SUPREME COURT OF QUEENSLAND

CITATION:	*Toodayan v Anti-Discrimination Commission Queensland* [2017] QSC 301
PARTIES:	**NADEEM TOODAYAN** (applicant) **v** **ANTI-DISCRIMINATION COMMISSION QUEENSLAND** (respondent)
FILE NO/S:	BS No 509 of 2017
PARTIES:	**NADEEM TOODAYAN** (applicant) **ZAHEER TOODAYAN** (second applicant) **v** **ANTI-DISCRIMINATION COMMISSION QUEENSLAND** (respondent)
FILE NO/S:	BS No 510 of 2017
PARTIES:	**NADEEM TOODAYAN** (applicant) **v** **ANTI-DISCRIMINATION COMMISSION QUEENSLAND** (respondent) **JULIE BALL** (second respondent)
FILE NO/S:	BS No 1698 of 2017
PARTIES:	**NADEEM TOODAYAN** (applicant) **v** **ANTI-DISCRIMINATION COMMISSION QUEENSLAND** (respondent) **JULIE BALL** (second respondent)
FILE NO/S:	BS No 1700 of 2017

DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2017
JUDGE:	Martin J
ORDER:	**In each of BS509/17 and BS510/17:** **1. The application is dismissed.** **In each of BS1698/17 and BS1700/17:** **1. The decision of the Anti-Discrimination Commission Queensland is set aside.** **2. The applicants are to provide minutes of order within 10 days.**
CATCHWORDS:	HUMAN RIGHTS – JURISDICTION AND PROCEDURE – QUEENSLAND – where the applicants were employed as interns at the Princess Alexandra Hospital – where the applicants lodged complaints of alleged discrimination with the respondent under the *Anti-Discrimination Act* 1991 – where the respondent rejected the complaints on the basis that they were misconceived or lacking in substance pursuant to s 139(b) – where the applicants seek judicial review of the decisions to reject the complaints – whether the respondent was correct to reject the complaints pursuant to s 139(b) *Anti-Discrimination Act* 1991 s 139 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280, cited *Federal Commissioner of Taxation v Consolidated Media Holdings Limited* (2012) 250 CLR 503, cited *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, cited *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102, cited *Wall v Bank of Victoria Ltd* (1890) 16 VLR 2, cited

COUNSEL:	N J Derrington for the applicants A D Scott for the respondents
SOLICITORS:	Antigone Legal for the applicants Respondent directly instructed

[1] Nadeem Toodayan and Zaheer Toodayan are brothers. They were employed as interns at the Princess Alexandra Hospital (PAH) and they claim to have been subjected to discrimination in connection with that employment. They made complaints about the alleged discrimination to the Anti-Discrimination Commission of Queensland (ADCQ). The complaints were rejected. There are four applications under the *Judicial Review Act* 1991 (JR Act) seeking reviews of the decisions to reject. One of those applications, BS509/17, is no longer being pursued.

[2] The applicants claim that they had been discriminated against on the basis of their race and religion, during and subsequent to the time when they were employed. In each claim, the ADCQ dismissed the complaint as being either misconceived or lacking in substance.

[3] The applicants seek orders setting aside those decisions and, in BS1698/17 and BS1700/17, orders that the ADCQ to accept those complaints. It is contended by the applicants that the ADCQ applied the wrong test in deciding to dismiss the complaints. The proper test, it was argued, is one which applies principles similar to those used in deciding a summary judgment application or an application to strike out a claim under the *Uniform Civil Procedure Rules*.

Some preliminary matters

[4] Each of the applications was made out of time. An application was made at the hearing for an extension. Detailed reasons were given for the delays and I was satisfied that an extension should be allowed.

[5] Applications BS1698/17 and BS1700/17 are identical to two applications which were dismissed by Daubney J last year because the applicants failed to appear. Given that I have accepted the reasons for an extension of time, and as they also adequately explain

the failure to appear, there is no reason not to allow the applicants to proceed on the applications filed in 2017.

The attitude of the ADCQ

[6] The ADCQ and, in BS1698/17 and BS1700/17, Ms Ball, appeared at the hearing and will abide by the order of the Court. They have been of considerable assistance in drawing my attention to relevant matters concerning the process that was followed, and relevant statutory provisions and authorities.

The individual applications

[7] Two of the complaints arise out of the applicants' internship at PAH:

(a) BS1698/17 concerns a complaint that the Dean of Medicine at Bond University unlawfully discriminated against the applicants by saying certain things in a telephone conversation with a senior doctor at PAH; and

(b) BS1700/17 concerns a complaint that the applicants were discriminated against by officers of PAH in their treatment of the applicants as interns as a result of the comments made by the Dean of Medicine the subject of the complaint relevant to BS1698/17.

[8] The third complaint – BS510/17 – concerns alleged treatment of the applicants after they ceased to be employed at PAH. It relates to actions taken by staff at PAH and by members of the Queensland Police Service.

Relevant statutory provisions

[9] The *Anti-Discrimination Act* 1991 (the Act) provides in s 6 that one of the purposes of the Act is "to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation". One of the ways of achieving that purpose, as described by s 6, is by prohibiting discrimination that is:

(i) on a ground set out in Part 2; and

(ii) of a type set out in Part 3; and

(iii) in an area of activity set out in Part 4.

[10] The Act does allow for exemptions but they are not relevant in this case.

[11] The Act sets out, in Part 2, the grounds of prohibited discrimination. As with other, similar legislation, the Act prohibits discrimination on the basis of certain "attributes". Those "attributes" include "race" and "religious belief or religious activity". The schedule to the Act defines the terms "race" and "religious activity" and "religious belief" as follows:

> "***race*** includes—
>
> (a) colour; and
>
> (b) descent or ancestry; and
>
> (c) ethnicity or ethnic origin; and
>
> (d) nationality or national origin.
>
> ***religious activity*** means engaging in, not engaging in or refusing to engage in a lawful religious activity.
>
> ***religious belief*** means holding or not holding a religious belief."

[12] Section 8 defines the meaning of "discrimination on the basis of an attribute" in this way:

> "**8 Meaning of discrimination on the basis of an attribute**
>
> Discrimination on the basis of an attribute includes direct and indirect discrimination on the basis of—
>
> (a) a characteristic that a person with any of the attributes generally has; or
>
> (b) a characteristic that is often imputed to a person with any of the attributes; or
>
> (c) an attribute that a person is presumed to have, or to have had at any time, by the person discriminating; or
>
> (d) an attribute that a person had, even if the person did not have it at the time of the discrimination.
>
> *Example of paragraph (c)—*

> If an employer refused to consider a written application from a person called Viv because it assumed Viv was female, the employer would have discriminated on the basis of an attribute (female sex) that Viv (a male) was presumed to have."

[13] Part 3 provides for two types of discrimination which are prohibited, namely direct and indirect discrimination.

[14] Section 10 defines direct discrimination as treatment, or proposed treatment, of a person with an attribute that is less favourable than another person without the attribute in circumstances that are the same or are not materially different.

[15] Section 11 defines indirect discrimination as the imposition, or proposed imposition, of a "term":

> "(a) with which a person with an attribute does not or is not able to comply; and
>
> (b) with which a higher proportion of people without the attribute comply or are able to comply; and
>
> (c) that is not reasonable."

[16] Section 11 defines "term" to include "condition, requirement or practice, whether or not written".

[17] Part 4 sets out various "areas of activity in which discrimination is prohibited". It is not material for the purpose of this application to exhaustively set out all of the areas of activity prescribed by Part 4. Examples of prescribed areas of activity include:

(a) Section 15 prohibits discrimination in denying or limiting access to opportunities for promotion, transfer, training or other benefit to a worker, and by treating a worker unfavourably in any way in connection with work;

(b) Section 101 which prohibits discrimination by any person who performs any function or exercises any power under State law or has any other responsibility for the administration of State law.

[18] Chapter 7 provides for the enforcement of the Act. That chapter includes provision for a complaints process whereby a person who is subject to an alleged contravention of the Act may complain to the Anti-Discrimination Commissioner.

[19] Under s 136 of the Act, a complaint must be in writing and set out reasonably sufficient details to indicate an alleged contravention of the Act. Relevantly, s 138 provides:

> "**138 Time limit on making complaints**
>
> (1) Subject to subsection (2), a person is only entitled to make a complaint within 1 year of the alleged contravention of the Act.
>
> (2) The commissioner has a discretion to accept a complaint after 1 year has expired if the complainant shows good cause."

The test for rejection of a complaint

[20] Section 139 of the Act provides:

> "**139 Commissioner must reject frivolous, trivial etc. complaints**
>
> The commissioner must reject a complaint if the commissioner is of the reasonable opinion that the complaint is—
>
> (a) frivolous, trivial or vexatious; or
>
> (b) misconceived or lacking in substance."

[21] One might first observe that s 139 affords no discretion. Once the Commissioner forms the reasonable opinion that a complaint comes within s 139(a) or (b) the complaint *must* be rejected.

[22] How then should the Commissioner approach the consideration of the complaint and the formation of an opinion about whether or not it is of a type described in the section? The Commissioner, in each case, formed the view that the relevant complaint was misconceived or lacking in substance. It is not contended by the applicants that consideration need be given to the matters in s 139(a) apart from any insight that they might afford by way of context.

[23] The applicants argue that the standard to be applied to reach a conclusion that a complaint is misconceived or lacking in substance is "high". This, it is said, applies because the decision to reject a complaint is a summary dismissal of that complaint and so should be seen as being analogous to striking out a claim or giving summary judgment.

[24] In arriving at that conclusion, the applicants seek to find support in the words contained in O 22 r 31 of the repealed *Rules of the Supreme Court* 1991, apparently on the basis that similar language was used in that rule (which allowed for the striking out of pleadings when no reasonable cause of action was disclosed) and that those were the rules in force at the time the Act came into force. The analogy is difficult to see. In particular, O 22 r 31 was not meant to take the place of a demurrer,[1] whereas the Commissioner is to proceed under s 139 as if the allegations were established. In a demurrer, the facts averred in the pleading are taken to be admitted.

[25] The applicants then argue that although the words "misconceived or lacking in substance" are not colloquially as strong as "frivolous" or "vexatious", the placement near those words, in the context of the way in which s 139 has been drafted, confirms the proposition that a high standard of certainty is required for the "misconceived or lacking in substance" test to be met, and for the power under s 139(b) to be exercised. That is, with respect, a circular argument. The mere proximity of one set of words to another – without more – cannot confirm a proposition that a high standard of certainty is required.

[26] It is also argued that the intent behind s 139 supports that conclusion too. According to the applicants a conclusion that a complaint is "lacking in substance" or "misconceived" is not one that should be easily reached.

[27] Reliance is placed on the decision of the Victorian Court of Appeal in *State Electricity Commission of Victoria v Rabel*.[2] That case concerned an application by a respondent to summarily dismiss a complaint under the *Equal Opportunity Act* 1984 (Vic) pursuant to s 44C of that Act. Section 44C relevantly provided:

> "(1) A respondent may apply in writing to the Board to have a complaint struck out on the grounds that it is frivolous, vexatious, misconceived or lacking in substance at any time between the lodging of the complaint and the commencement of the hearing of the complaint by the Board, other than at a time when the matter is in the process of being conciliated."

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1 *Wall v Bank of Victoria Ltd* (1890) 16 VLR 2.

2 [1998] 1 VR 102.

[28] In that case, the Board had concluded that the complaint was "lacking in substance" because there was an insufficiently solid factual foundation for it. Tadgell JA observed that such a finding is a justification for dismissing a complaint after hearing the complainant's evidence but not a justification for ordering that the complaint be "struck out" pursuant to s 44C – at all events without allowing evidence to be called by the complainant with a view to establishing a prima facie case.[3]

[29] Ormiston JA agreed with Tadgell JA and drew an analogy with the test for summary dismissal, saying that:

> "I cannot accept that Parliament intended a lesser test than has been imposed by the courts …"[4]

[30] The applicants submitted that the decision in *Rabel*, being a decision of an intermediate appellate court, should be strictly applied. But, there are some important differences between s 44C of the Victorian Act and the operation of s 139 of the Act. First, under the Victorian Act, it is the respondent who applies for the complaint to be struck out. Section 139 does not contemplate a respondent being aware of the complaint, let alone making an application. It is the Commissioner who acts on his or her own volition. Secondly, s 141 of the Act establishes a very short time period in which a decision to reject may be made – within 28 days of receipt of the complaint. The Victorian statute allows for an application to be made at any time between the lodging of the complaint and the commencement of the hearing. Thirdly, and most importantly, s 139 itself provides the test to be applied. Some legislation does not prescribe a standard to be observed – s 44C of the Victorian statute is an example. Some impose quite detailed requirements, for example, s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 refers to the court being satisfied by acceptable, cogent evidence and to a high degree of probability. But, all that the Commissioner need form is the "reasonable opinion" that a complaint is misconceived or lacking in substance. The Act does not impose upon the formation of that opinion any higher barrier than that the opinion be "reasonable".

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3 At 119-120.

4 At 110.

[31] The High Court has often stated that the task of statutory construction must begin with a consideration of the text.[5] Consideration of s 139 demonstrates that the test which is to be applied is that of whether or not a reasonable opinion can be formed that a complaint comes within one of the legs in s 139. The standard to be applied is no higher than that. To do, as the applicants suggest, would be to coat s 139 with an impermissible gloss.

The over-zealous eye

[32] It has long been accepted that a court should not be concerned with looseness in language nor with unhappy phrasing in the reasons of an administrative decision-maker. Further, the reasons for an administrative decision which is the subject of judicial review "are not to be construed minutely and finely with an eye keenly attuned to the perception of error".[6] As the High Court said in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*:[7]

> "These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed."

BS1698/17

[33] Both of the applicants undertook medical studies at Bond University. At some time before 31 January 2012, Dr Lizbeth Jordan (the Deputy Director of Medical Services at PAH) sent the following email to Dr Richard Hay (the Dean of Medicine at Bond University):

> "I am emailing you to ask whether it might be possible to speak to yourself or someone else about one of your medical students who finished at Bond last year and is now an intern with us at the PAH.
>
> Zaheer Toodayan is one of a pair of twins who were both Bond students and who are both doing their intern jobs with us. There has been a bit of an

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5 See, for example, *Federal Commissioner of Taxation v Consolidated Media Holdings Limited* (2012) 250 CLR 503 at 519.

6 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287.

7 (1996) 185 CLR 259 at 272.

incident we have been dealing with today when he chose to have a long discussion with a patient at 11 pm last night and then write 7 pages in the patient's chart on his views of the patient's diagnosis, why he thinks it's wrong and what he believes the patient's real problem is. He has apparently caused 'chaos' with the patient and the family who have been very difficult to manage previously for a variety of reasons.

We are just in the process of gathering information before our Director of Clinical Training meets with him to understand from Zaheer's perspective what seems to have happened. Fully recognising the issues of privacy and confidentiality, my purpose in making contact with you is that I would be keen to know anything you feel able to share with us with regards any relevant difficulties Zaheer had as a student which might be helpful in informing how best we can support him at this early time in his internship.

Please feel free to call me on my mobile or office number if it is easier to chat on the phone."

[34] Dr Hay spoke to Dr Jordan on, it would appear, 31 January 2012. His comments were summarised by Dr Jordan in an email she sent to some other staff members at PAH:

"Richard Hay was actually very helpful 'off the record' of course!

2 issues with both twins:

1. Background - devout Muslims, born in Australia but brought up and schooled in Saudi. At least one parent a doctor (possibly both) and one of the parents worked a lot in Saudi. Described the twins as both having a 'rather narrow view of normality and could be quite judgmental about patients at times'

2. Very bright (off the scale) and want to be world leaders in something - and probably will be! Zaheer in particular when writing up clinical cases would go off at tangents on scientific trivia not related to the patient. **They both responded to a long period in 4th year of direct feedback, being specific, precise and consistent about what is appropriate and what is not. The clear message was to be very firm with no margin for question!** They were apparently much better in their final year and their tutors thought they would be okay albeit fairly intense and keen to succeed. He feels that we will probably have some success if we are fairly blunt and to the point about what interns can and cannot do and say and continually correct them when they get it wrong till they learn the required behaviour.

I agreed with Richard (Hay) that we would not be discussing our source for this helpful info but use it as a strategy to assist in managing the boys so they hopefully develop into more all-rounded doctors. He is keen to hear how it all goes .....

> I am copying this to Kim and Melissa so they have all the info **but I do not want it to be copied any further**. Happy for your guys to have conversations with current and future tutors as required and no doubt we will chat much more as the year progresses." (emphasis original)

[35] There is, of course, no evidence from Dr Hay or Dr Jordan about this conversation.

[36] The applicant in this matter, Nadeem Toodayan, contended that what Dr Hay was alleged to have said was discriminatory. He lodged a complaint. The ADCQ engaged in correspondence with him and his solicitors and, as a result, a submission was made to the ADCQ which contained a summary of the complaint in this matter and, also, the complaint which is the subject of BS1700/17:

> "4. With respect to the amended pleadings, in the case of Dr Jordan it is asserted that she identified an attribute (religion) as being causative of performance issues and then implemented a management strategy to address it which led to the Applicant being treated differently and less favourably than persons without the attribute. It is asserted that Dr Jordan knew or ought to have known her strategy would be implemented in this way.
>
> 5. In the case of Dr Nicholls, it is asserted that she adopted the strategy developed by Dr Jordan (and Dr Hays), and, in her position as Director of Clinical Training at the hospital, used this strategy to unfairly compromise the Applicant's progression through his internship year. Furthermore, our client asserts that she unfairly influenced a number of the Applicant's term to term assessments, and otherwise communicated pessimistic (even unfounded) views about the Applicant's ongoing progression to the medical authorities. She did not treat other interns in this manner.
>
> 6. In the case of Dr Hays it is asserted that he identified the attribute (religion) as being causative of 'concerns' and communicated this to Dr Jordan where he knew or ought to have known that his comments would affect the way in which the Applicant would be treated by his employer. It is further asserted that he knew or ought to have known that his comments would lead to less favourable treatment of the Applicant."

[37] In the applicant's written submission on this hearing the substance of the complaint was summarised in this way:

"(a) a supervisor (Dr Lizbeth Jordan) of the applicant at the PA Hospital had a telephone call with Dr Hay, in which Dr Hay is recorded as having:

(i) said that there were two concerns with the applicant and his brother for two years, one of which was that they 'were extraordinarily devout Muslims', '(born in Australia but brought up & schooled in Saudi)', 'Doctors as parents', 'Rather narrow views of mortality', 'Judgmental views of patients', and in doing so attributed the applicant's behaviour to his religion; and

(ii) encouraged that the applicant be treated more firmly than others because of that behaviour (attributable to the applicant's religion); and

(b) each of these elements of the complaint constituted religious discrimination under the ADA."

[38] In a letter of 14 November 2016, Ms Ball, a delegate of the ADCQ, rejected the complaint for the following reasons:

"**Discussion**

In deciding whether a complaint indicates an alleged contravention of the *Anti-Discrimination Act*, the Commission is required to consider the allegations at face value; that is, the complaint is assessed on the basis of the person making the complaint is able to prove the facts that they allege.

In this case, that means that you are able to prove that Dr Hay made the comments to Dr Jordan as indicated in the handwritten notes, and in the email to Margaret Hayman, copied Kim Nicholls and Melissa Naidoo.

The Commission must also consider the context of the alleged conduct on the face value of undisputed information in the complaint material. Relevantly, the context of the telephone conversation between Dr Hay and Dr Jordan is described in an email from Dr Jordan to Dr Hay. That email indicates there were concerns about your brother's conduct relating to a patient, and Dr Jordan sought information relevant to how best to support your brother in the early stage of his internship.

The complaint indicates that Dr Hay told Dr Jordan that you and your brother are devout Muslims. Other background information was also provided, including where you were born and raised, your parents' occupation, and your intellect.

As explained in the Commission's letter dated 20 October 2016, a comment or notation identifying an attribute is not of itself discrimination on the basis of the attribute.

> I note that in the subsequent correspondence, your solicitors allege that Dr Hay 'identified religion as being causative of concerns and communicated this to Dr Jordan', and did so in circumstances where he knew or ought to have known that his comments would lead to less favourable treatment of you. In my view, those allegations are not supported by the facts alleged in the complaint material. Your religion is identified, as is your upbringing and your intellect, however neither the handwritten notes nor the email suggest that your religion was a cause of concerns. The earlier email from Dr Jordan to Dr Hay indicates the circumstances of Dr Hay's communication as Dr Hay being asked for his opinion on how best to help your brother in his early stage of internship. There is nothing in the complaint material that Dr Hay requested or encouraged anyone to treat you less favourably because of your religion.
>
> At paragraph 22 of the amended pleadings, it is alleged that the email from Dr Jordan to Margaret Hayman conveyed the message that your religion was cause for concern because of purported behaviours attributed to your religion. There are a number of behaviours described in the email, including having a narrow view of normality, being judgmental about patients, how clinical cases were written up, and responses to direct feedback and precise expectations.
>
> In my view, the information in the email about management of you and your brother is clearly about behaviours. Your religion is no more than background information about your upbringing.
>
> **Conclusion**
>
> In my view the complaint does not meet the threshold requirement in section 136 of *Anti-Discrimination Act* 1991 of indicating an alleged contravention.
>
> I am satisfied there is no arguable case, in fact or in the law, which should be allowed to proceed. In my opinion the complaint is misconceived or lacking in substance within the meaning of section 139 of the *Anti-Discrimination Act* 1991. Accordingly, the complaint is rejected."

[39] The applicant contends that:

(a) the decision involved an error of law (thus coming within s 20(2)(f) of the JRA) in that the delegate:

(i) did not apply the correct test in determining whether the complaint was misconceived pursuant to s 139(b) of the Act;

(ii) applied the wrong test in determining whether the complaint was lacking in substance, and failed to take into account relevant considerations in applying the test, pursuant to s 139(b) of the Act; and

(iii) applied the wrong test to her consideration of what constituted direct discrimination within the meaning of s 10 of the Act; and

(b) the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made because it was:

(i) unreasonable; and

(ii) failed to take into account relevant considerations.

[40] In considering whether s 139 might apply, the Commissioner must proceed on the assumption that the facts alleged can be substantiated. Thus, in this case, the Commissioner should proceed on the basis that the email from Dr Jordan contained an accurate summary of what Dr Hay had said. The Commissioner did do that – "the complaint [was] assessed on the basis [that] person making the complaint [was] able to prove the facts that they allege."

[41] What is taken to have been said must also be considered in its context. That also was accepted by the Commissioner. The Commissioner's decision appeared to turn upon the view that the reference to the applicant's religion was nothing more than a comment or a notation identifying an attribute and, on that basis, was not discriminatory. But the context may allow more than that to be drawn from the comment or notation.

[42] The email from Dr Jordan to Dr Hay contains the following:

> "I would be keen to know anything you feel able to share with us with regards any **relevant difficulties** Zaheer had as a student …" (emphasis added)

[43] The summary of Dr Hay's response contains this:

> "2 **issues** with both twins:
>
> 1. Background - devout Muslims, born in Australia but brought up and schooled in Saudi. At least one parent a doctor (possibly both) and one of the parents worked a lot in Saudi. Described the twins as both having a 'rather narrow view of normality and could be quite judgmental about patients at times'.
>
> …" (emphasis added)

[44] The original request sought information about any "relevant difficulties" which Dr Toodayan might have had. In the response, the applicant's religion is referred to under

the general description of "issues". The word "issues" is pregnant with meaning. Without entering upon a consideration of whether the notation of the applicant's religion as an "issue" is discriminatory, it is, in this context, sufficient to exclude it from the operation of s 139. It could, in this context, be argued to be more than a mere notation of the applicant's religion. Dr Hay may not have used those words or Dr Jordan may have misinterpreted what he said. There may have been more said in the conversation which goes to explain the reference to religion. This is not, of course, the time to form a final view given that the proposed respondents have not yet been involved.

[45] Section 139 does not provide for the rejection of weak cases – which this case may well be – but only those which come within the category sometimes described as "hopeless". By not considering fully the context in which the alleged discriminatory words were used, the Commissioner failed to take into account a relevant consideration. The application must be allowed. The decision to reject the complaint is set aside.

BS1700/17

[46] This complaint relates to the conversation between Dr Jordan and Dr Hay which was recorded by Dr Jordan and is set out above with respect to BS1698/17. This complaint was made against PAH, Dr Jordan and Dr Nicholls.

[47] The complaint was rejected for reasons which were substantially those contained in the letter from the ADCQ which is set out with respect to BS1698/17. The same reasoning applies to this complaint.

BS510/17

[48] The circumstances giving rise to this complaint are conveniently summarised in some paragraphs of the first applicant's affidavit. So far as is relevant, it states:

> "14. Whilst working in the colorectal unit at the PA Hospital, a young patient is admitted under the care of Zaheer's team on 4th April 2014. The patient ends up being diagnosed with a recurrent and terminal malignancy and this case effects Zaheer profoundly.
>
> …

16. Early on the morning of 4th April 2014, Zaheer visits the PA hospital colorectal ward to pay his respects to the aforementioned patient of his whom he met on that ward a year prior. It is intended as a personal reflective exercise to provide closure after the death. I attended with him primarily for moral support, and also to return a library book and take pictures of certain historical medical posters both myself and Zaheer had earlier erected at the hospital.

17. At the time, we had been under the honest misapprehension that we were still authorised to visit the hospital as we were registered practitioners of medicine. We held this (misguided) view because during our internship we had regularly seen medical officers from other facilities come and go without issue on an almost daily basis. Accordingly, we too thought we were authorised to come and go. The fact that our ID cards still worked reinforced our honest misunderstanding that, as registered Australian doctors at the time, we were authorised to enter. We paid very heavily for this honest mistake.

18. During the short visit, Zaheer spent some time on the ward where he had first met and admitted his deceased patient. He took photos of the surroundings (desk and corridors where he had worked) and a pathology result on the computer screen (affirming terminal diagnosis). It is to be noted that at all times, Zaheer had had long standing permission from both the patient and family to access the patient's medical records for such purposes. Additionally, he knowingly acted in full view of nurses on the ward (where he could have accessed the same information from any number of private computers where there are no staff; this fact bears witness to the honest misapprehension that he was still authorised to be on the ward)."

[49] The date of the deceased patient's admission referred to at [14] of the affidavit is obviously an error. Other material establishes that he died on 15 December 2013. Nadeem Toodayan had resigned from PAH in November 2013. Zaheer Toodayan completed his contract in January 2014 and left PAH then.

[50] Nadeem Toodayan deposes in his affidavit to a confrontation with a security guard and to the execution of a search warrant at his premises in May 2014. Each of the applicants was interrogated, arrested, charged and then released on bail. The original charges were replaced with lesser charges of trespass to which each applicant pleaded guilty.

[51] The complaint made to the ADCQ was that the staff of the PAH had acted in a discriminatory way in initiating what the applicants described as a "counter terrorism investigation" into them.

[52] As with the other complaints, the ADCQ sought further information and that was provided. A further complaint was then made in which the Department of Health and the Queensland Police Service were named as respondents. The ADCQ again sought further information and this was provided.

[53] In response to the further information, the ADCQ sent a letter of 14 April 2016 to the applicants in which they were informed that the Commissioner was of the view that there was an absence of direct evidence of a causal connection between the treatment afforded them and their race or religion or both. The letter went on to deal with the issue of whether there was circumstantial evidence of the causal connection. The letter stated:

> "I have examined the evidence you have presented and consider that such an inference cannot reasonably be based on the evidence. Referral to the police appears to be explained by the finding of criminal responsibility for this matter, albeit reduced from the original matter to a charge of trespass. The evidence of the police witnesses is scant and does not establish a probable connection between the actions of the hospital or the police and your race and/or religion.
>
> I confirm my previous comment that a mere belief or suspicion is not enough without identifying something more from the circumstances surrounding the treatment to give rise to a reasonable inference of discrimination."

[54] In a further letter from the ADCQ of 23 May 2016, the following was stated:

> "… The circumstances you have alleged are that at around 5.00 a.m. on 4 April 2014, when you were both ex-employees of the hospital, hospital staff observed you at the hospital, taking photos of the ward and one of the patient's pathology results which you had accessed on a staff computer. The staff became suspicious and reported your actions to the Director of Emergency and Counter-Disaster Unit within the hospital, who advised the hospital to refer the situation to the G20 Task force Queensland Police Service Liaison Officer, who you allege allocated the matter to the Counter-Terrorism Unit of the Police. The Princess Alexandra Hospital staff then cooperated with the police by providing witness statements about the event, including providing information about your appearance and the language they observed you were speaking. You allege that all of these

> actions amount to less favourable treatment on the basis of your race in contravention of the Act.
>
> …
>
> From the information provided it does not appear that you have been treated less favourably than a person who does not have your attribute of race. The hospital's decision to report the perceived breach of security to the Director of Emergency and Counter-Disaster Unit is not less favourable treatment of you. It is an internal decision of the hospital. From the information provided, neither the hospital nor the Director of Emergency and Counter-Disaster Unit, contacted you or otherwise treated you less favourably. Similarly, cooperating with police by providing them with statements about the alleged incidents, is not less favourable treatment of view on the basis of your race. Describing your physical appearance to police, and informing them that you were speaking a different language in the context of providing police statements, would not be considered less favourable treatment of you on the basis of your race.
>
> …
>
> I am of the reasonable opinion that your complaint does not provide sufficient details to indicate that your race was not a substantial reason for the decisions made by the hospital, or that those decisions amounted to less favourable treatment of you on the basis of your race. The alleged decision of the G20 Task Force Police Liaison Officer to refer the complaint about you to a specific task force does not amount to less favourable treatment of you on the basis of your race.
>
> …
>
> In the circumstances I have decided to reject your complaint and we have closed our file. We will not take any further action in relation to your complaint."

[55] In response to that letter, the applicants made further submissions. They were informed by the ADCQ, in a letter of 23 November 2016, that a decision had been made to reject the complaint on the basis that it was "misconceived or lacking in substance under s 139 of the Act". So far as is relevant the letter stated:

> "In your complaint, you allege that race is the reason for the actions taken by the hospital in response to what the hospital staff perceived to be your unauthorised entry to the hospital on the morning of 4 April 2014 (hereinafter referred to as the "the incident").
>
> In your previous complaint lodged with the Commission on 8 February 2016, you complained that:
>
> 1. the hospital reported the incident to the Director of Emergency and Counter-Disaster Unit;

2. the hospital staff cooperated with police in their investigations including describing your appearance to the police;

3. the hospital reported the incident to the G20 Taskforce Queensland Police Service Liaison officer.

…

In your further complaint, you have provided numerous further documents that you have subsequently obtained including:

1. An email between David Evans (then Director of Medical Services at QEII hospital) and another person;

2. Copies of documents reflecting the investigation undertaken by the Princess Alexandra Hospital arising directly from your unauthorised entry on 4 April 2014.

You have made submissions that the documents you have provided are evidence that the decisions made and actions taken by the hospital amounted to unfavourable treatment of you on the basis of your race, and that people without your attribute of race would not have been treated the same way in similar circumstances.

You have submitted that there is now clear evidence that the hospital decided to refer the incident to the G20 taskforce.

You have submitted that previous communications in 2012 between Dr Jordan, then Acting Director of Medical Services, Princess Alexandra Hospital), and the Dean of the Bond University Medical School, Dr Richard Hays, during which your religion and place of schooling were noted, are also evidence that the actions taken by the hospital in response to the incident were due to your race.

After reviewing all of your further information, I am still of the view that your race was not a substantial reason for the alleged treatment.

The email from David Evans does not show that he was treating you unfavourably because of your race. He specifically states in the email that he does not know you. His high level of suspicion and concern appears to relate to the environment of high alert and security under which the hospital was then operating because of the G20. A reference to watching too many TV shows and considering he may have a 'ridiculously high level of suspicion' does not mean that his decisions were based on your race.

The documents you have provided regarding the hospital's investigation show that the actions taken by the hospital were taken as a direct result of the incident in the context of high security and high alert in preparation for the G20 later that year, and a royal visit on 19 April 2014.

In my letter to you dated 23 May 2013, I accepted that the hospital decided to report the incident to the G20 Taskforce Queensland Police Service

> Liaison officer. However I remain of the view that this did not relate to your race.
>
> You have also said that the information showing that the hospital contacted Nigel Johns, part of the Queensland Police Service Security and Counter-Terrorism Unit, shows that you were treated unfavourably because of your race. Again, in the heightened state of security and alert under which the hospital was operating at that time, this does not show that the hospital took this step because of your race. Irrespective of who initiated the contact with police, which department of the police the incident was reported to, and any inconsistencies about how this has been relayed to you, this does not amount to an allegation of discrimination. It appears the hospital reacted in the way they considered appropriate in the environment they were operating under in response to what they considered may be a serious security risk requiring investigation.
>
> A conversation between staff of Bond University and the Princess Alexandra Hospital in 2012 in which a notation was made of your religion and where you grew up does not mean that the actions taken by the hospital in response to the incident in April 2014, was because of your race.
>
> In the circumstances the Commissioner has rejected your complaint and we have closed our file. We will not take any further action in relation to your complaint."

[56] On 25 November 2016, a further letter was sent by the ADCQ which, so far as is relevant, stated:

> "I refer to my previous letter dated 23 November 2016 …
>
> You have pointed out in your email that my letter only referred to the attribute of race and has not referred to the attribute of religion as a basis for discrimination …
>
> I confirm that although I only specifically referred to the attribute of race in my letter, I have considered whether the complaint provides reasonably sufficient detail to indicate any alleged contravention of the *Anti-Discrimination Act* 1991 … including on the basis of any attribute under section 7 of the Act.
>
> For the same reasons set out in my letter of 23 November 2016 that I am of the view that you have not shown that you were not treated unfavourably because of your race, I am also of the view that you have not shown that you were treated unfavourably because of your religion. …"

[57] The applicants, relying upon their view of the test to be applied, argued that the Commissioner did not consider whether the applicants had no prospect of establishing, on the evidence that they had presented and that which might be found later, that the

reporting of the applicants to the police, and the counter-terrorism unit in particular, was done because of the applicants' race and religion, and that it would not have been done but for those attributes.

[58] The conclusion reached by the Commissioner was not affected by any error. Even if the extremely high standard advanced by the applicant were to be applied, there is still no evidence of direct discrimination or indirect discrimination. There was nothing to link the communication in 2012 which founded the complaint in BS1698/17 with anything that occurred in 2014. There was no evidence to link the actions of the hospital staff with any form of discrimination. There was ample evidence to conclude that the actions of the PAH staff were generated, not by the applicants' race or religion, but by their behaviour. The Commissioner found that there was no evidence to support a finding that race was a substantial reason for alleged treatment. This was supported by the statement of the man who initiated the complaint to the police – he did not know either of the applicants. The reasoning of the Commissioner was consistent with the requirements of the Act.

[59] It was advanced by the applicant that the Commissioner not only had to proceed on the basis that the evidence presented by the applicants would be established, but also had to consider whether they had no prospect of establishing evidence that might be found later. That formulation cannot be accepted. It would require the Commissioner to engage in an exercise of hypothesising entirely inconsistent with the requirement of forming a "reasonable opinion". Section 139 refers to the "complaint"; that is a set of allegations and supporting material which is fixed in time. It does not include evidence which is not known at the time of the complaint. If it were otherwise, then no complaint could be rejected because it is always possible to imagine circumstances which might establish discrimination.

Conclusions

[60] The application in BS1698/17 and BS1700/17 have been successful. The applicants sought orders that the ADCQ must accept the complaints. But, there is a question about whether the complaints were within time and that has yet to be considered.

[61] The application in BS510/17 is dismissed.

[62] I will hear the parties on the appropriate form of orders including costs. The applicants are to provide minutes of order within 10 days.