# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Hart v Anti-Discrimination Commission Queensland & Anor* [2011] QSC 319 |
| PARTIES: | **IRENE HART**<br>(applicant)<br>**v**<br>**ANTI-DISCRIMINATION COMMISSION QUEENSLAND**<br>(first respondent)<br>and<br>**STATE OF QUEENSLAND**<br>(second respondent) |
| FILE NO: | BS 2291 of 2011 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application for judicial review |
| ORIGINATING COURT: | Supreme Court of Queensland |
| DELIVERED ON: | 2 November 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 17 October 2011 |
| JUDGE: | Daubney J |
| ORDERS: | **1. The application is dismissed;**<br>**2. The applicant shall pay the second respondent's costs of and incidental to the application.** |
| CATCHWORDS: | ADMINISTRATIVE LAW – JUDICIAL REVIEW – PROCEDURE AND EVIDENCE – EXTENSION OF TIME – GENERALLY – where the applicant applied pursuant to the *Judicial Review Act* 1991 (Qld) for a statutory review of a decision under s 138(2) of the *Anti-Discrimination Act* 1991 (Qld) - where a decision by the Deputy Commissioner of the Anti-Discrimination Commission was made to refuse to accept the applicant's complaints which were made outside of the time limit – whether the decision was infected by jurisdictional error – whether the Deputy Commissioner failed to take a relevant consideration into account in the exercise of the power<br><br>ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURTS UNDER JUDICIAL REVIEW LEGISLATION – OTHER ORDERS – where the applicant sought that the Court exercise its discretion to order that the applicant only bear it's own costs – where an applicant may |

apply under s 49(1)(e) of the *Judicial Review Act* 1991 (Qld) for an order that the applicant bear it's own costs of the proceeding regardless of the outcome – where the Court is required to consider the factors in s 49(2) of the *Judicial Review Act* 1991 (Qld) - whether the proceeding involved issues affecting or which may affect the public interest

*Anti-Discrimination Act* 1991 (Qld), s 136, s 138
*Industrial Relations Act* 1999 (Qld), s 74
*Judicial Review Act* 1991 (Qld), s 21(2)(e), s 23(b), s 49
*Migration Act* 1958 (Cth), s 198A

*Borden v Walters* [1999] QSC 226, cited
*Buderim Ginger Ltd v Booth* [2003] 1 Qd R 147, cited
*Craig v South Australia* (1994-1995) 184 CLR 163, cited
*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985-1986) 162 CLR 24, considered
*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, cited
*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, cited
*Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 280 ALR 18, considered
*R v Australian Broadcasting Tribunal & Ors; ex parte Hardiman & Ors* (1980) 144 CLR 13, cited

COUNSEL: K F Watson for the applicant
J A Ball *(sol)* for the first respondent
C J Klease for the second respondent

SOLICITORS: Julie Ball, Anti-Discrimination Commission Queensland for the first respondent
McCullough Robertson Lawyers for the second respondent

[1] The applicant has applied pursuant to the *Judicial Review Act* 1991 (Qld) ("*JRA*") for a statutory order of review in respect of a decision under s 138(2) of the *Anti-Discrimination Act* 1991 (Qld) ("*ADA*"). The decision, which was made by the Deputy Commissioner of the first respondent, amounted to a refusal to accept complaints made by the applicant under the *ADA* after the expiration of one year of the alleged contraventions of the *ADA* on the basis that the applicant had not shown good cause. The first respondent is the Anti-Discrimination Commission Queensland ("ADCQ"), which quite properly indicated its intention not to take an active part in the application, other than in relation to any submissions on the Commission's powers and procedures that might assist the Court.[1] The second respondent, acting through Queensland Health, opposed the present application.

**Background**

[2] On 13 March 2006, the applicant filed a "complaint form" with the ADCQ. In response to the question "Who do you think has discriminated against you, sexually harassed you or publicly vilified you because of your race, religion,

1 *R v Australian Broadcasting Tribunal & Ors; ex parte Hardiman & Ors* (1980) 144 CLR 13.

gender, identity or sexuality?", the applicant identified the Gold Coast Hospital and two individuals employed at the Gold Coast Hospital. Under the heading "Type of complaint", the applicant identified discrimination because of impairment, and particularised her impairment as "whiplash injury neck adjustment disorder depression". In response to the question "Do you think you have been victimised because you complained about discrimination, sexual harassment or public vilification?", the applicant ticked "Yes". The applicant provided some further details in the forms including that the discrimination of which she complained had been ongoing for more than 12 months. In response to the question "Do you have a case in the Industrial Relations Commission (IRC) or any court or tribunal about anything included in this complaint?", the applicant answered "Yes unfair dismissal", and stated that her solicitor had the documents relating to that case.

[3] The applicant appended a statement to this claim form in which she set out a history of her complaints. She complained about her treatment at the hands of the hospital's manager of medical records, alleging that she had been denied opportunities for promotion and training by that person and that matters had progressively got worse "from 2003 onwards". She referred to having had a car accident on 4 June 2003 (this date appears to be mistaken) and to suffering a whiplash injury to the neck. Her father then died. When she returned to work she received an email about her work performance.

[4] On 24 March 2006, a delegate of the Anti-Discrimination Commissioner wrote to the applicant in the following terms:

> "Dear Ms Hart
>
> **RE: YOUR COMPLAINT**
>
> Thank you for sending us your complaint.
>
> Under section 136 of the *Anti-Discrimination Act 1991*, a complaint must set out reasonably sufficient details to indicate an alleged breach of the Act.
>
> Your complaint does not appear to come under the Act because you have not shown that Ms Holman or Ms Hinze treated you unfavourably *because of* your impairment. Nor have you shown that the respondents set a workplace *term* or *condition* that disadvantaged you because of your impairment. In terms of victimisation, you do not claim that either respondent treated you poorly because you alleged that they were discriminating against you.
>
> Many of the allegations in your complaint speak of bullying and harassing behaviour by the respondents. Whilst I do not doubt that such behaviour is distressing, unless it can be linked to your impairment, the bullying can not be accepted as discrimination. To complain of workplace bullying, you need to contact the Division of Workplace Health and Safety on 1300 301 147.
>
> I hope this information is helpful to you. If you have any questions please contact Tom Lipscomb on 3247 0916"

[5] On 1 May 2007, the applicant filed a further complaint form with the ADCQ. In the interim, the applicant had pursued relief pursuant to s 74 of the *Industrial Relations Act* 1999 (Qld) against the second respondent in the Industrial Relations

Commission, contending that her dismissal from employment on or about 11 November 2005 was unfair. It seems that the hearing of that application in the Industrial Relations Commission occupied some seven days, and on 28 February 2007 the Industrial Relations Commission released a decision which dismissed her application. The applicant appealed against that decision of the Industrial Relations Commission to the Industrial Court of Queensland, and on 20 August 2007, the Industrial Court allowed the appeal and called for further submissions on the compensation to be paid to the applicant.

[6] In any event, the complaint filed with the ADCQ on 1 May 2007 again named the Gold Coast Hospital and a number of individuals employed at the Gold Coast Hospital. The complaint specified discrimination because of impairment, and the applicant stated "depression and whip lash injury" as the impairment she suffered. In this form, she answered "No" to the question as to whether she had been victimised. Under the heading "Part E – Additional details", the applicant said that the discrimination had occurred more than 12 months ago. In this form, however, in response to the question "Do you have a case in the Queensland Industrial Relations Commission (QIRC), Australian Industrial Relations Commission (AIRC) or any court or tribunal about anything included in this complaint?", the applicant "No".

[7] The applicant appended to this form a schedule which gave further details of the matters of which she complained. That schedule commenced:

> "Why Complaint Should be Accepted on the Grounds of Being Out of time
>
> See the following point for consideration:
>
> - I was unaware of the possibility of an Anti Discrimination complaint.
> - I was actively pursuing remedies concerning my workplace issues including an unlawful dismissal. Had a 7 day hearing in November/December 2006, as well as a WorkCover claim and appeal.
> - As I am a lay person without legal training and knowledge of Anti Discrimination legislation, I was relying upon others to guide me.
> - I have suffered reactive depression since January 2005. I have included a medical certificate to support this.
> - Bruce Simmonds, Solicitor, told me in March 2007, that I may have a case for discrimination and told me to seek advice. I was also not informed by other legal representatives and by the Union who had been involved in my ongoing matters.
> - If my complaint is not accepted because it is out of time, I would lose the right to lodge a complaint with the Anti Discrimination Commission Queensland or the Human Rights Equal Opportunity Commission.
> - My case is highly documented through the records of the Queensland Industrial Relations Commission action, as well letters, emails and diary entries, so the memory of individuals are not sole or determinative factors in deciding my case."

[8] Further in that schedule, and under the heading "Direct Discrimination", the applicant stated that because of her impairment she was treated differently to other employees and was being excessively scrutinised by superiors. She further contended:

> "Legitimately, my unfair dismissal was due to my disability. Without my disability I would not have been terminated."

[9] Under the heading "Details of your complaint", the applicant referred to the car accident in May 2003 in which she sustained a whiplash injury to the neck, and issues that she subsequently suffered, including adjustment disorder with depressed mood.

[10] On 25 June 2007, the ADCQ responded to the complaint filed on 1 May 2007 by a letter which stated:

> "Dear Ms Hart
>
> **RE: COMPLAINT BY YOU AGAINST STATE OF QUEENSLAND DEPARTMENT OF HEALTH, GOLD COAST HOSPITAL & ORS**
>
> Thank you for sending us your complaint.
>
> Under section 136 of the *Anti-Discrimination Act 1991* (the Act), a complaint must set out reasonably sufficient details to indicate an alleged breach of the Act.
>
> We cannot decide whether your complaint comes under the Act because you have not shown that you were treated this way <u>because of</u> any of the grounds under the Act.
>
> You state that you sustained a whiplash injury in May 2003. Your complaint goes on to describe action allegedly taken in 2005 demoting you from AO3 level 4 to AO2 level 8 as a result of disciplinary action. You have not indicated what less favourable treatment was imposed on the basis or your medical condition (impairment) between 2003 and 2005.
>
> You refer to two issues raised as indirect discrimination, ie the provision of standard chairs and quantity of work. You have not provided sufficient details to enable assessment of these allegations. Information such as when the term was imposed, who imposed the term and why the term was imposed might be helpful.
>
> If you have more information to show that your complaint should be accepted, please provide it to us within 7 days.
>
> As requested I attach a copy of your complaint form and chronology of events.
>
> You should keep in mind that you have only one year from the first incident you are complaining about, to provide us with sufficient information to show it comes under the Act. This time limit under the Act can only be extended for good reason.
>
> I hope that this information is helpful to you. If you have any questions please contact me on 1300 130 670."

[11] On about 29 August 2007, the applicant filed a further complaint form with the ADCQ. This form again named the Gold Coast Hospital and the same two

individuals who had been referred to in the 2006 complaint form. The discrimination claimed was impairment, specified as "whiplash injury adjustment disorder". This form also claimed that the applicant had suffered victimisation. Under the heading "Additional details", the applicant contended that the discrimination had occurred more than 12 months previously, and also answered the question about proceedings in the Queensland Industrial Relations Commission or other court or tribunal in the negative. This complaint form also contained an appendix with further details of the applicant's complaints. The first page of this appendix stated as follows:

> "**Why Complaint Should be Accepted on the Grounds of Being Out of Time**
>
> - I was unaware of the possibility of an Anti Discrimination complaint. As soon I became aware of a potential discrimination complaint I took active steps to lodge a complaint.
> - I was actively pursuing remedies concerning my workplace issues including an unlawfully dismissal. Had a 7 day hearing in November/December 2006, as well as a WorkCover claim and appeal.
> - I have been appealing the decision of the unfair dismissal in the Industrial Court of Queensland.
> - I was not informed by other legal representatives and by the Union who had been involved in my ongoing matters.
> - If my complaint is not accepted because it is out of time, I would lose the right to lodge a complaint with the Anti Discrimination Commission Queensland or the Human Rights Equal Opportunity Commission.
> - My case is highly documented through the records of the Queensland Industrial Relations Commission actions, as well letters, email and diary entries, so the memory of living individuals are not the sole or determinative factors in deciding my case."

[12] In respect of this complaint filed in August 2007, it appears that the ADCQ responded with a letter dated 7 March 2008 which stated:

> "Dear Ms Hart
>
> **COMPLAINT BY YOU AGAINST QUEENSLAND HEALTH GOLD COAST HOSPITAL AND JOSEPHINE HOLMAN AND KIRSTEN HINZE**
>
> Thank you for sending us your complaint. I apologise for the lengthy delay in responding.
>
> Under section 136 of the *Anti-Discrimination Act 1991* (the Act), a complaint must set out reasonably sufficient details to indicate an alleged breach of the Act.
>
> Your complaint does not appear to come under the Act because you have not shown that you cannot comply with a term or condition that has been imposed. The information provided does not indicate how your impairment (whiplash injury) affected your ability to comply with the term imposed ie that you were to use the equipment supplied to do your work.
>
> If you have any questions please contact us on 1300 130 670."

[13] Correspondence then ensued through 2008 between solicitors acting for the applicant and for the ADCQ. This correspondence culminated in a letter from the ADCQ dated 22 October 2008 in which the Commissioner advised that, after considering the issues raised in the complaint, the Commissioner was of the opinion that the complaint was lacking in substance under s 139 of the *ADA* and that the complaint was therefore rejected. The letter went on to set out the reasons for the rejection.

[14] The applicant then filed proceedings in this Court seeking a statutory order of review of the decision to reject her complaints. On 23 December 2008, the ADCQ wrote again to the applicant referring to the judicial review proceedings, stating that a review of her complaints had been conducted, and advising that the Anti-Discrimination Commissioner had decided "to revoke the decision of 22 October 2008". The Commissioner said:

> "I have decided that your complaints satisfy the requirements of s136 of the [ADA]."

The letter concluded:

> "As the complaints were lodged more than one year from the alleged contraventions of the Act, I must now consider whether to exercise my discretion under s138 of the Act to accept the complaints. This involves consideration of submissions from all parties. My delegate will contact you in relation to this process."

[15] On 9 April 2009, the ADCQ wrote to the applicant advising:

> "Dear Ms Hart
>
> **COMPLAINTS BY IRENE HART AGAINST STATE OF QUEENSLAND & OTHERS**
>
> Your complaints received on 1 May 2007 and 31 August 2007 allege that discrimination on the basis of impairment in the area of work occurred between May 2003 and November 2006.
>
> Complaint 1 relates to the period from February 2005 when you were transferred to November 2005 when your employment was terminated. This complaint was initially received on 1 May 2007.
>
> Complaint 2 relates to the period from May 2003 when you were injured to February 2005 when you were demoted and transferred. This complaint was initially received on 31 August 2007.
>
> I enclose lists of complaint documents for each complaint. These have been sent to the respective respondents.
>
> Section 138(1) of the *Anti-Discrimination Act 1991* provides that generally a person is only entitled to make a complaint within one year of the alleged discrimination. There are no allegations of discrimination within one year before the complaints were made.
>
> Under section 138(2) of the Act the Commissioner may also accept a complaint after one year has expired if a complainant shows "good cause". The allegations of discrimination which occurred before 1 May 2006 (complaint 1) and 31 August 2006 (complaint 2) are outside the one year time limit and so can only be accepted if "good cause" is shown.

When deciding whether to accept these out of time allegations in the complaint, the Commissioner will consider all the circumstances including:

1. The length of time by which your complaint is out of time.
2. Whether the respondent will suffer any prejudice if the out of time part of your complaint is accepted. For example, has the respondent lost evidence or witnesses because of the delay.
3. Whether the delay is due to you, your representatives or the respondent/s.
4. The reasons for your delay in making the complaint.
5. Your circumstances.
6. Any other information which would show cause why the out of time part of your complaint should be accepted – including how and when you found out about your right to complain to this office and about the time limit on such complaints.

Please provide within 14 days, written submissions about why the Commissioner should accept the out of time part of your complaint, based on the six points listed above.

When I have received your submissions, I will then pass them onto the respondents for comment and also ask them for their submissions on the six points listed above. You will then be given a final opportunity to comment on their submissions.

Once I have received all submissions and comments the Commissioner will then consider the material and make the decision whether to accept the out of time part of your complaint.

I look forward to hearing from you as soon as possible, and in any event within 14 days of the date of this letter.

Yours sincerely

**Delegate for the Anti-Discrimination Commissioner**
**Cairns Office**"

[16] On 15 June 2009, the applicant's solicitors wrote to the ADCQ setting out the applicant's submissions as to why her complaints should be accepted notwithstanding the fact that they had been made out of time. The submissions addressed potential prejudice, noting, amongst other things, that "the facts of the matter are highly documented through the records of the Queensland Industrial Relations Commission proceedings as well as letters, emails and diary entries so that the memory of individuals are not the sole source of information." The submissions on behalf of the applicant then continued:

"<u>The cause of the delay</u>

The prime cause of the delay was that our client was taken up with pursuing her complaint of unfair dismissal against her former employer and other legal action. Her unfair dismissal application was filed shortly after her dismissal but the matter did not proceed to hearing until November 2006. The matter was subject to an appeal which was not finalised until August 2007. In addition, our client pursued a workcover claim concurrently with her unfair dismissal proceedings.

> Our client was not advised and nor was she aware of her ability to make a complaint to the Commission in relation to the discrimination aspects of her matter until she received advice on the issue from a solicitor in March 2007. She then took steps to make enquiries and lodge her complaint. She was not aware at that time of lodgement of the limitations period for making her complaints and only became aware upon contact from the Commission.
>
> It should also be noted that our client was suffering from moderate to severe depression over several years associated with her treatment by Queensland Health which hampered her ability to take proactive steps to take legal redress. We enclose a report by Dr Chittenden in this regard for your information.
>
> Our client is unemployed and has largely had to rely on her own resources and pro bono legal assistance in pursuing her claims against the respondents."

[17] Submissions were subsequently lodged with the ADCQ on behalf of the second respondent. Those submissions argued that the discretion to allow lodgement of the complaints out of time ought not be exercised in favour of the applicant.

[18] By a letter dated 8 December 2009, the ADCQ advised of its decision not to accept the complaints on the basis that the applicant had not shown good cause.

[19] On 13 January 2010 the applicant filed an application for judicial review of that decision by the first respondent.

[20] On 8 June 2010, the applicant wrote to the ADCQ asking that the ADCQ take into account further information in relation to its decision not to accept the complaints. Attached to the applicant's letter was a copy of the complaint she had made in March 2006. It appears that this was the first that the second respondent knew of the March 2006 complaint. It had not been mentioned previously in any of the complaint documents in May or August 2007 nor was it mentioned in the application for judicial review filed in January 2010. In any event, on 16 June 2010, the second respondent conceded that the March 2006 complaint was a matter that the ADCQ should have had regard to in its decision dated 8 December 2009. Orders were made in the judicial review proceedings which had been filed in January 2010 that the decision of the ADCQ dated 8 December 2009 be set aside and the matter be referred back to the ADCQ for decision and further that each of the applicant and the second respondent file further written submissions with the ADCQ in relation to the ADCQ's reconsideration of the applicant's complaints.

[21] Pursuant to those orders, on 14 July 2010 the applicant provided further submissions to the ADCQ. Those submissions did not advert in any way to the March 2006 complaint.

[22] The second respondent's further submissions were provided to the ADCQ under cover of a letter dated 28 July 2010. The submissions made by the second respondent in respect of the March 2006 complaint were as follows:

> "**6 Impact of March 2006 complaint on s138 submission**
>
> 6.1 The fact that Ms Hart lodged a complaint with the ADCQ in March 2006 clearly demonstrates that Ms Hart was aware, at the very latest

by March 2006, of her right to complain about alleged discrimination by an employer on the basis of a disability.

6.2 In her letter to the ADCQ dated 8 June 2010, Ms Hart also says that she sought advice form Legal Aid Queensland on 10 March 2006 about whether she had a complaint in discrimination and was told she did not. She said she filed the March 2006 complaint anyway. The fact that she received legal advice specifically on making a discrimination complaint no later than 10 March 2006 is, in our submission, extremely relevant and negates all attempts by Ms Hart to explain away her delay on the basis of a lack of knowledge, at the very latest, from March 2006.

6.3 In fact, it would appear that Ms Hart knew she could complain about discrimination to the ADCQ at least as early as 4 November 2005. A copy of a screen from the ADCQ's electronic records dated 4 November 2005 indicates that Ms Hart contacted the ADCQ on that day to allege discrimination by Queensland Health on the basis of trade union activity. The screen records that Ms Hart was provided with general information about the Act. There is also a checked box that indicates that information was sent to Ms Hart. This document is **attached** for the sake of clarity.

6.4 In her submissions dated 16 June 2009, Ms Hart (through her lawyers at the time) asserted that she was not advised nor was she aware of her ability to make a complaint to the ADCQ in relation to the discrimination aspects of her matter until she received advice from a solicitor in March 2007. In her application for judicial review dated 13 January 2010 she says again:

> *'I was not advised nor was I aware of my ability to make a complaint to the Anti Discrimination Commission until I received advice on the issues from a solicitor in March 2007.'*

6.5 This is clearly incorrect. Ms Hart's letter of 8 June 2010 shows that Ms Hart knew she could make a discrimination complaint more than a year before her May 2007 complaint, because she received legal advice about making a discrimination complaint and filed a discrimination complaint in March 2006.

6.6 Ms Hart's submissions dated 14 July 2010 are silent about the fact that she had filed a complaint in March 2006 and its relevance to the ADCQ's deliberations under section 138. The submissions ignore the fact and almost suggest, again, at paragraphs 1, 3 and 5, that she was not aware of her right to complain and had not received legal advice about making a discrimination complaint until March 2007 and, once being aware of her right, she diligently pursued her claim. For the reasons already stated, this is clearly incorrect, if indeed that was the meaning intended by Ms Hart in her submissions.

6.7 It is submitted that the ADCQ would be satisfied of the following:

(a) At the absolute latest, Ms Hart was aware of the existence of the ADCQ and her right to complain about discrimination by 4 November 2005 as she rang the ADCQ complaining about discrimination on the basis of trade union activity and received verbal and written information from the ADCQ;

(b) Ms Hart received legal advice specifically about making a discrimination complaint no later than 10 March 2006;

(c) Ms Hart filed a discrimination complaint with the ADCQ in March 2006 and was advised by the ADCQ by letter dated 24 March 2006 that she had not provided sufficient details to demonstrate any of the conduct of which she complained was *because of* her impairment;

(d) Ms Hart took no steps to obtain more information from the ADCQ or legal advisers or provide further information about her complaint to satisfy the requirements of section 136 of the Act;

(e) The next interaction Ms Hart had with the ADCQ was the lodgement of her May 2007 complaint.

6.8 The ADCQ can only draw the conclusion that Ms Hart made conscious choices:

(a) not to make a discrimination complaint before March 2006, even though she knew that she could at least from November 2005 (we say as early as 2003); and

(b) not to pursue her March 2006 complaint, by providing further details in support of it or obtaining assistance to pursue it.

6.9 These very findings necessitate a conclusion (and not just reinforce a conclusion) by the ADCQ that there is no good reason for Ms Hart's May 2007 and August 2007 complaints to be accepted out of time pursuant to section 138 of the Act.

6.10 It is also worthy to note that the Queensland Court of Appeal recently found, when considering an application to extend a one year limitation period in a different statutory context, that mere ignorance of the strict time limits imposed by the legislation in question was not a reasonable basis to excuse non-compliance with them. Any suggestion by Ms Hart that she was unaware of the time limit (see p.4 of Schedule 1 to Ms Hart's judicial review application) cannot assist her. Moreover, no inference can be drawn that she was not aware of the time limit either after her telephone enquiry with the ADCQ on 4 November 2005 or her receipt of legal advice on 10 March 2006. Also, the Court there approved comments by Kingham DCJ in *Murphy v Lewis* [2009] QDC 37 to the effect that a choice by a litigant to focus on, or choose, one cause of action over another is not a reasonable excuse for delay in commencing that other action. The clear choice that Ms Hart clearly made to focus on her QIRC and WorkCover claims is not a reasonable excuse for her delay in making and progressing a claim in discrimination." (Omitting citations)

[23] On 18 August 2010, the applicant provided further submissions to the ADCQ. In those further submissions, she said:

"**Reason why I did not pursue the March 2006 complaint**

- The complaint that was lodged in March 2006, was not pursued further because:
  - I had been told by Legal Aid Queensland that I did not have a complaint for discrimination. Based on this advice, along with my illness and no money to pay for legal fees to get another opinion, the complaint was not pursued further;

- **In the letter from the ADCQ dated 24 March 2006, I was not invited to provide further information to show that my complaint should be accepted**; and
- In any event, I understood that the ADCQ staff would not be able to give legal advice or comment on individual cases that may come under the Anti Discrimination Act. I also understood that the staff there would be limited to providing general information on the area of alleged discrimination. As a result I did not contact the ADCQ in relation to my complaint.

- In the letter from the ADCQ dated 24 March 2006, the ADCQ acknowledges that my complaint lodged in March 2006, had the status of a complaint, as it had been assigned the file number 7049582 and it was referred to as a complaint.

- It appears from the letter from the ADCQ, dated 24 March 2006, that my complaint lodged in March 2006 was neither accepted nor rejected.

- In the letter from the ADCQ dated 24 March 2006, it was concluded that my complaint did not meet section 136 of the Anti Discrimination Act 1991 because my complaint did not set out reasonably sufficient details to indicate an alleged breach of the Act. Because of this, the ADCQ had effectively "rejected" my complaint because I did not link the bullying and harassing behaviour of the respondent to my impairment.

- I was only informed in the letter from the ADCQ dated 24 March 2006, the reasons why my complaint did not meet Section 136 of the Anti Discrimination Act 1991 and that I should contact the Division of Workplace Health and Safety to complain about workplace bullying. **I was not told in this letter that I could provide further information and I was not told what I needed to do to bring the complaint within Section 136 of the Anti Discrimination Act 1991**.

- Because the March 2006 complaint had been 'rejected', I could not provide further details to support my complaint.

- On 27 June 2007, I received a letter from the ADCQ dated 25 June 2010 regarding the outcome of my complaint lodged in May 2007. In this letter, Janice McFadden, Delegate of the ADCQ, stated:

  > 'Under section 136 of the Anti Discrimination Act 1991 (the Act), a compliant [sic] must set out reasonably sufficient details to indicate an alleged breach of the Act. We cannot decide whether your complaint comes under the Act because you have not shown that you were treated this way because of any of the grounds under the Act ... If you have more information to show that your complaint should be accepted, please provide it to us within 7 days'.

  **I was not provided with this opportunity in my 2006 complaint.**

- I repeat and rely on the submissions attached to my May 2007 and August 2007 complaints in relation to why my complaints should be accepted out of time." (Emphasis added)

[24] On 21 February 2011, the Deputy Commissioner of the ADCQ made the decision which is the subject of the present application. By the statement of reasons dated 21 February 2011, the decision was stated in the following terms:

> "**DECISION**
>
> 1. The complainant, Irene Hart, made two complaints of impairment discrimination to the Commissioner, identified as follows:
>
>  (a) Complaint dated 27 April 2007 against State of Queensland, Jeff Hollywood, Jackie Hawkins, Josephine Holman and Ken Orr, lodged on 1 May 2001 (**Complaint 1**); and
>
>  (b) Complaint dated 29 August 2007 against State of Queensland, Josephine Holman and Kirsten Hinze lodged on 31 May 2007 (**Complaint 2**).
>
> 2. Pursuant to section 244 of the *Anti-Discrimination Act 1991* (the Act), the Commissioner has delegated to me the powers, duties and functions under section 138(2) of the Act.
>
> 3. I have decided in relation to both Complaint 1 and Complaint 2 not to exercise the discretion under section 138(2) of the Act to accept the complaints."

[25] In the course of the statement of reasons, the Deputy Commissioner set out a brief statement of background, including:

> "13. By letter dated 8 June 2010 the complainant asked the Commission to take into account further information, namely a complaint dated 7 March 2006 lodged with the Commission on 13 March 2006 (the **March 2006 complaint**).
>
> 14. The State of Queensland conceded that the March 2006 complaint was a relevant consideration for the decision under section 138(2), and orders were made by the Supreme Court setting aside the decision of 8 December 2009 and remitting the matter to the Commission to reconsider the complaints.
>
> 15. Subsequently the Commission identified database records that indicated the complainant telephoned the Commission on 4 November 2005 as a relevant consideration, and invited the parties to address this in their further submissions.
>
> 16. The parties made further submissions to the Commission in accordance with orders of the Supreme Court.
>
> 17. The Commission gave the complainant a further opportunity to make submissions about the decisions of the Queensland Industrial Relations Commission and the Queensland Industrial Court relating to her unfair dismissal proceedings against the State, and the complainant provided further submissions on 11 February 2011."

[26] The substance of the complaints was summarised by the Deputy Commissioner as follows:

> "19. Complaint 1 relates to the period from February 2005 when the complainant was demoted and transferred, to November 2005 when her employment was terminated.

20. Complaint 2 refers to the period commencing February 2003 to February 2005, however the allegations under the Act related to the period from May 2003 when the complainant was injured, to February 2005 when the complainant was demoted and transferred.

21. Complaint 1 was lodged on 1 May 2007 and Complaint 2 was lodged on 31 August 2007. In both complaints, all allegations under the Act are outside the one year time limit."

[27] The Deputy Commissioner then set out a lengthy chronology, before turning to discuss the nature and scope of the power under s 138(2) of the *ADA*. The Deputy Commissioner made observations about the length of the delay concerning the complaints and summarised the reasons advanced by the applicant for explaining the delay. The Deputy Commissioner then said in her statement of reasons:

"31. The following information that was not considered in making the decision under section 138(2) in December 2009 and later identified as relevant:

(a) the Commission's database record indicating the complainant telephoned the Commission on 4 November 2005; and

(b) the March 2006 complaint made by the complainant to the Commission.

32. The complainant denies telephoning the Commission on 4 November 2005 and has provided records of telephone calls made from her home phone on that day. Those records do not prove that the complainant did not make a call to the Commission, and the complainant concedes that she would have been at work on that day.

33. However, as I am not in a position to test evidence and make a determination, and in view of the complainant's denial, I have decided to disregard and give no weight to the Commission's database record in considering whether the complainant has shown good cause to accept the complaints out of time.

34. As regards the March 2006 complaint, I agree it is a relevant consideration. The parties have made submissions about the March 2006 complaint and I discuss it later in these reasons."

[28] Further in the reasons, the Deputy Commissioner noted what were described as "Inconsistencies" in the applicant's material:

"41. One of the complainant's reasons for the delay in lodging the complaints is her involvement in the industrial proceedings. The complainant says she was *engrossed in other proceedings with the respondents which totally preoccupied me*, however she also says *I had legal representation for WorkCover and Unfair Dismissal claims, which were being pursued in 2006/2007, so I was not personally pursing (sic) the claims*.

42. Another of the complainant's reasons for not lodging in time is that she was unaware of the ability to make a complaint until she received advice from a solicitor in March 2007. However, the complainant had in fact made a complaint to the Commission in March 2006 and had obtained advice from Legal Aid Queensland about a discrimination complaint.

43. The complainant also claims that her ability to make a complaint was affected by severe depression and symptoms of anxiety, which started in 2003 and continues. However, in Complaint 1 the complainant says *I have suffered reactive depression since January 2005*. It is also stated in the letter from Disability Discrimination Legal Services of 5 July 2007 that the complainant has suffered reactive depression since January 2005.

44. The respondents state that a medical certificate for the complainant's absence from work for the period from 13 October 2003 until 17 February 2004 showed the reason as being *adjustment disorder and severe anxiety*." (Omitting citations)

[29] In the conclusions, the Deputy Commissioner stated:

"49. Although she claims not to have known of the existence of the Anti-Discrimination Commission until around early March 2006, the complainant was aware of unlawful discrimination and the *Anti-Discrimination Act 1991*. She was aware of Queensland Health policies relating to discrimination and reminded her supervisor of this as early as August 2003.

50. Even if the complainant did not know of the time limit for making a complaint, she had the ability and sufficient knowledge to seek advice and assistance. She did in fact make a complaint to the Anti-Discrimination Commission in March 2006, and the complainant describes the subsequent complaints (Complaint 1 and Complaint 2) as an elaboration of her March 2006 complaint.

51. In the Commission's letter of 24 March 2006 informing the complainant that her complaint did not appear to come under the Act, the complainant was invited to telephone the Commission if she had any questions. The complainant chose not to make any further contact with the Commission until she lodged Complaint 1 on 1 May 2007, some thirteen months later." (Omitting citations)

[30] As a further, and separate, consideration under the conclusions, the Deputy Commissioner stated:

"57. If the complaints are not accepted the complainant will be prejudiced in that she will not be able to prosecute her complaints. However, the complainant has not been without any recourse for the events associated with the alleged discrimination as she was successful in her claim for unfair dismissal."

[31] The Deputy Commissioner concluded:

"58. Taking into account all the relevant circumstances, I am not satisfied the complainant has shown good cause to accept the complaints which were made more than one year from the alleged contraventions of the Act."

[32] The making of complaints under the *ADA* is regulated by the provisions of Chapter 7 of that statute. Section 136 provides:

"**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

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

[33] Central to the present application is s 138, which provides:

"**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."

[34] The arguments advanced by the applicant in seeking to demonstrate that the Deputy Commissioner erred in finding that the applicant had not shown good cause to accept the complaints under s 138(2) fall to be considered under two heads:

(a) the March 2006 complaint;

(b) the unfair dismissal proceeding.

**The March 2006 complaint**

[35] The applicant pointed to the following facts:

(a) that the response by the first respondent to the complaint made in March 2006 simply amounted to a rejection on the basis that the complaint did "not appear to come under the Act" because it did not particularise the way in which the applicant was treated unfavourably because of her impairment;

(b) in stark contrast, the first substantial response to the complaint filed on 1 May 2007 was the letter of 25 June 2007, which stated that it could not be decided whether that complaint fell under the *ADA* because the applicant had now shown that she was treated in the way complained of because of any of the grounds under the *ADA*. The letter went on:

"You state that you sustained a whiplash injury in May 2003. Your complaint goes on to describe action allegedly taken in 2006 demoting you from the AO3 level 4 to AO2 level 8 as a result of disciplinary action. You have not indicated what less favourable treatment was imposed on the basis of your medical condition (impairment) between 2003 and 2005."

Having identified the issues in respect of which the first respondent said, in effect, that the form lodged by the applicant lacked sufficient particularity, the letter specifically asked:

"If you have more information to show that your complaint should be accepted, please provide it to us within 7 days."

[36] It was submitted that the significance of the difference of approach between 2006 and 2007 was that if the applicant had been invited in 2006 to submit further information, as she was in 2007:

> " ... then the Applicant may well have been able to provide the details, which ultimately led to the Anti-Discrimination Commissioner to accept the Applicant's later complaints. It is likely this would have occurred at least 12 months earlier than her later complaints."[2]

[37] The applicant advanced two arguments:

(a) that the Deputy Commissioner erred in that, in failing to appreciate the difference between the first respondent's responses in 2006 and 2007, the Deputy Commissioner either asked the wrong question or ignored relevant material and thus committed an error of law;

(b) the difference between the two responses was a relevant consideration for the purposes of s 21(2)(e) and s 23(b) of the *JRA* which the Deputy Commissioner failed to take into account in the exercise of the power under s 138(2) of the *ADA*.

[38] It is fair to observe that a significant amount of the submissions by counsel for the applicant in the hearing before me was devoted to the applicant's arguments concerning the distinction between the responses to the 2006 and 2007 complaints. It is also fair to observe that:

(a) Notwithstanding orders having been made for further submissions as a consequence of the concession that the March 2006 complaint was a matter to which the ADCQ should have had regard in its decision of 8 December 2009, the applicant's further submissions of 14 July 2010 did not even refer to the March 2006 complaint or the response to that complaint;

(b) The second respondent's submissions on the March 2006 complaint were as set out above in [22]. Not surprisingly, the submissions did not address any argument concerning the difference between the 2006 and 2007 responses; this point had simply not been raised by the applicant;

(c) At its highest, the applicant adverted to the distinction on which she now placed such emphasis in her further submissions of 18 August 2010, and then only by reference to the sentences which I have highlighted in the passages quoted above in [23].

[39] Be all that as it may, it was submitted that the Deputy Commissioner failed to appreciated the difference between the 2006 and 2007 responses when considering the question of delay for the purpose of determining whether the applicant had shown "good cause". This, in turn, meant that the Deputy Commissioner asked the wrong question when exercising the power under s 138(2) or ignored relevant material when exercising the power under s 138(2). This led, so it was submitted, to the Deputy Commissioner having committed a jurisdictional error. In that regard, reliance was placed on the oft-cited passage in the judgment of the High Court in *Craig v South Australia*:[3]

> "If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error

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2 Submissions of the applicant at [15].

3 (1994-1995) 184 CLR 163 at 179.

> which will invalidate any order or decision of the tribunal which reflects it."

[40] In *Minister for Immigration and Multicultural Affairs v Yusuf*,[4] McHugh, Gummow and Hayne JJ, after citing that passage, explained:

> "'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. **What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law**. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it." (Omitting citations)

[41] Central to the issue whether a decision maker has committed a jurisdictional error, in the sense described in these authorities, is the power which is exercised (or purportedly exercised) by the decision maker. The Court is concerned to ensure that the decision maker has exercised the power which is actually conferred by the relevant statute.

[42] In the present case, therefore, the focus needs to be on the power conferred under s 138(2), i.e. the power to exercise the discretion to accept a complaint after one year has expired. The criterion for the exercise of that power is the Commissioner's opinion as to whether the applicant has shown good cause. The matters to which the decision maker might have regard when forming an opinion as to whether a complainant has shown good cause were described by Atkinson J in *Buderim Ginger Ltd v Booth*:[5]

> "Although it is not essential to show that there is good reason for and justification for the delay in order to show good cause, such a consideration is always relevant to such a decision. In forming an opinion that the complainant has shown good cause, the Commissioner is not fettered by rigid rules but must take into account all of the relevant circumstances of the particular case such as the length of the delay; whether the delay is attributable to the acts or omissions of the complainant or his or her legal representatives, the respondent or both; the circumstances of the complainant; whether there has been a satisfactory explanation for the delay; and whether or not the delay will cause prejudice to the respondent." (Omitting citations).

In the same case, de Jersey CJ said:[6]

> "In her reasons, Atkinson J has referred to some of the matters which may fall for consideration in determining whether 'good cause' has been shown, of which the reason why the complaint was not made within time, the

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4 (2001) 206 CLR 323 at [82].
5 [2003] 1 Qd R 147 at [22].
6 At [2].

> extent of the delay in its being brought forward, and whether accepting the complaint late would occasion prejudice to the respondent, will often feature prominently."

[43] The legislation in the present case, and the conferral of power under that legislation, is quite different from that considered by the High Court in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*.[7] That case was concerned with s 198A of the *Migration Act* 1958 (Cth). Subsection 198A(1) permitted a specified officer to "take an offshore entry person to a country in respect of which a declaration is in force under subsection (3)". Subsection 198A(3) empowered the relevant Minister to make a declaration in respect of a country in relation to four specified criterion which were detailed in the subsection. French CJ,[8] accepted that it was necessary for the Minister to form, in good faith, an evaluative judgment based on each of the specified criterion, properly construed. His Honour said:

> "That the minister properly construe them is a necessary condition of the validity of his declaration. Properly construed, they define the content of the declaration which the parliament has authorised. If the minister were to proceed to make a declaration on the basis of a misconstrued criterion, he would be making a declaration not authorised by parliament. The misconstruction of the criterion would be a jurisdictional error."

(His Honour then cited *Yusuf's Case*.[9])

[44] Whilst obviously concerned with a different type of power conferred in a completely different legislative scheme, this passage nevertheless highlights that the jurisdictional error is committed when the power which the decision maker purports to exercise is not the power actually conferred by the legislation.

[45] The applicant in the present case does not contend that the Deputy Commissioner misapprehended the nature of the power to be exercised under s 138(2). Such a submission would have been difficult to maintain in light of the Deputy Commissioner's express discussion of the nature and scope of power under s 138(2), in the course of which she said:

> "The discretion to accept a complaint after one year of the alleged contravention has expired is confined only by the complainant showing good cause. The Act does not set out the factors which the Commissioner is bound to consider, in which case they are to be determined by implication from the subject matter, scope and purpose of the Act."[10] (Omitting citations)

[46] The Deputy Commissioner then cited both *Borden v Walters*[11] and the passage from the judgment of Atkinston J in *Buderim Ginger* (quoted above at [42]), and then proceeded to discuss the merits of the arguments which had been advanced in relation to whether good cause had been shown under the headings:

- Length of delay
- Reasons for the delay
- New information

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7 (2011) 280 ALR 18.
8 At [59].
9 At [82].
10 Statement of reasons at [24].
11 [1999] QSC 226.

- Knowledge
- Inconsistencies in complainant's material
- Prejudice

[47] The Deputy Commissioner's reasons in fact acknowledge the fact and relevance of the March 2006 response in consideration of the explanation for delay. The Deputy Commissioner placed that response in the context of other action subsequently taken by the applicant after receiving the March 2006 response (i.e. the Industrial Relations action), noting the applicant's contention that after receiving the March 2006 response and initiating the Industrial Relations proceedings she was "engrossed in other proceedings [i.e. the Industrial Relations proceeding] with the respondent which totally preoccupied" her.[12] The Deputy Commissioner contrasted and weighed the inconsistencies between the assertion by the applicant that she was not advised nor was she aware of her ability to make a complaint to the ADCQ until she received legal advice on the issues in March 2007 and the fact of her having lodged the March 2006 complaint. Further, the Deputy Commissioner noted, in the conclusions to her reasons, that the 2006 response in fact contained an invitation for the complainant to telephone the first respondent if she had any questions, but the applicant "chose not to make any further contact with the Commission until she lodged Complaint 1 on 1 May 2007, some thirteen months later".[13]

[48] The applicant has not criticised either the Deputy Commissioner's statement of the nature of the power to be exercised nor the process by which the Deputy Commissioner considered the merits as to whether "good cause" had been shown by reference to the headings described above. Rather, the applicant's argument seems to be that because the Deputy Commissioner did not note the differences between the 2006 and 2007 responses, and did not expressly consider (or speculate on) the possibility that if the applicant had received a different response in 2006 she might have been able to provide further details which might have led to her complaint being accepted at that time, then it ineluctably followed that the Deputy Commissioner's exercise of the power was affected such as to result in an error of law. Such a result does not, however, follow automatically. One of the matters (or criterion) which the Deputy Commissioner was undoubtedly required to consider in this case for the purpose of deciding whether good cause had been shown was whether there was an explanation for the delay. The Deputy Commissioner specifically addressed this criterion, and did so in a quite conventional fashion. The fact that the Deputy Commissioner appears not to have given weight to the submission now sought to be advanced by the applicant may sound in whether the decision maker failed to take a relevant matter into account when making the decision. But it does not, of itself, mean that the exercise of the power has been affected such as to result in an error of law.

[49] I therefore reject the applicant's argument that the decision was infected by jurisdictional error.

[50] The applicant's alternative argument was that the difference between the two responses was a relevant consideration for the purposes of s 21(2)(e) and s 23(b) of the *JRA* which the Deputy Commissioner failed to take into account in the exercise of the power under s 138(2) of the *ADA*. By s 21(2)(e), improper exercise of the power conferred by the relevant statute is specified as one of the grounds upon

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12 Statement of reasons at [41].

13 Statement of reasons at [51].

which an application may be made for a statutory order of review. By s 23(b), the reference in s 21(2)(e) to an improper exercise of a power includes a reference to failing to take a relevant consideration into account in the exercise of a power.

[51] In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[14] Mason J (as His Honour then was), recounted a number of propositions which had been established in relation to the question as to whether the failure of a decision maker to take into account a relevant consideration in the making of an administrative decision gives rise to judicial review. The matters identified by his Honour included:

- The ground of failure to take into account a relevant consideration can only be made out if a decision maker fails to take into account a consideration which the decision maker is *bound* to take into account in making that decision;

- The factors a decision maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the Court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act;

- Where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except insofar as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision maker may legitimately have regard;

- By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the Court will not find that the decision maker is bound to take a particular matter into account unless an implication that the decision maker is bound to do so is to be found in the subject matter, scope and purpose of the Act;

- Not every consideration that a decision maker is bound to take into account but fails to take into account will justify the Court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision;

- The limited role of a Court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not for the Court to substitute its own decision for that of the decision maker by exercising a discretion which the legislature has vested in the decision maker. The Court's role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned;

- It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision maker and not

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[14] (1985-1986) 162 CLR 24 at 39-42.

> the Court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power.

[52] In the present case, the fact that was commonly conceded by the parties to be of relevance, which was accepted by the Deputy Commissioner as being of relevance, and which the Deputy Commissioner was bound to take into account was the fact of the March 2006 complaint having been made. That fact was taken into account by the Deputy Commissioner in her decision. It was, amongst other things, referred to by the Deputy Commissioner as demonstrating that the applicant did know of her ability to make a complaint of discrimination prior to March 2007. Moreover, the contents of the letter were taken into account by the Deputy Commissioner, as appears in the passage quoted above at [29].

[53] The applicant had made extensive submissions in reply to the Deputy Commissioner about why she did not pursue the March 2006 complaint. Those submissions, as a whole, were taken into account by the Deputy Commissioner. It is important in this regard to recall that the reasons of the decision maker are to be read on the basis that they 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".[15] (Omitting citations),

[54] In the present case, the applicant is, in effect, complaining about the factual conclusions drawn by the Deputy Commissioner from the submissions put to her by both parties about a relevant fact, i.e. the fact of the applicant having lodged a complaint in March 2006. I accept the submission by the second respondent that this is tantamount to the applicant asking the Court to conduct a merits review of the Deputy Commissioner's decision. That is not permitted on a judicial review.

[55] Accordingly, I do not accept that the applicant has demonstrated that the Deputy Commissioner failed to take a relevant consideration into account.

**The unfair dismissal proceeding**

[56] The applicant's contention under this heading turns on the matters stated in paragraph 57 of the Deputy Commissioner's reasons (quoted above at [30]). It was submitted that, in making the statement in the second sentence in that paragraph, the Deputy Commissioner failed to take into account a relevant consideration, namely that the applicant was ultimately successful in her Industrial Relations proceedings because of a procedural error by the hospital in dealing with her dismissal, and that her success in the Industrial Relations proceeding had nothing to do with her impairment. It was also submitted that the Deputy Commissioner failed to advert to the fact that under the *ADA*, the applicant was permitted to proceed both with her Industrial Relations proceedings and to make a complaint under the ADA, and further that there was a limit on the compensation recoverable by the applicant in her Industrial Relations proceedings but there is no such limit under s 209 of the *ADA*.

[57] In advancing this argument, however, it seems to me that the applicant is taking the impugned sentence completely out of context. It is necessary to set out the relevant passage of the decision in full in order to understand the context:

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15 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, per Brennan CJ, Toohey, McHugh and Gummow JJ at 272.

> "54. As to prejudice: *It is always presumed that <u>some</u> prejudice will be occasioned to a respondent if leave is granted by reason of the fact that the respondent will have been denied the freedom from liability which the time limitation otherwise afforded.*
>
> 55. There was no evidence that witnesses for the respondents are unavailable, but it was suggested that their memories would be affected by the passage of time. I acknowledge that the memories of all witnesses for all parties will be affected by the passage of time, however it seems the relevant events are well documented through the various grievances and other proceedings and the respondents have been able to respond to some extent to the substance of the complaints in the submissions they have provided.
>
> 56. Although the documentation of various events and the earlier proceedings will be of assistance, it does not necessarily follow that there will be no prejudice to the respondents if the complaints are accepted. The matters in issue in a complaint of discrimination, particularly a complaint of indirect discrimination, will not have been the focus of the unfair dismissal proceedings, and not necessarily the focus of the internal processes.
>
> 57. If the complaints are not accepted the complainant will be prejudiced in that she will not be able to prosecute her complaints. However, the complainant has not been without any recourse for the events associated with the alleged discrimination as she was successful in her claim for unfair dismissal."(Omitting citations)

[58] It is clear, in this context, that the decision maker was expressing her conclusions on the question of prejudice, which it can be accepted for present purposes was a matter the decision maker was bound to consider for the purposes of determining whether good cause had been shown. Importantly, the Deputy Commissioner did not conclude that the applicant's success in the Industrial Relations proceedings precluded her from being able to show good cause. Nor did the Deputy Commissioner conclude that the prejudice suffered by the applicant in not being able to prosecute her discrimination claim was neutered by her success in the Industrial Relations proceedings. Nor did the Deputy Commissioner equate the Industrial Relations proceedings with the discrimination proceedings, or refer to the Industrial Relations proceedings having been conducted on the basis of the alleged impairment. Indeed, as was noted in the course of argument, the impugned sentence could safely have been omitted from the statement of reasons without any affect whatsoever on the integrity of the conclusions reached by the decision maker on the question of prejudice.

[59] But in any event, as is apparent from the propositions derived from the *Peko-Wallsend Case*, the Court can only intervene in the present case if satisfied that the Deputy Commissioner failed to take into account a factor that she was bound, upon a proper construction of the *ADA*, to take into account and that failure materially affected the decision. It is clear enough that prejudice to the parties is one of the matters that the decision maker in this case was bound to take into account. It is quite another thing, however, for the applicant to ask this Court to review the merits of the weight which was given (or not given) by the decision maker to particular facts and circumstances when making the decision in relation to that factor.

[60] Accordingly, I do not consider that the applicant has established a reviewable error under this heading.

**Costs**

[61] For the reasons that I have stated above, the outcome will be that the application will be dismissed. The applicant has, however, sought that, in that eventuality, the Court exercise a discretion to order that the applicant only bear her own costs. By s 49(1)(e) of the *JRA*, the applicant may apply to the Court for an order that the applicant "is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding". In considering such a costs application, s 49(2) requires that the Court have regard to, inter alia, the financial resources of the applicant and whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the applicant.

[62] The evidence discloses that the applicant is of very limited financial means. That is a relevant, but not necessarily compellingly persuasive factor. It is also necessary and relevant to consider whether this proceeding involved issues affecting, or which may affect, the public interest.

[63] As will be apparent from the foregoing reasons, there was no aspect of public interest associated with this application. It was completely personal to the applicant.

[64] The reality of this application is that the applicant was dissatisfied with the Deputy Commissioner's decision not to grant the requisite extension under s 138(2), and challenged that by way of this judicial review proceeding. The applicant has been unsuccessful in that challenge, and I see no reason why costs ought not follow the event.

**Conclusion**

[65] There will therefore be the following orders:

1. The application is dismissed;

2. The applicant shall pay the second respondent's costs of and incidental to the application.