reading Speech, Honourable Daryl Williams, Commonwealth Parliamentary Debates, House of Representatives, 3 December 1998, 1276).*

42. A decision of the Federal Court on substantively similar legislation is, at the least, highly persuasive. Moreover, the drafters of the ACT legislation probably had a similar goal to that of the drafters of the Commonwealth, being the goal of establishing an efficient and simple determination process. However, there are two difficulties with applying the approach of Justice Collier in *Hervey Bay* to the present case.

43. First, the ACAT is a tribunal, not a Court. It has neither the inherent jurisdiction nor the declaratory powers available to a Court. Any power the Tribunal has to review the 'validity' of a decision must be grounded in legislation conferring a power to do so. There is nothing in the relevant legislation that confers such a power in this case. Division 4.2A of the HRC Act provides that the role of the Tribunal in discrimination proceedings is to consider whether the person complained about in the referred complaint engaged in an unlawful act. The provisions do not provide authority for the Tribunal to unpick the process leading to the making of the complaint.

44. Perhaps one could argue that a valid complaint that complies with specific provisions of the HRC Act is so fundamental to the jurisdiction of the Tribunal that a review of the legitimacy of the complaint is a prerequisite to exercising power and the power of review is inherent in the HRC Act. But how, then, is such a review to be conducted? What would be its limits? Presumably, such a review would need to include compliance with Part 4 of the HRC Act generally, but what about compliance with other sections of the Act – for example, compliance with the appointment or delegation process?

45. To ask the Tribunal to reconsider whether the applicant had standing to make a complaint to the HRC is to ask the Tribunal to engage in a collateral review of the decision making processes of the HRC that led up to the acceptance of the

complaint. The extent to which a tribunal may engage in reviews of collateral issues has been considered at length in several contexts, including the Victorian Court of Appeal in *Director of Housing v Sudi* [2011] VSCA 266 in relation to the VCAT, and by Presidential Member Daniel, as she is now, in *Commissioner for Social Housing in the ACT v Massey* [2013] ACAT 41. Both decisions concerned human rights in the context of residential tenancy disputes, but the observations in both cases are relevant here and have been applied in other contexts.[4] Both cases provide a lengthy discussion of the difficulties that confront tribunals when dealing with 'collateral reviews'. I do not need to repeat the observations in full here, but in summary, the authorities indicate that while the scope of the Tribunal's power to engage in collateral review is ultimately determined by the scope of the authorising Act, in the absence of an express power, it is only rarely appropriate for a tribunal to engage in a review of the validity or lawfulness of actions preliminary to the matter under review. Moreover, even where the review is permissible, it is usually only appropriate that the review consider whether preliminary actions are "invalid on their face."[5]

46. The issue of standing in this case, as considered below, involves a consideration of the facts, and accordingly I am satisfied that this matter raises invalidity on its face.

47. This leads to the second difficulty I have with simply applying the approach in *Hervey Bay* in these circumstances – the Tribunal has minimal evidence before it compared to what was before the Federal Court in *Hervey Bay*.

48. In *Hervey Bay*, the Disability Discrimination Commissioner appeared as *amicus curiae* and put submissions to the Court about its actions. By contrast, the HRC was not a party to, or represented at, these proceedings. There is minimal evidence before the Tribunal as to what the HRC considered. The Tribunal has a copy of the referral from the HRC, which includes a complaint form and some correspondence, but the documentation is not complete. The Tribunal has not requested a copy of the material before the HRC under section 53DA (and has

[4] See *Hocking v Medical Board of Australia* [2015] ACAT 22
[5] *Ibid* citing Weinberg JA in *Sudi* at [231]-[264]

not been requested to), and neither party has subpoenaed the HRC file. Moreover, even if the documentation before the Tribunal is complete, it is possible that conversations took place between officers of the HRC and the applicant, and that during those conversations the applicant satisfied the HRC of his 'sufficient interest'. No witness statement or testimony was offered from the HRC officials in relation to this point.

49. Pursuant to the presumption of validity, the Tribunal is entitled to and indeed should assume that the HRC had sufficient information to be satisfied of its capacity to consider the complaint, including concluding that the applicant had standing, unless there is some compelling proof otherwise. I have no compelling, and indeed no evidence at all, that the HRC did not consider the applicant's standing. I am neither able, nor willing, to engage in the kind of collateral review necessary to examine this issue further, at least at this stage in the proceedings. I am certainly not willing to consider the issue further without a review of what was before the HRC, or the attendance of a representative of the HRC before the Tribunal to give evidence on this point.

50. If the issue of compliance with section 43 were now put to the HRC, and the HRC agreed there was a problem, there would then be a question as to whether the HRC could withdraw the referral, consistent with the reasoning about remaking decisions in *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11, or whether some other remedy could be sought. However, this is not a matter for the Tribunal at this time.

51. I appreciate that this may be a controversial decision, especially in light of *Hervey Bay*, so I make the following observation: even if I am wrong on my interpretation of the HRC Act, and the Tribunal is entitled to review the validity of the complaint through a review of the standing of the applicant to make it, then I am not, in any case, satisfied that the applicant lacks standing.

52. The respondent argued that the applicant has not demonstrated a 'sufficient interest' to meet the test in section 43(2)(f). In support of this, the respondent relied upon the principles expanded in *Hervey Bay*, and particularly upon the

ground that a person must have "more than an intellectual or emotional concern in the subject matter..."

53. Two observations can be made about this submission.

54. First, the factors in *Hervey Bay* arose in the context of whether the applicant was a 'person aggrieved by the alleged unlawful discrimination' under section 46P(2)(a) of the HREOC Act. The equivalent provision in the HRC Act is section 43(1)(a), not section 43(1)(f). Although the applicant does not specify that he is relying on section 43(1)(f), the respondent has apparently conceded that this is the relevant provision.

55. Section 43(1)(f) imposes a different test to the 'person aggrieved' test under section 43(1)(f). It asks not whether the applicant is 'aggrieved', but whether the applicant has a 'sufficient interest' in the matter, in accordance with the terms of the test in 43(2).

56. Paragraph 43(1)(f) and 43(2) were inserted into the HRC Act by way of the *Discrimination Amendment Act 2016*. This provision only came into operation on 24 August 2016 – after the applicant had lodged his application. There were no transitional provisions, so it is unclear how this provision was intended to apply to complaints that were before the HRC as at the date that the amendments commenced. However, the HRC did not conclude its consideration of the complaint until September, by which time section 43(1)(f) had come into operation. I am therefore prepared to accept that the provision applied to the applicant's application.

57. The *Explanatory Memorandum to Discrimination Act 2016* makes it clear that the 'sufficient interest' test was intended to be broader than the 'aggrieved person' test:

> *This clause provides that a person has sufficient interest in a discrimination complaint if the conduct complained about is a genuine to concern to the person, because the conduct would adversely affect (or has the potential to adversely affect) the interests of the person or interests or welfare of the anyone the person represents. This provision will allow support services, legal representatives or advocacy groups to assist a person to exercise their rights under the Act. It acknowledges that due to*

> *the nature of discrimination, the vulnerabilities of people with protected attributes and the potential power imbalance between a complainant and respondent, complainants should be supported to make complaints. This provision is not intended to remove or alter the authority of the Commission to conduct a complaint as a representative complaint in accordance with s 71 of the Human Rights Commission Act.*

58. The focus of the test is not on whether the applicant is an aggrieved person, but rather on whether:

    (a) The *conduct complained about;*

    (b) Is a matter of *genuine concern* to the applicant; *because*

    (c) *Conduct of that kind has the potential to affect the interests of the applicant.*

59. No submissions were made by either party about the interaction between subsections 43(1)(a) and 43(1)(f). Section 43(1)(f) appears to be at least partially intended to facilitate representative actions by community and advocacy groups – and this is confirmed by subsection 43(6), which provides that:

> *"(6) A person mentioned in subsection (1) (f) may make a complaint only if the aggrieved person consents to the making of the complaint."*

60. However, 43(1)(a) and 43(1)(f) are clearly intended to be alternative grounds for standing, and neither the language of section 43(1)(f) or 43(6) limit 43(1)(f) to representative complaints. Final determination of how these provisions interact is beyond the scope of this decision and is unnecessary. The Respondent appears to accept that it is the "sufficient interest" test that applies.

61. There could be little doubt that, if the applicant had applied to join the ACTF&R during the latest recruitment campaign, he would meet the standing requirement as person aggrieved. In his submissions filed 9 March 2016, he stated that he was an applicant. I accept the evidence of the respondent that there were no applicants with the name 'Phil Macca' or 'Phillip Macca' in the recent round, but that is not necessarily conclusive evidence that the applicant did not apply. It possible, for example, that the applicant applied under a different name. It is impossible to determine that question at this time, because

of the lack of evidence before the Tribunal (noting that much of that lack of evidence is due to the applicant's failure to comply with directions), but in considering whether to strike out this application, it is relevant to consider whether the applicant should be given an opportunity to prove this assertion at a substantive hearing.

62. In any case, under questioning from Tribunal, the respondent's representative conceded that it would not be necessary for the applicant to establish that he actually applied to ACTF&R. Rather, she submitted, the applicant "has not identified the nature of his interest in the equal opportunity policy at all," such that he could not establish a sufficient interest of any kind.

63. I do not accept that submission. The 'interest' of the applicant is his self-stated desire to be engaged as a firefighter. The applicant is a male. His prospects of becoming a firefighter may have been compromised by the implementation of the equal opportunity policy (the test requires only that his interests be 'potentially' affected). The implementation of such policies in the future may further compromise his interests. Arguably, as a consequence of such equal opportunity policies, there will be fewer places for male applicants, the standard for male applicants will be higher, and those male applicants who are not at the top of the selection process may miss out where they otherwise would have been successful. On the wording of section 43(2), the applicant arguably requires no more than that to demonstrate that the policy has the potential to adversely affect his interests.

64. It may perhaps be contended that the applicant's lack of compliance with the directions of the Tribunal are indicative of the applicant not having a 'genuine interest' in the complaint, as opposed to, for example, making a political statement or having some ulterior motive. However, no such argument was advanced, and the applicant's involvement in this process evidences a strong feeling of grievance and concern, even if the nature of his involvement has been somewhat unorthodox.

65. Having regard to all the above, I decline to strike out this matter on the basis that the complaint was not validly before the Tribunal. I am not convinced that I

have the power to strike the application out on the ground that the complaint was not validly before the HRC, but even if I did, I am not satisfied that the applicant lacks standing, or that this is a matter that can properly be resolved at an interim hearing.

Dismissal for failure to provide an address

66. The respondent also sought that the Tribunal strike the Application out on the basis that the applicant failed to provide an address to the HRC (or, hence, to the Tribunal) as required by section 44(1)(e). The respondent submitted that:

> *...unless or until the Applicant confirms his address, the complaint has not been validly made and it would be open to the Tribunal to dismiss it on that basis alone...*

67. The relevant section of the HRC Act provides, in full, as follows:

> ***44 Complaint to be in writing***
> *(1) A complaint must—*
> *(a) be in writing; and*
> *(b) if the complaint is made by an agent—state that it is made for an aggrieved person and name the aggrieved person; and*
> *(c) if the complaint is made by a person under section 43 (1) (f)— name the aggrieved person; and*
> *(d) state the complaint and the grounds on which it is based; and*
> *(e) include the name and address of the complainant.*
> *...*
> *(4) Despite subsection (1) (a), a complaint may be made orally if the commission is satisfied on reasonable grounds that exceptional circumstances justify action without a written complaint. Example— exceptional circumstances Waiting until the complaint is put in writing would make action in response to the complaint impossible or impractical.*

68. This ground raises broadly the same concerns as that in relation to the standing issue under section 43(1)(f), considered above. Section 44 lists the prerequisites for the making of a complaint to the HRC, not the making of an application to the Tribunal. Reliance on this ground amounts to a similar collateral attack on the application.

69. Even setting that aside, the argument is ill-founded. The applicant did in fact provide an address on his complaint – he provided an email address. The HRC Act does not require the provision of a home address or other physical address

in order to make a complaint. The *Legislation Act 2001* provides for service on email addresses, and defines an 'email address' as one form of address, along with a residential address and a business address. The email address provided by the applicant is valid and the HRC (and the respondent) have communicated with him using it. I have no basis to conclude that the applicant did not provide 'an address' with his complaint.

70. Moreover, even were a physical address required, I have no basis for concluding that the HRC did not have such an address. The address may have been supplied on documents that were not forwarded to the Tribunal, or the HRC may have initially or otherwise accepted that applicant's complaint as an oral complaint pursuant to section 44(4) or the HRC Act, or the HRC may simply have been satisfied with an email address for the reasons outlined above.

71. In short, I decline to strike out the Application on the basis that the applicant did not provide the HRC, and has not since provided the Tribunal with, a physical address.

Want of prosecution

72. Section 56(d) of the ACAT Act grants the Tribunal the power to dismiss matters for want of prosecution.[6] The Tribunal also has the specific power in section 74(2)(b) of the ACAT to strike out an application if the applicant fails, without reasonable excuse, to comply with a Tribunal order.

73. There is little doubt that the Tribunal has the power to strike out an application for want of prosecution. However, such power must be exercised with due regard to the Tribunal's obligations to ensure processes are simple, fair, informal and consistent with natural justice[7]. It must be remembered that parties to Tribunal proceedings are often self-represented, and may find legal processes to be complicated or confusing. Accordingly, before exercising the power to strike a matter out for some procedural failing, the Tribunal must observe procedural fairness by ensuring that the applicant has notice of the risk that their application might be finalised in this way, an opportunity to provide an excuse

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[6] *CIC Australia Ltd v ACT Planning and Land Authority, Mainore Pty Ltd and ACT Civil and Administrative Tribunal* [2013] ACTSC 96 at [92]

[7] ACAT Act sections 6(b), 6(d) and 7

for any default and an opportunity to remedy any default.[8] This is particularly, in my view, important in case of applications brought under beneficial legislation, such as the HRC Act.

74. Having regard to the terms of respondent's submissions on the strike-out application, it appears that the respondent relies on the following considerations in support of that application:

(a) On 11 January 2017, the applicant declined to attend the scheduled mediation.

(b) On 11 January 2017, the respondent emailed the applicant indentifying the 'standing' issue and asking that he provide information on whether he had ever applied for a position with ACT Fire and Rescue. The applicant did not reply.

(c) On 16 January 2017 the Tribunal made directions requiring the respondent to file submissions with the Tribunal addressing the alleged discrimination and the issue of standing by 6 February 2017. The applicant did not comply.

(d) On 3 February 2017, the Tribunal issued a subpoena requiring the applicant to produce documents relating to any involvement he has had with ACTF&R, including any applications for employment. The subpoena was returnable on 14 February 2017. The applicant did not produce any documents or appear on the return of subpoena.

(e) The subpoena was adjourned to 21 February 2017, and again to 10 March 2017. The applicant has still not responded to the subpoena and nor did the applicant appear on any return date.

(f) To the extent that the applicant was confused about compliance with the orders of the Tribunal and the subpoena, that confusion was addressed by the Registrar's email of 15 February 2017, in which she set out the

[8] See *Humble v Constructions Occupation Registrar and Ors* [2011] ACAT 17 at [6] per General President Crebbin

requirements for compliance with both the directions and the subpoena. The respondent has not complied with either.

(g) The applicant has failed to attend any hearing, allegedly due to his erratic work hours, but he has not provided any evidence of his employment status, or his working arrangements, and nor has he suggested alternative dates for the mediation or hearings.

(h) The applicant's correspondence to the Tribunal, particularly his email of 6 February 2017 and 1 March 2017, indicate that he was in a position to comply with the directions of the Tribunal, but has failed to do so.

(i) The applicant's failure to comply has been intentional and without reasonable excuse and is grounds for dismissal under section 56(d) or 74(2)(b) – the respondent cites the emails of 6 February 2017 and 10 March 2017 as particular evidence of this.

75. The applicant's email to the Tribunal of 10 March 2017 can be considered his response to the allegations set out in the interim application.

76. Before considering those allegations, one preliminary matter must be dealt with. In his response to the interim application, the applicant makes various assertions of bias on the part of the Tribunal, as well as untoward conduct by the respondent. I have considered the allegations, and reject them as unfounded. I do not intend to give them any further consideration.

77. In terms of the more substantive reasons for the applicant's failure to comply with the directions to date, they may be summarised as follows:

(a) The applicant was confused about the interaction between the Tribunal's directions and the subpoena process, and was uncertain was to which he should comply with. Having regard to the aforementioned allegations of untoward conduct by the respondent's solicitors, he chose to comply with neither until the situation was clarified.

(b) The applicant has not submitted his full particulars to the Tribunal because he is concerned that, should that information be provided to the respondent, it may jeopardise any future job application he makes to ACTF&R. However, he had provided this information to the HRC dealing with this issue.

78. I do not consider either to be a particularly good excuse for non-compliance. To the extent that the applicant was confused about the process, that confusion should have been allayed by the Registrar's email of 15 February 2017. To the extent that the applicant was genuinely concerned about revealing his identity, it was open to him to apply for certain types of suppression orders under section 39 of the ACAT Act.

79. However, there are three additional observations in the applicant's favour.

80. First, no adverse inference can be drawn from the applicant's failure to attend the mediation scheduled for 9 January 2017. The applicant had advised the parties that he would find attending the proceedings in person difficult, and the Tribunal's directions of that date reflect that the applicant was entitled to advise the Tribunal, prior to 16 January 2016, if he did not wish to proceed with the mediation. He complied with those directions.

81. Second, the applicant's non-attendance at hearings has been explained. While the explanations are hardly as fulsome as they could be, the parties have both consented to a determination being made on the papers, so the failure to appear does not give rise to any unfairness or injustice. The applicant's non-appearance was not questioned prior to the strike-out, and nor did the respondent call for evidence of working hours prior to making the application. The respondent consented to a hearing on the papers.

82. Third, this is not a case where the applicant has completely failed to provide any submissions or evidence. In an email to the Tribunal of 8 January 2016 (forwarded to the respondent by the Tribunal on 9 January 2016), the applicant set out what he stated to be his "case in writing". The document is not as comprehensive as would be expected from a solicitor, and it does not clearly articulate all the legal issues that may arise in his claim. Nonetheless, it is no

worse than many other documents filed by self-represented litigants in Tribunal proceedings. It sets out, adequately, why the applicant contends that the equal opportunity policy is not a reasonable means to address inequality. It provided the respondent with sufficient understanding of the applicant's position, such that a response may be prepared. Certainly, the situation is not ideal, but the applicant's reliance on such minimalist submissions disadvantages him more than the respondent.

83. Having regard to the above, while I acknowledge that these proceedings have proceeding in a somewhat irregular manner, I am not convinced that these facts amount to a 'want of prosecution' by the applicant, and I am not satisfied that the matter should be dismissed for failure to comply with directions.

84. One issue that does concern me is the applicant's apparent failure to comply with the subpoena. However, this too warrants further comment.

85. While I do not accept the totality of the Applicant's reasons for non-compliance with the subpoena, particularly given the advice provided to him by the Registrar, I do accept that some aspects of the process can be confusing. For example, it is not clear on the face of the subpoena documents what a person who has been subpoenaed to produce documents should do if they have no documents to produce. Most parties will, in such circumstances, advise the Tribunal by email that they have nothing to produce, but self-represented litigants are not likely to be aware of this practice. A failure to produce documents on subpoena does not necessarily mean that the subpoena has been ignored.

86. Nonetheless, in some matters, a failure to comply with a subpoena without reasonable excuse may give rise to an unfairness or injustice that compromises the integrity of the proceedings. In such cases, it is open to the Tribunal to strike out an application or make an order in favour of the other party pursuant to section 74(b) or (c) of the ACAT Act. I have considered at some length whether the facts of this case are sufficient to justify such action, and have come to the conclusion that they are not.

87. Assuming that the applicant actually has documents that fall within the scope of the subpoena, his failure to produce those documents has, if anything, compromised his own position. Having produced no evidence that he was an applicant for the recruitment process, he will not be in any position to seek damages or compensation, even if successful. The applicant has also, through his failure to address the standing issue, exposed himself to any other remedies the respondent may have, whether in the Tribunal in this proceedings, or in other forums, such as through judicial review or declaratory relief if in fact he did not have sufficient interest to make a complaint to the HRC. One may suggest that the applicant has been unwise, but I am not satisfied that his conduct is, at this stage, fatal to the proceedings.

88. That said, a subpoena is a lawful order of the Tribunal, and a failure to comply with a subpoena exposes the defaulting person to the possibility of a presidential member issuing a warrant for their arrest[9] or a fine[10]. The applicant's persistent failure to respond to the subpoena has exposed him to these penalties.

89. I am not unsympathetic to the position that the respondent finds itself in, particularly in that it has never spoken to the applicant, cannot confirm whether he has ever been an applicant for a position with ACTF&R, and has some concerns about the genuineness of his application. There is, perhaps, the possibility that the applicant is being deliberately obtuse or recalcitrant because he is not genuinely pursuing this matter, and as such is wasting resources. One may also suggest that he is pursuing this matter in a manner that is designed to unfairly and unreasonably minimise his own exposure to the reasonable risks of litigation. In a jurisdiction where costs were readily available, similar circumstances would likely be grounds for a security for costs application, or a similar measure to protect the interests of the respondent, should the application prove to be vexatious or otherwise not genuine. The extent to which such avenues are available in the Tribunal is less clear, but there is in any case no such application before the Tribunal.

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[9] see ACAT Act, section 42, re a Presidential Member issuing a warrant for arrest
[10] ACAT Act section 71(1)

90. One final observation may be made in relation to this matter (and to matters like it). The applicant is a self-represented litigant, apparently with limited understanding of legal processes and procedures. He is clearly aggrieved by what he perceives to be the discriminatory conduct of the Territory. Whatever the ultimate merit of his claim (which has yet to be determined), he has set out in writing why he believes the equal opportunity policy is discriminatory. His are sufficiently clear that the respondent is capable of addressing them. The costs of doing so are unlikely to be excessive, particularly given the agreement by all parties that the hearing will be 'on the papers'. In the circumstances, which include most significantly that this is a discrimination dispute, and having weighed the various considerations, I am not minded to strike out the applicant's application and deny him an opportunity. I would not be so minded unless I was satisfied that he had nothing to argue. I am not so satisfied.

91. Instead, I will provide the parties with a final opportunity to put submissions and/or evidence to the Tribunal. I will then proceed to determine the substantive matter on the material before me, as agreed by both parties. If the applicant fails to comply with the directions, and to file further material, then I will decide the matter in the absence of that material, which may well be to his disadvantage.

92. Accordingly, I order:

    1. The interim application is dismissed.

    2. Directions 3 through 6 of 16 January 2016 are vacated.

    3. The applicant is to file any further material and/or submissions on or before 7 April 2017.

    4. The respondent to file any further material and/or submissions by 21 April 2017.

    5. The applicant to file any material in reply by 28 April 2017.

6. The Tribunal will thereafter determine this matter without an oral hearing.

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Senior Member H Robinson

HEARING DETAILS

FILE NUMBER:	DT 10/2016
PARTIES, APPLICANT:	Phil Macca
PARTIES, RESPONDENT:	Australian Capital Territory represented by Emergency Services Agency
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	N/A
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR RESPONDENT	ACT Government Solicitor
TRIBUNAL MEMBERS:	Senior Member H Robinson
DATES OF HEARING:	10 March 2017