SUPREME COURT OF QUEENSLAND

CITATION:	*Toodayan & Anor v Anti-Discrimination Commissioner Queensland* [2018] QCA 349
PARTIES:	**NADEEM TOODAYAN** (first appellant) **ZAHEER TOODAYAN** (second appellant) **v** **ANTI-DISCRIMINATION COMMISSIONER QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 211 of 2018 SC No 510 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Miscellaneous Application – Civil
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 301 (Martin J)
DELIVERED ON:	14 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	14 May 2018
JUDGES:	Fraser and Philippides JJA and Burns J
ORDERS:	**1. The appeal is allowed.** **2. The decision of the delegate rejecting the appellants' complaint is set aside.** **3. There be no order as to costs.**
CATCHWORDS:	HUMAN RIGHTS – JURISDICTION AND PROCEDURE – QUEENSLAND – where the appellants worked as interns at the Princess Alexandra Hospital – where the appellants made complaints to the respondent alleging discrimination arising out of a police investigation and the related conduct of hospital staff – where a delegate of the respondent rejected the complaints on the basis that they were misconceived or lacking in substance under s 139(b) of the *Anti-Discrimination Act* 1991 (Qld) – where an application for judicial review was dismissed – whether the primary judge

erred by failing to find that the delegate applied the wrong test when rejecting the complaint under s 139(b) of the *Anti-Discrimination Act* 1991 (Qld) – whether the primary judge erred by finding that the evidence before the delegate did not establish a contravention of the *Anti-Discrimination Act* 1991 (Qld)

Acts Interpretation Act 1954 (Qld), s 24AA, s 27A(8)
Anti-Discrimination Act 1991 (Qld), s 6, s 7, s 9, s 10, s 134, s 136, ss 139 – 143, s 154A, ss 156 – 158, s 164, s 164A, s 166, ss 168 – 169, s 174A, s 174B, ss 175 – 193A, ss 204 – 208, s 244
Judicial Review Act 1991 (Qld), s 20(2)(f)

Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41, cited
Black & White (Quick Service) Taxis Ltd v Sailor & Anor [2008] QSC 77, cited
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232; [2005] QCA 227, cited
Langley v Niland [1981] 2 NSWLR 104, cited
R v Australian Broadcasting Tribunal & Ors; ex parte Hardiman & Ors (1980) 144 CLR 13; [1980] HCA 13, cited
Sharma v Legal Aid (Qld) [2002] FCAFC 196, cited
State Electricity Commission v Rabel & Ors [1998] 1 VR 102; [1996] VSC 78, cited

COUNSEL: N J Derrington for the appellants
J A Ball (*sol*) for the respondent
J M Horton QC appointed *amicus curiae*, as contradictor

SOLICITORS: Antigone Legal for the appellants
Anti-Discrimination Commission Queensland for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Burns J and the orders proposed by his Honour.

[2] **PHILIPPIDES JA:** I agree with the orders proposed by Burns J, for the reasons given by his Honour.

[3] **BURNS J:** The principal question raised on this appeal is whether the rejection of a complaint made by the appellants to the Anti-Discrimination Commission was affected by an error of law. The provision under which the complaint was rejected, s 139(b) of the *Anti-Discrimination Act* 1991 (Qld) (**ADA**), is in terms that compel that course if the anti-discrimination commissioner is of the reasonable opinion that the complaint is misconceived or lacking in substance.

[4] The appellants are twin brothers who were born in Brisbane to Afghani parents. They were raised in accordance with traditional Islamic values and identify as Muslim. When they were growing up, the family left Australia for Saudi Arabia for

some years, during which time the appellants completed their secondary education. They then returned to Australia to study medicine at Bond University and graduated in 2011. In January of the following year, both commenced work as medical interns at the Princess Alexandra Hospital, but the first appellant resigned in November 2013. The second appellant went on to complete his internship in January 2014.

[5] The appellants subsequently made four separate complaints to the Commission in which they alleged that they had been discriminated against by various persons on the basis of their race and religion in the course of, and subsequent to, their employment. Each was rejected by an authorised delegate[1] of the commissioner pursuant to s 139(b) ADA.

[6] Subsequently, four applications for a statutory order of review of those decisions under the *Judicial Review Act* 1991 (Qld) (**JRA**) were filed on behalf of the appellants.[2] One of those applications was not pursued,[3] two resulted in orders setting aside the particular decision because the delegate failed to take into account relevant considerations[4] and the remaining application was dismissed.[5] It is the order dismissing that application which is challenged on this appeal.

[7] The commissioner was represented on the hearing of the appeal but, consistently with the position taken in the court below, took no active part in advancing a case against the appellants and will abide the order of the Court.[6] Prior to the hearing of the appeal, Mr Horton QC was appointed as *amicus curiae* by the President and this ensured that the Court had the considerable benefit of his submissions in the role of contradictor.

Factual and procedural history

[8] In the early hours of 4 April 2014, the appellants returned to the Princess Alexandra Hospital. They used their still-active access cards to gain entry and then made their way to the colorectal unit. The second appellant worked at that unit during his internship, and the death of a young patient who had been under the care of the medical team of which he was a member was said to have profoundly affected him. He later gave this account as to the purpose of their visit:

> "My visit was intended as a personal reflective exercise to provide

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1 By s 244 ADA, the commissioner may delegate powers under the ADA to another person. And see s 27A(8) of the *Acts Interpretation Act* 1954 (Qld) which provides: "If, when performed or exercised by the delegator, a function or power is dependent on the delegator's opinion, belief or state of mind, then, when performed or exercised by the delegate the function or power is dependent on the delegate's opinion, belief or state of mind."

2 File numbers BS 509 of 2017, BS 510 of 2017, BS 1698 of 2017 and BS 1700 of 2017.

3 No BS 509 of 2017.

4 Nos BS 1698 of 2017 and BS 1700 of 2017.

5 File no BS 510 of 2017. See *Toodayan v Anti-Discrimination Commission Queensland* [2017] QSC 301.

6 The position taken by the commissioner accorded with established principle. See *R v Australian Broadcasting Tribunal & Ors; ex parte Hardiman & Ors* (1980) 144 CLR 13, 35-36.

> closure after the death. My brother Nadeem attended with me primarily for moral support, and also to return a library book and take pictures of certain historical medical posters we had earlier erected at the hospital."[7]

[9] Whilst there, the appellants accessed a computer to look at, and photograph, a pathology result for the deceased patient and took a number of additional photographs in the unit as well as the doctors' lounge. Their presence was challenged by a nurse on duty in the unit as well as by a security guard. Advice was then sought by the hospital from the Emergency Management and Counter Disaster Unit of the Department of Health following which the Queensland Police Service became involved, initially through what is described in material as the G20 Taskforce QPS Liaison[8] and then through the QPS Counter Terrorism Unit.

[10] On 8 May 2014, a search warrant was executed by members of the counter-terrorism unit at the appellants' home. Subsequently, they were charged with serious criminal offences and remanded in custody overnight until bail was granted on the following day. The charges were ultimately discontinued in April 2015 in favour of less serious offences to which the appellants pleaded guilty in the Magistrates Court. Each appellant was placed on a good behaviour bond and no conviction was recorded.

[11] The complaint which is the subject of this appeal was first made to the Commission on 30 September 2015. It named the hospital as the respondent. The appellants did not complain that their visit to the hospital was reported to the police; rather, their complaint was that their presence was reported to the G20 Taskforce QPS Liaison and then to the QPS Counter Terrorism Unit. In that regard they alleged that they had been discriminated against because of their race and religion, as follows:

> "We would like the PA Hospital to be held accountable for their initiation of, and participation/co-operation in a rigorous counter-terrorism investigation following our honestly mistaken visit to the hospital premises on 4th April 2014, after we were no longer employed at the facility.
>
> We allege that proceedings of this nature were not only extremely unnecessary but were highly, if not only, influenced by our appearance/race and religion.
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> …
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> We allege that discrimination occurred in the follow-up to our honestly mistaken visit to the PA Hospital on 04/04/14."[9]

[12] The complaint seems to have been accompanied by a copy of a lengthy letter sent to the chief executive of the hospital on the same day, in which an account of the

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7 Affidavit of Zaheer Toodayan filed on 8 May 2017, par 16 (ARB 182).

8 It is also referred to in places as the QPS Dignitary Protection Unit.

9 ARB 68-69.

events of 4 April 2014 and what followed was contained along with several other allegations of discrimination by staff of the hospital during the appellants' time as interns.[10]

[13] The complaint was in a form approved by the Commission. In the section entitled, "Details of your complaint", the following appeared:

> "Following our honestly mistaken, overwhelmingly innocent and entirely non-malicious visit to the PA Hospital on 4th April 2014, the hospital initiated and then co-operated in, an extremely unnecessary counter-terrorism investigation that included an inappropriate interest in religious radicalisation. The initial charges laid by police, which followed a prolonged period of consultation with hospital employees and officials, were incredibly serious, albeit unsubstantiated and later amended. In the absence of any direct correspondence to us from the hospital in relation to this matter, we are left with no alternative explanations for the severity of their proceedings other than multifaceted maladministration that was initiated and perpetuated by conscious and subconscious racial and religious discrimination. Further details pertaining to this complaint, including our long history of bullying at the institution, are included in the addended [sic] letter.
>
> This complaint is being made now (>12 months later) since our bail conditions required that we not initiate any contact with the PA Hospital. These ended with the resolution of the criminal matter in court in late April 2015. Since then we have both been heavily engaged with job applications and negotiations with a variety of individuals and organisations about how to best approach this matter."[11]

[14] By letter dated 6 November 2015, a delegate of the commissioner acknowledged receipt of the complaint but, after referring to the provision of the ADA that specifies how to make a complaint (s 136), this was said:

> "We cannot decide whether your complaint comes under the Act because you have not provided enough detail for us to consider accepting your complaint. If you have more information to show that your complaint should be accepted, please provide it to us within 7 days."[12]

[15] By way of response, the appellants lodged a second complaint with the Commission on 7 February 2016.

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10 Whether the letter to the chief executive was attached to the complaint is not clear, although it probably was. If not, it was certainly attached to the second complaint made by the appellants to the Commission on 7 February 2016 (ARB 82) and, in which, its significance was explained (ARB 94).

11 ARB 70.

12 ARB 73.

[16] By then, the chief executive of the hospital had responded to the appellants' letter of 30 September[13] and, in that response of 18 January 2016, made the point that, at the time of the appellants' visit on 4 April 2014, the hospital was "on high alert and preparing for the attendance of the Duke and Duchess of Cambridge on 19 April"[14] as well as being "on high alert in anticipation of the G20 meeting to be held later"[15] that year. The chief executive stated that the appellants' "unlawful entry and subsequent unlawful access to [the] computer systems was considered suspicious and advice was sought from the Director, Emergency Management and Counter Disaster Unit, Department of Health".[16] The chief executive then stated that, "[on] the Director's advice, your unlawful entry was escalated to the G20 Taskforce QPS Liaison" but maintained that the hospital "had no involvement in the decision of the QPS to assign the matter to the QPS Counter Terrorism Unit".[17]

[17] Be that as it may, the second complaint contained even greater detail than the first. In addition to the hospital, it named the Director, Emergency Management and Counter Disaster Unit, Department of Health as well as "unknown"[18] individuals from the G20 Taskforce as respondents. They complained that the "instigated investigation, which required the co-operation of PA Hospital staff and executives, was inappropriately focussed [sic] on religious radicalisation".[19] A number of annexures were attached to the complaint including a copy of the appellants' letter to the chief executive of 30 September 2015, his response of 18 January 2016 and the appellants' critique of that response. Seven handwritten pages of "details" were advanced by the appellants, including this:

> "In a recent (18/01/16) response ..., the PAH … outlined a sequence of decisions that followed which, given the overwhelmingly innocent, open and transparent nature of our visit, resulted in an unnecessarily intense and inappropriately focussed [sic] investigation by counter-terrorism police. For some reason (which we argue is our racial and religious affiliations), our actions were deemed to be so suspicious that our visit was immediately linked to an upcoming visit by the Duke and Duchess of Cambridge and the G20 event that was to be hosted in Brisbane later that year. On these grounds, the hospital has escalated the matter to the Director of the Emergency Management and Counter Disaster Unit of the Department of Health, who reportedly advised the hospital to refer the situation to the G20 taskforce QPS liaison officer, with which the hospital then proceeded.

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13 The chief executive's response was by letter dated 18 January 2016.

14 ARB 78.

15 Ibid.

16 ARB 79.

17 Ibid.

18 ARB 84.

19 ARB 86.

…

> On receiving the hospital's referral, the G20 Planning Unit had decided it was reasonable to allocate the matter to the Counter-Terrorism Unit. We feel this was an incredible inappropriate albeit revealing decision as it would not at all be far-fetched to claim that racial and religious factors would be given special consideration in allocating matters to a counter-terrorism group, especially in the absence of any specific evidence that may otherwise justify such a line of inquiry."[20]

[18] On 7 March 2016, the delegate forwarded a letter to the appellants that was, relevantly, in these terms:

> "It appears that there is insufficient information in the materials provided regarding the first allegation (reports and referrals following your visit on 4 April 2014) to indicate that you were discriminated against because of your religion. While you have beliefs and suspicions about the reasons for your treatment, the information you have provided when considered in conjunction with the explanations of the respondents is insufficient to connect the treatment with your religion.
>
> …
>
> A mere belief or suspicion is not enough without identifying something more from the circumstances surrounding your treatment to give rise to a reasonable inference of discrimination.
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> …
>
> Because of these outstanding questions, we cannot decide whether your complaint comes under the Act at this time. If you have more information to show that your complaint should be accepted, please provide it to us within 7 days."[21]

[19] On 24 March 2016, the appellants responded by letter. They claimed that the respondents to their second complaint "based their decisions to escalate the matter [in] the way they did, on … irrelevant grounds of our race and religion"[22] and then added:

> "That direct evidence … is apparently lacking, does not mean that illegal discriminatory behaviour can be ruled out considering the circumstances. This is because the outcomes engendered by each step of the escalation, cannot be otherwise accounted for. That is to say, there is simply no other reasonable explanation to link our

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20 ARB 88-89.

21 ARB 96-98.

22 ARB 99.

> honestly mistaken visit and overwhelmingly innocent actions on the day to involvement of the counter terrorism police/G20 Planning Unit in any way, shape, or form. A reasonable person would undoubtedly accept that discriminatory considerations (viz. our race and religion) contributed to this outcome …
>
> Additionally, it is manifestly obvious to us, that other people not belonging to our race and religion would never have been treated the way we were for our honest mistake. If say a Caucasian intern had made the same mistake we had in the same circumstances, we can very confidently assert that they would not have their homes searched by counter terrorism police forces; or have been referred to the G20 Planning Unit for that matter – especially if they openly conveyed the purpose for their visit as we did."[23]

[20] The delegate replied by letter on 12 April 2016 but, after stating that the appellants "must show a causal connection between [their] treatment and [their] race and/or religion",[24] determined that there was no "direct evidence"[25] to that effect or circumstantial evidence to reasonably support such an inference:

> "[There] is a possibility that race might have operated as a factor in the decision making, but that inference is based on supposition rather than on the materials provided to the Commission. It is a mere possibility, rather than a probable connection.
>
> I have examined the evidence that 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 your treatment to give rise to a reasonable inference of discrimination."[26]

[21] The appellants continued to agitate for acceptance of their complaint, by telephone and email. For example, on 20 May 2016, the first appellant emailed an officer of the Commission to clarify the status of the G20 Taskforce QPS Liaison and also to

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23 ARB 99-100. To be clear, the response continued beyond these passages to debate at length the observations expressed by the delegate in her letter of 7 March 2016.

24 ARB 107.

25 Ibid.

26 ARB 108.

"maintain that the decision of the hospital to politicise our overwhelmingly innocent mistake should be seen as reasonably inferable discrimination".[27] Three days later (23 May 2016), the delegate forwarded a letter to the appellants in terms formally rejecting their second complaint. After discussing the merits of the complaint, the delegate stated:

> "I am of the reasonable opinion that your complaint does not provide sufficient details to indicate that your race was ...[28] 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 Taskforce Police Liaison Officer to refer the complaint about you to a specific taskforce does not amount to less favourable treatment of you on the basis of your race.
>
> I understand that this is a very difficult situation for you and continues to cause you distress. Unfortunately the allegations are not covered by the Act and so we have no power to deal with them.
>
> 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."[29] [Emphasis in original]

[22] Undeterred by the rejection of their second complaint, the appellants lodged a third and final complaint with the Commission on 14 September 2016. It was made with the benefit of a copy of some internal emails forwarded during the currency of their internship[30] along with "Incident Notes",[31] "PAH Incident Triage Meeting" minutes[32] and various other "Meeting Notes"[33] referable to the 4 April 2014 incident and its follow-up which they had obtained, although a request of the hospital for the provision of a copy of their personnel files was outstanding. Amongst the "details" provided in support of their complaint was the following:

> "We have previously submitted a complaint about the same matter …, but after quite some deliberation, that complaint was declined by the [Commission] on grounds of insufficient evidence. At the time, we decided to pursue obtaining further information from the hospital (our personal files) and to await the decision of the Queensland Ombudsman who was also involved. Although the hospital have not

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27 ARB 114.

28 The word "not" has been omitted. The inclusion of that word in the delegate's response must have been in error.

29 ARB 117.

30 ARB 118-121.

31 ARB 141-142.

32 ARB 143-146.

33 ARB 147-154.

yet provided any information to us, we have recently acquired (1st September 2016) some information through alternative proceedings relating to the hospital. The following points outline the major concerns that we feel are substantiated by this new information:

1. It is clear from the documentation that hospital executives gave inappropriate consideration to our religion from the very early days of our internships (see e-mail dated 31 January 2012 from [a named doctor] to medical eduction [sic] unit staff). Since these executives were essentially the same people who initiated the counter-terrorism investigation following our visit on 4th April 2014, it can be reasonably inferred that similar (if not the same) discriminatory considerations contributed towards the inappropriate politicisation of our visit. Meeting records indicate that the attending police officers were provided with a 'comprehensive background' of us. Given the executives' previously documented discriminatory views, we can infer that information pertaining specifically to our race and religion was likely included in these exchanges (comments on our background, religion, and upbringing in Saudi Arabia were included in the 'psychological report' of Nadeem which was handed over to police). This would explain why the police then followed through with evaluating us for risk of religious radicalisation during the search warrant interview on 8th May 2014 (this was subject of a previous referral to [the Commission]).

2. When we initially complained about the Hospital's response to our visit, they gave a quite misleading and apparently incorrect account of the chain of events that led to this politicisation. In a letter signed on 18th January 2016 …, the hospital denies that they had anything to do with the decision to refer the matter to the G20 planning unit and attributes this decision to the QPS and the Director of Emergency Management and Counter-Disaster unit at the Department of Health. However, it is very clear from the internal files that it was in fact entirely the hospital chief executive's … own decision to politicize our honest mistake and to follow through with this quite inordinate line of persecution. From the recorded information, it appears the QPS and Director had nothing to do with this decision. Further, the G20 Planning Unit were also not explicitly involved in the decision to allocate the matter to counter-terrorism police, as previously suggested by the hospital. Rather it is quite clear that the hospital directly contacted an officer … who was part of the security and counter-terrorism unit. Given this clarification about the nature of the escalation, being entirely a result of the decision of hospital executives (chiefly [the chief executive]), the Director from the Department of Health and individuals from the G20 Planning Unit (QPS) are no longer included as respondents in this matter and the sole respondent is now the PA Hospital.

In regards to the manifestly misleading account of events provided to

> us by the hospital, we have previously advised the [Commission] about a conflict of interest in relation to [the chief executive's] involvement in this matter. Nonetheless, the explanations given in his letter were heavily relied upon for the [Commission's] previous declinature. As we can now prove that crucial aspects of the explanations put forward in that correspondence were largely false, we ask the [Commission] to take this important point into consideration when re-evaluating our complaint.
>
> 3. During the executives' initial meetings with police, much consideration was given to entirely irrelevant issues (e.g. comment on length of beards; ostensibly a reference to our perceived religiosity; lengthening the beard is observed by 'devout Muslims') whereas considerations of relevant facts was demonstrably insufficient. Should due consideration have been given to all the facts relating to our visit, it would have become very clear that the line of escalation was entirely unnecessary. This is partly proven by the court outcome in April 2015, wherein the initial charges were formally discontinued.
>
> Once we had received that above given information, we relayed these concerns in a letter to the QLD Ombudsman (dated 8 September 2016) as we felt this information would substantiate our claim of maladministration against the hospital. We received a response from the Ombudsman (letter dated 9th September 2016) in the mail today (14th September 2016) advising us that since our underlying concern about the hospital's conduct relates chiefly to discrimination, it would be more appropriate for the [Commission] to investigate all our matters before the Ombudsman will consider resuming its investigation – the idea was to avoid duplication. Please see the attached letter from the Ombudsman in relation to this. After receiving the letter, we … were advised to re-present our newfound concerns (and evidence) to the [Commission] for reconsideration of this issue.
>
> Given this additional information, and the postponement of the Ombudsman's investigation until the [Commission's] determination over our matter, we would like the [Commission] to reconsider our concerns about discrimination relating to the hospital's response to our visit on 4th April 2014. We believe that discrimination (due to inappropriate consideration of our racial and/or religious affiliations) can be reasonably inferred from the circumstances to which all this information relates (a counter-terrorism investigation with considerable focus on religious radicalisation)."[34]

[23] On 25 September 2016, the appellants wrote again to the Commission. They

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34 ARB 128-130.

enclosed a copy of another internal email forwarded by one of the hospital's doctors on 4 April 2014 which they had obtained to support their complaint, although they recorded that they had been refused "access to a substantial number of other documents" by the hospital's Information Access Unit.[35]

[24] By letter dated 23 November 2016, the delegate rejected the appellants' third complaint. Relevantly, he stated:

> "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 [the doctor] 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 [sic, 2016], 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 [a named person], 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.
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> A conversation between staff of Bond University and the Princess Alexandra Hospital in 2012 in which a notation was made of your

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35 ARB 171-173.

> 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."[36]

[25] Following receipt of that letter, the appellants made contact with the Commission to draw attention to the feature that it did not refer to the attribute of religion as a basis for the discrimination about which they had complained. A follow-up letter from the delegate two days later (25 November 2016) sought to clarify the matter:

> "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 [ADA], 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 …[37] 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. I am of the view that your complaint is lacking in substance under section 139 of the Act and your complaint has been rejected."[38]

[26] On 16 January 2017, the appellants filed an application for a statutory order of review of the delegate's decision. The application was amended by leave when it came on for hearing before the primary judge.[39] By the amended grounds of review, the appellants contended that the delegate applied the wrong test to determine whether their complaint was misconceived or lacking in substance and this, they maintained, amounted to a reviewable error of law within the meaning of s 20(2)(f) JRA.

[27] In support of their application, the appellants argued that, on a proper construction of s 139(b) ADA, a high standard is to be applied before a reasonable opinion may be formed that a complaint is misconceived or lacking in substance. This, they submitted, was because the decision under review amounted to a summary dismissal of their complaint and, for that reason, the standard ought to be considered analogous to that which is required to be met in order to strike out or summarily

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36 ARB 177-178.

37 Again, the word "not" has been omitted, it being apparent that the inclusion of that word in the delegate's response must have been in error.

38 ARB 179.

39 ARB 2 and 202-207.

dismiss a civil claim.[40] Thus, they argued, a complaint will be "misconceived" if it does not properly allege a contravention of the ADA or "lacking in substance" if it is hopeless or has no real prospect of ultimately proving the facts on which it relies to make out the alleged contravention.[41] The appellants submitted that their complaint could not be characterised in either of these ways and therefore should not have been rejected. Instead of applying the correct test, the delegate wrongly embarked on an assessment of whether the material before him established a contravention under the ADA.[42] That, the appellants submitted, was an error.

[28] The primary judge did not agree. In particular, his Honour found that, even if the test contended for by the appellants was to be applied, there was "no evidence to link the actions of the hospital staff with any form of discrimination" and "ample evidence to conclude that the actions of the [hospital] staff were generated, not by the [appellants'] race or religion, but by their behaviour".[43] His Honour otherwise endorsed the finding of the delegate to the effect that there was no evidence to support a finding that the appellants' race or religion was "a substantial reason"[44] for the treatment about which they complained.

[29] The appellants filed their Notice of Appeal on 8 January 2018. A number of different grounds were advanced, and some in different ways, but it is unnecessary to consider all of them. Their essential grievances were that the primary judge erred by failing to find that the delegate applied the wrong test when rejecting their complaint[45] and by going on to find that the evidence before the delegate did not establish a contravention of the ADA.[46]

The scheme of the Act

[30] Before considering whether the delegate's approach to the application of s 139(b) ADA was in error, it is useful to outline the relevant features of the statutory scheme.

[31] The principal purpose of the ADA is to "promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation": s 6(1). That purpose is intended to be achieved through the operation of various provisions contained in Parts 2, 3 and 4 of Chapter 2 but, in essence, discrimination on the basis of any one of a number of attributes specified in s 7 is prohibited. A person who unlawfully discriminates in

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40 As to which, see *Agar v Hyde* (2000) 201 CLR 552, 575-576; *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, [3].

41 Submissions of the Applicants filed on 28 August 2017, par 37 (ARB 219).

42 Ibid, par 122(c) (ARB 248). And see transcript of proceedings at first instance (28 August 2017), 1-5, 1-7, 1-14 to 1-16, 1-21 (ARB 5, 7, 14-16, 21).

43 See *Toodayan v Anti-Discrimination Commission Queensland* [2017] QSC 301, [58].

44 Ibid.

45 Grounds 1 and 3(b).

46 Ground 2.

this sense contravenes the ADA.[47]

[32] Among the attributes specified in s 7 are "race"[48] and "religious belief or religious activity".[49] The terms "race", "religious activity" and "religious belief" are defined in the dictionary schedule:

> "***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."

[33] Two types of discrimination are prohibited under the ADA – direct discrimination and indirect discrimination: s 9. Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different: s 10(1). It is not necessary that the person who discriminates considers that the treatment is less favourable (s 10(2)) and the person's motive for discriminating is irrelevant (s 10(3)). If there are two or more reasons why a person treats a person with an attribute less favourably, the conduct is direct discrimination if the attribute is a "substantial reason" for the treatment: s 10(4).

[34] Chapter 7 is concerned with enforcement. Section 134 provides for the making of a complaint to the commissioner about an alleged contravention by, relevantly, the "person who was subjected to the alleged contravention".[50] Section 136 sets out what is required:

> "**136 Making a complaint**
>
> A complaint must—
>
> (a) be in writing; and
>
> (b) set out reasonably sufficient details to indicate an alleged contravention of the Act; and
>
> (c) state the complainant's address for service; and

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47 A "contravention", in relation to the ADA, is defined to include "unlawful discrimination": Dictionary (Schedule) to the ADA.

48 Section 7(g).

49 Section 7(i).

50 Section 134(1)(a).

(d) be lodged with, or sent by post to, the commissioner."

[35] Section 139 is in these terms:

"**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."

[36] The commissioner must decide whether to accept or reject a complaint within 28 days of its receipt and then promptly notify the complainant: s 141. If a complaint is rejected, it lapses, and the complainant is not entitled to make a further complaint relating to the act or omission that was the subject of the complaint: s 142(1)).[51] Reasons may be requested by the complainant: s 142(2). If a complaint is accepted, the commissioner must notify the respondent of the substance of the complaint and invite a written response: s 143.

[37] A complaint may be investigated by the commissioner at any time after it is received (s 154A) and power is conferred on the commissioner to obtain information, documents and data relevant to the investigation (ss 156 and 157). Where the commissioner believes that a complaint may be resolved by conciliation, the commissioner must try to resolve it in that way: s 158. If a complaint is not referred to conciliation, or is not resolved following an attempt at conciliation, the complainant may then require it to be referred to the tribunal: ss 164A, 166. For a complaint that is or includes a work-related matter, the tribunal is constituted by the Queensland Industrial Relations Commission but, for all other types of complaint, it is constituted by the Queensland Civil and Administrative Tribunal.[52] When a complaint is referred, the tribunal's function is to hear and decide it: ss 174A and 174B. To facilitate the performance by the tribunal of that function, the ADA provides for a number of pre-hearing procedures[53] and then, for the hearing, makes clear that it is for the tribunal to decide, after an evaluation of the evidence, whether the respondent contravened the ADA.[54]

[38] Lastly, s 168 provides for the rejection of a complaint by the commissioner after it has been accepted but prior to it being referred to the tribunal:

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51 Despite this provision, it would be open to the commissioner to repeal a decision and in that way allow the complaint to be reconsidered or to enable a fresh complaint to be filed (see *Acts Interpretation Act* 1954 (Qld), s 24AA), and that appears to be what was successively done in this case.

52 Sections 164(2) and 166(1). And see the definition contained in the Dictionary (Schedule) to the ADA.

53 In Division 1 of Part 2 of Chapter 7 (ss 175-193A).

54 See Division 2 of Part 2 of Chapter 7 (ss 204-208). The general principle is that it is for the complainant to prove, on the balance of probabilities, that the respondent contravened the Act (s 204), although there are exceptions. See ss 205 and 206.

"**168 Frivolous etc. complaint lapses**

(1) This section applies if, at any time after a complaint is accepted and before it is referred to the tribunal, the commissioner is of the reasonable opinion that the complaint is—

(a) frivolous, trivial or vexatious; or

(b) misconceived or lacking in substance.

(2) The commissioner must tell the complainant in writing that, unless the complainant is able to show to the commissioner's satisfaction within 28 days that the complaint is not frivolous, trivial, vexatious, misconceived or lacking in substance—

(a) the complaint will lapse; and

(b) if the complaint lapses, the complainant can not make a further complaint relating to the act or omission that was the subject of the complaint.

(3) If, at the end of 28 days, the commissioner is of the reasonable opinion that the complaint is—

(a) frivolous, trivial or vexatious; or

(b) misconceived or lacking in substance;

the commissioner must write to the complainant and respondent as soon as practicable to tell them that the complaint has lapsed.

(4) The complaint then lapses, and the complainant can not make a further complaint relating to the act or omission that was the subject of the complaint."

[39] There are other provisions of the ADA that may be engaged to reject, stay or lapse complaints where the complaint is, or has been, the subject of a proceeding in a court or tribunal (ss 140 and 168A) or where the complainant appears to "lose interest" (ss 160(1) and 169). However, those provisions aside, the only power to reject or lapse a complaint because it is frivolous, trivial, vexatious, misconceived or lacking in substance arises under ss 139 and 168.

Consideration

[40] As s 136(b) ADA provides, a complaint must set out "reasonably sufficient details to indicate an alleged contravention". There is no requirement at the lodgement stage to support a complaint with evidence, although that no doubt commonly occurs to varying degrees. When the complaint is supplemented with supporting material, that material will of course also form part of the details to be considered by the commissioner. Furthermore, on receipt of a complaint, the commissioner may request further information or documents and such a request may extend to a request of the complainant for supporting evidence in order to assist in the

formation of the opinion required under s 139(b), although there will be limited time to do so because the commissioner must decide whether to accept or reject a complaint within 28 days of its receipt. But, however the complaint is constituted and whatever the commissioner does after it is received, it is plain that the obligation on the part of the complainant at this early stage does not extend beyond the provision of *reasonably sufficient* details to *indicate* a contravention.

[41] It is also to be observed that, although the statutory test is expressed in the same way, s 139 operates differently to s 168. In the first place, s 168 will only be engaged after the complaint has been accepted, a written response has been invited from the respondent and any attempt at conciliation has taken place. In addition, the commissioner may by that stage have investigated the complaint. Because such a complaint will already have been accepted under s 141 following consideration by the commissioner whether it was, relevantly, misconceived or lacking in substance, s 168 will only be engaged where something has emerged, either from the respondent or from the investigation, to change the commissioner's opinion. But, even more importantly, if under s 168(1) the commissioner forms the reasonable opinion that the complaint is, relevantly, misconceived or lacking in substance, the complainant must show cause to the commissioner's satisfaction why that is not so to avoid the complaint lapsing under s 168(4) whereas, under s 139, there is no onus on the complainant to prove anything.

[42] The nature of the commissioner's task under s 139(b) is informed by these statutory features as well as the protective purpose of the legislation.[55] A complaint cannot be expected to "allege the relevant facts with the particularity of an indictment or of a pleading".[56] Nor should it be assumed that the details supplied are comprehensive or that they aspire to do any more than indicate what is intended to later be proved to establish the complaint. Thus, when forming an opinion under that provision, the question for the commissioner is whether the details provided in and with the complaint, if proved at a hearing of the tribunal, are indicative of a contravention that is neither misconceived nor lacking in substance. A complaint will be "misconceived" if it is based on a false conception or notion such as an allegation of discrimination on the basis of an attribute that is not protected by the ADA and "lacking in substance" where the detail provided in the complaint fails to point to conduct on the part of the named respondent that is capable, if proved, of amounting to a contravention under the ADA. Obviously, because rejection will deprive the complainant of a hearing, it must clearly appear that the complaint is misconceived or lacking in substance before the requisite opinion may reasonably be formed.

[43] Often, a conclusion of discrimination will only arise as a matter of inference.[57] So, in the absence of direct proof, the commissioner will need to consider whether the details provided in and with the complaint are indicative of circumstances that, if ultimately proved, are capable of supporting such an inference. However, where more than one inference is reasonably open on the indicated circumstances, it is not

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55 Section 6(1) ADA. And see *Black & White (Quick Service) Taxis Ltd v Sailor & Anor* [2008] QSC 77, [36].

56 *Langley v Niland* [1981] 2 NSWLR 104, 108. And see: *State Electricity Commission v Rabel & Ors* [1998] 1 VR 102, 116-117; *Black & White (Quick Service) Taxis Ltd v Sailor & Anor* (Ibid), [32].

57 See *Sharma v Legal Aid (Qld)* [2002] FCAFC 196, [40].

for the commissioner when forming an opinion under s 139 ADA to decide which inference is more probable; that is a matter within the exclusive province of the tribunal.

[44] Plainly, it is no part of the commissioner's functions under the ADA to decide the complaint, but that appears to be what the delegate did in this case.

[45] The appellants complained of direct discrimination. Prominent among the details contained in each of their three successive complaints was the allegation that their race or religion was, at the least, a substantial reason for the initiation of a counter terrorism investigation into their conduct.[58] That they had been treated less favourably than other persons who were not of their race or religion was at the heart of their grievance. There being no direct proof of discrimination on the basis of either attribute, the acceptance or otherwise of the appellants' allegations was always going to depend on the drawing of inferences to the effect alleged. It is also to be observed that the appellants' complaint was not finally rejected because it was misconceived; rather, it was rejected because the delegate was of the opinion that it was "lacking in substance".[59]

[46] In the course of rejecting the first two complaints, the delegate reasoned that:

(a) the appellants' "beliefs and suspicions about the reasons for [their] treatment" when considered alongside the "explanations of the respondents" were "insufficient to connect the treatment with [their] religion";[60]

(b) while there was "a possibility that race might have operated as a factor in the decision making", such an "inference [was] based on supposition rather than on the materials provided to the Commission" and, in the delegate's view, "a mere possibility, rather than a probable connection" was insufficient to make out a contravention;[61]

(c) any inference of discrimination could not "reasonably be based on the evidence";[62]

(d) the "evidence … is scant and does not establish a probable connection between the actions of the hospital or the police and [their] race and/or religion;[63] and

(e) the "complaint does not provide sufficient details to indicate that [the appellants'] race was … a substantial reason for the decisions made by the hospital, or that those decisions amounted to less favourable treatment of [the

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58 See: Complaint dated 30 September 2015 (ARB 68-69 and 70); Complaint dated 7 February 2016 (ARB 88-89); Complaint dated 14 September 2016 (ARB 128-130).

59 Letter from the delegate dated 25 November 2016 (ARB 179).

60 Letter from the delegate dated 7 March 2016 (ARB 96-97).

61 Letter from the delegate dated 12 April 2016 (ARB 108).

62 Ibid.

63 Ibid.

appellants] on the basis of [their] race."[64]

[47] It will be seen from the reasoning extracted in the preceding paragraph that, although it was accepted to be possible to infer from the circumstances detailed by the appellants that their race or religion "might have operated as a factor" in the "decision making" of the hospital, the delegate regarded such an inference as improbable. Because of that, the delegate concluded that the appellants could not establish a sufficient "connection" between those circumstances and an inference of discrimination to make out a contravention under the ADA.

[48] Similar reasoning was supplied by the delegate for the decision to reject the appellants' final complaint dated 14 September 2016, that is to say, the decision under review. In support of that complaint, the appellants provided the Commission with a copy of the emails, minutes and notes from the hospital to which reference was earlier made (at [20]). The contended significance of that material was detailed in the complaint. Then, under cover of a letter dated 25 September 2016, the appellants forwarded a copy of an email sent by one of the hospital's doctors on 4 April 2014 to give further support to their complaint. In both the complaint and the subsequent covering letter, the appellants made the point that they were still awaiting a response from the hospital to their request for "access to a substantial number of other documents".[65]

[49] Notwithstanding the provision of this additional material, the delegate again expressed the opinion that the details provided were insufficient to indicate that the appellants' race or religion was a substantial reason for the decisions made by the hospital, or that those decisions amounted to less favourable treatment of them on the basis of their race or religion.[66] To the point, the delegate determined that the appellants had not "shown" otherwise.[67] In the course of doing so, the delegate expressed a number of conclusions:

(a) the material did "not show" that the appellants had been discriminated against;[68]

(b) nor did it "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";[69]

(c) given "the heightened state of security and alert under which the hospital was operating", the fact that the QPS Counter Terrorism Unit was contacted "does

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64 Letter from the delegate dated 23 May 2016 (ARB 117).

65 Complaint dated 14 September 2016 (ARB 128); Letter from the appellants to the Commission dated 25 September 2016 (ARB 171-173).

66 Letters from the delegate dated 23 November 2016 (ARB 176-178) and 25 November 2016 (ARB 179).

67 Letter from the delegate dated 25 November 2016 (ARB 179).

68 Letter from the delegate dated 23 November 2016 (ARB 176-178)

69 Ibid.

not show" that the appellants were discriminated against;[70] and

(d) a conversation between staff of Bond University and the hospital in 2012 in which the appellants' religion was recorded in notes of that conversation did "not mean that the actions taken by the hospital in response to the incident in April 2014" were discriminatory.[71]

[50] It is apparent that the delegate approached the task under s 139(b) ADA as though the detail contained in, with and subsequent to the complaint was comprehensive of the matters relied on by the appellants to support an inference of discrimination. That was not only the wrong approach in circumstances where the appellants had expressly advised the Commission that they had made requests for potentially relevant material from the hospital that were still outstanding, but also because s 139(b) requires no more of a complainant than to provide reasonably sufficient details to indicate a contravention. The correct approach should have been to reach an opinion as to whether the details were indicative of a contravention that was not, relevantly, lacking in substance. Furthermore, although it was accepted that the details provided by the appellants were sufficient to support an inference of discrimination, the delegate erroneously embarked on an evaluation of the available competing inferences – one that would support the contravention about which the appellants complained and one that would not – before deciding that the former was only a "mere possibility" and that the latter was not only the preferred inference but that it provided the explanation for why a counter terrorism investigation was initiated.

[51] Of course, it should not be thought that s 139(b) does not require an evaluation of the substance of each complaint; it does. Indeed, there might be some irremediable defect in the chain of reasoning or logic behind a complaint or some incurable gap in the evidence that might be gathered in support of it that makes it clear that there can be no substance in it, but where, as here, the details provided are indicative of circumstances that, if ultimately proved, are capable of supporting a conclusion of discrimination under the ADA it cannot reasonably be concluded that the complaint lacks substance.

[52] It follows that the appellants' contention before the primary judge that the delegate applied the wrong test when rejecting their complaint must be accepted as correct. It is not however entirely correct to contend, as the appellants did in this Court, that his Honour failed to make such a finding. To the contrary, by the submissions that were then made,[72] his Honour was drawn into an inquiry as to whether there was an incurable defect in the evidence that might be gathered to support the finding of facts on which an inference of discrimination could be based whilst, at the same time, being prepared to assume that "the extremely high standard"[73] advanced by the appellants was to be applied. As it was, his Honour was right in my respectful view to hold that the statutory test was not to be glossed in the ways then contended

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70 Ibid.

71 Ibid.

72 ARB 22-26.

73 *Toodayan v Anti-Discrimination Commission Queensland* [2017] QSC 301, [58].

on behalf of the appellants (because s 139(b) means what it says) but, unfortunately, the court's attention was not directed to all of the evidence that was before the Commission to support an inference of discrimination,[74] and certainly not in the thorough way in which that was done in this Court.[75] I have little doubt that, had that occurred, the primary judge would not have found that there was an absence of such evidence, let alone endorsed the delegate's conclusion in that regard.

Conclusion and proposed orders

[53] For these reasons, the appeal should be allowed.

[54] The decision of the delegate rejecting the appellants' complaint should be set aside.

[55] Because the respondent took no active part in the appeal, there should be no order as to costs.

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74 ARB 22-26.

75 See: Appellants' Amended Outline of Argument on Appeal, pars 29 and 30.