SUPREME COURT OF QUEENSLAND

CITATION:	*Chivers v State of Queensland (Queensland Health)* [2014] QCA 141
PARTIES:	**REBECCA LOUISE CHIVERS** (appellant) **v** **STATE OF QUEENSLAND (QUEENSLAND HEALTH)** (respondent)
FILE NO/S:	Appeal No 9930 of 2013 QCAT No 158 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	13 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2014
JUDGES:	Muir and Gotterson JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Appellant to pay the respondent's costs of the appeal on the standard basis.**
CATCHWORDS:	HUMAN RIGHTS – DISCRIMINATION – GROUNDS OF DISCRIMINATION – DISABILITY OR IMPAIRMENT – EMPLOYMENT – where in 2004 the appellant sustained a head injury from a horse riding accident – where in 2008 the appellant commenced a Graduate Nurses Program with the respondent – where a condition of the program was that the appellant would be on a six month probation period, with a possible extension of three months in the event of under achievement – where the appellant was required to work night shifts – where the appellant was unable to complete night shifts due to headaches and nausea resulting from her 2004 head injury – where the respondent initially catered for the appellant's request not to do night shifts – where the respondent's evidence was that such arrangements worked "with difficulty" – where the respondent extended the appellant's probation period a number of times, pending further medical evidence about her impairment – where the appellant found other employment and resigned in February 2009 – where pursuant to the *Anti-Discrimination Act* 1991 (Qld) the appellant commenced action in QCAT on the basis that she was subjected to direct and indirect

discrimination by the respondent – where the senior member found there was indirect discrimination – where the respondent appealed to the QCAT appeal tribunal – where the presiding member concluded that the senior member had erred in failing to find that a s 25 exemption applied – where the appeal tribunal overturned the decision of the senior member – whether working night shifts was a "genuine occupational requirement" – whether the respondent made reasonable adjustments for the appellant in accordance with the respondent's policy – whether working night shifts endowed the appellant with necessary clinical skills

Anti-Discrimination Act 1991 (Qld), s 7, s 10, s 11, s 15, s 25, s 134, s 174A
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 115, s 142, s 146, s 149

Chivers v State of Queensland [2012] QCAT 166, related
Cosma v Qantas Airways Limited (2002) 124 FCR 504; [2002] FCAFC 425, cited
Qantas Airways Ltd v Christie (1998) 193 CLR 280; [1998] HCA 18, applied
State of Queensland (Queensland Health) v Rebecca Chivers [2013] QCATA 256, related
The State of Queensland v Che Forest (2008) 168 FCR 532; [2008] FCAFC 96, cited
X v The Commonwealth (1999) 200 CLR 177; [1999] HCA 63, applied

COUNSEL: C A Ronalds SC, with J W Merrell, for the appellant
J E Murdoch, with C J Murdoch, for the respondent

SOLICITORS: Slater & Gordon for the appellant
Minter Ellison for the respondent

[1] **MUIR JA:** I agree that the appeal should be dismissed with costs for the reasons given by Gotterson JA.

[2] **GOTTERSON JA:** The appellant, Rebecca Louise Chivers, made a complaint pursuant to s 134 in Chapter 7 Part 1 of the *Anti-Discrimination Act* 1991 (Qld) ("AD Act") in which she alleged that the respondent, State of Queensland (Queensland Health), had contravened s 15(1) of the AD Act. Her complaint was that circumstances which culminated in the cessation of her employment by the respondent on 27 February 2009 had constituted both direct and indirect discrimination within the meaning of ss 10 and 11 respectively of the AD Act on the part of the respondent towards her. Each form of discrimination was denied by the respondent.

[3] In due course, the complaint was referred to the Queensland Civil and Administrative Tribunal ("QCAT") which, pursuant to s 174A of the AD Act, was empowered to hear and determine the complaint. In the event that, upon a hearing, it found that the respondent had contravened the AD Act, QCAT had a discretion to make an order requiring the respondent to pay the appellant compensation for loss and damage caused by the contravention.[1]

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1 AD Act s 209(1)(b).

[4] After a nine day hearing in November 2011, a senior member of QCAT[2] decided that she was unable to conclude that there had been direct discrimination against the appellant.[3] However, she did conclude that the respondent had contravened s 15(1) by indirect discrimination against the appellant.[4] In so doing, she rejected a claim by the respondent of the benefit of the exemption for genuine occupational requirements under s 25 of the AD Act.[5] An award of compensation of $18,000 together with interest thereon of $2,700 was made to the appellant.[6]

[5] The respondent appealed to an appeal tribunal of QCAT pursuant to s 142(1) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ("the QCAT Act") on a number of grounds, each one of which contended for an error of law on the part of the senior member.[7] The appeal was heard in July 2013 by an appeal tribunal constituted by a judicial member who presided and a member of QCAT.[8] The presiding member concluded that the senior member had erred in failing to find that the respondent had established by evidence that the claimed exemption applied.[9] On that footing, he made orders pursuant to s 146 of the QCAT Act that the appeal be allowed; that the decision under appeal be set aside; and that the appellant's claim be dismissed.[10] The member, on the other hand, concluded that the senior member had not erred in this respect. She would have dismissed the appeal. By virtue of s 115 of the QCAT Act, the orders proposed by the presiding member were the orders of the appeal tribunal.

[6] On 21 October 2013, the appellant filed a notice of appeal[11] to this Court pursuant to s 149(2) of the QCAT Act against the orders of the appeal tribunal. The grounds of appeal raise questions of law only. The appellant seeks orders that the orders of the appeal tribunal be set aside; that the decision of the senior member be affirmed; and that the respondent pay her costs of the appeal.

Circumstances giving rise to the appellant's complaint

[7] A little time after she had applied to enrol in a bachelor of nursing degree course at the University of Queensland in late 2003, the appellant was involved in a horse riding accident. She sustained a head injury. On 7 January 2004, she was admitted for two days as an inpatient of the Ipswich Hospital, discharged and then re-admitted on 11 January unable to speak or walk properly and suffering from vomiting and severe headaches.[12] Upon discharge from hospital, she noted impaired visual acuity and reduced alacrity and sensation of her left limbs. Importantly, she admitted to a three day interval of post traumatic amnesia which, according to Dr Paul Sandstrom, a neurologist, represented a substantial traumatic brain injury.[13]

[8] The appellant recovered sufficiently to begin her nursing course in March 2004. However, a weakness on the left side of her body and severe headaches, each

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2 Ms C Endicott.
3 AB1807: Reasons published 10 April 2012 [76].
4 AB1820: Reasons [154].
5 AB1823: Reasons [165]. By virtue of s 24 of the AD Act, discrimination in the work area is not unlawful if a s 25 exemption applies to it.
6 AB1826: Reasons [182].
7 AB1833-1835.
8 The Hon J B Thomas AM QC and Ms A Fitzpatrick respectively.
9 AB1911: Reasons published 23 September 2013 [111], [112].
10 AB1915: Reasons [135].
11 AB1933-1936.
12 AB355: Appellant's affidavit sworn 21 October 2010 paragraph 7.
13 AB1523: Report 26 February 2009.

a consequence of the accident, caused her to defer and re-commence in 2005.[14] She completed the course and graduated at the end of 2007.[15]

[9] In August 2007, and in anticipation of graduating, the appellant applied online to the respondent to be accepted into the Graduate Nurses Program.[16] In December 2007, she was offered employment with the respondent as a registered nurse at the Ipswich Hospital in the Beginning Registered Nurse Transition To Practice Program 2008 ("the Beginning Nurse Program"). The offer was subject to the terms and conditions in the Queensland Health General Terms and Conditions of Employment document and stated that a probation period of six months would apply to her appointment with provision of a possible extension of up to a further three months in the event of under achievement.[17]

[10] The appellant accepted the offer and commenced employment as a graduate nurse on 11 February 2008. The Beginning Nurse Program required her to nominate and undertake three rotations during the course of it. She had nominated Ward 7C, the Respiratory Ward at Ipswich Hospital, a rural health placement at Laidley Hospital, and a placement at Ward 7A, the Surgical Ward at Ipswich Hospital.[18]

[11] Her first placement was at Ward 7C. The roster required her to work night shifts on 18 and 19 March 2008. Night shifts typically begin between 10 and 11 pm and end between 6 and 7 am. During these particular night shifts she experienced extreme headaches and nausea. She was too sick to work on 20 March. She had a similar experience with a night roster on 19 April 2008. She took some annual leave in May 2008 in order to avoid a night shift on 10 May.[19]

[12] The appellant brought her difficulties with working night shifts to the attention of the program coordinator. She obtained a short report from Dr Sandstrom dated 3 June 2008 which stated:

> "… [The appellant] suffers with a medical affliction associated with myoclonus of the upper limbs and, additionally, cyclical vomiting and ataxia associated with a headache disorder, particularly during the early morning hours. As this condition remains profound at the present time, I would strongly endorse her proposal to avoid night shift duty at this time."[20]

She forwarded a copy of this letter to the acting director of nursing at the Ipswich Hospital on 4 June 2008.

[13] On 16 June 2008, the appellant commenced a rotation at the Laidley Hospital. She explained her problems with doing night shifts to Ms Erica Fletcher, the director of nursing at Laidley Hospital. It appears that some effort was made to accommodate the appellant. She was not rostered for any night shifts during this four month rotation. Ms Fletcher gave evidence at the QCAT hearing that the accommodation worked "with difficulty". In cross-examination, she elaborated that there were complaints from other staff members because they were doing what they considered to be "an unfair amount of night duty" and complaints concerning a perceived lack

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14 AB356: Appellant's affidavit sworn 21 October 2010 paragraph 6.
15 AB359: *Ibid* paragraph 15.
16 AB440-442.
17 AB359: Appellant's affidavit sworn 21 October 2010 paragraph 16.
18 AB360: *Ibid* paragraph 19.
19 AB361-364: *Ibid* paragraphs 22, 23, 30 and 33.
20 AB509.

of effort on the appellant's part "to learn any of the skills and techniques that she may have been able to utilise in order to work night shift".[21] Ms Fletcher was not challenged on this evidence. Nor was her evidence on these matters contradicted by other evidence.[22]

[14] According to the appellant, on 8 July 2008, she was told that her probationary period which was due to expire on 11 August 2008 would be extended "indefinitely".[23] On 29 July 2008, a written request was made on her behalf by the Queensland Nurses Union ("QNU") for a revocation of the extension to the probationary period on the footing that it was discriminatory.[24] The request was supplemented by a further letter dated 6 August 2008 which enclosed a brief report from Professor Richard Jackson, an endocrinologist, dated 4 August 2008 which stated that because of her condition, the appellant could not do night duty after 11 pm.[25]

[15] This latter letter obviously crossed with a letter from the district manager of the respondent's West Moreton South Burnett Health Service District also dated 6 August 2008 whereby QNU was advised that the appellant's probationary period would be extended to 11 November 2008 "whilst further medical evidence can be obtained from her treating neurologist".[26] This letter included the following statement:

> "Queensland Health is of the view that working night duty is an important part of working as a registered nurse, especially a graduate nurse who is still learning the duties required of a registered nurse. Where employees are not able to work night shift, this puts a greater burden on the staff whom are prepared to work night duty shifts. Regrettably, the Hospital only has a minimum of areas where staff can work solely on day shift and these areas are usually for experienced clinical staff and not new graduates. Most nursing areas require the majority of employees to work all shifts in order to provide equitable working conditions for all staff and adequate nursing care to all patients."[27]

[16] On 21 August 2008, a complaint of indirect discrimination was lodged with the Anti-Discrimination Commission (Qld) by QNU on behalf of the appellant in respect of the extension of the probationary period.[28] The complaint matter did not resolve at conciliation on 10 November 2008.[29]

[17] In the meantime, the appellant had continued to work at Laidley Hospital. A further report was provided by Dr Sandstrom to the respondent.[30] It was dated 9 September

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21 AB145 p 362 LL30-38. Evidence to a similar effect was also given by Ms Fletcher in her affidavit sworn on 25 February 2011 at paragraph 57: AB743.

22 In reply, the appellant cited a passage from the cross-examination of Ms E Waterhouse at AB164; P- 380 and especially at AB165; P-381 LL9-34 as suggesting that a "false representation" of resentment at Laidley Hospital had been presented: Tr1-38 LL9-34. A reading of this evidence reveals that it was not addressed to resentment expressed by nurses at the hospital concerning the appellant's not working night shifts.

23 AB366: appellant's affidavit sworn 21 October 2010 paragraph 41.

24 AB510-513.

25 AB517.

26 AB367: appellant's affidavit sworn 21 October 2010 paragraphs 45, 46.

27 AB514-515.

28 AB510-513.

29 AB372: appellant's affidavit sworn 21 October 2010 paragraph 62.

30 AB518.

2008 and was to a similar effect as his earlier report. On 4 November 2008, the appellant was notified that the probationary period had been further extended to 11 February 2009.[31]

[18] The appellant said in evidence that Miss Fletcher had agreed to a request that the appellant had made to do her third rotation at Laidley Hospital on a basis of working early and late shifts, but not night shifts.[32] However, on 19 November 2008, the appellant was advised by email that her third rotation was to commence at Ward 7D at Ipswich Hospital on 1 December 2008.[33]

[19] On 24 November 2008, solicitors acting for the respondent wrote to QNU to convey the following proposal with respect to the appellant's employment:

> "(a) [The appellant's] placement with the Laidley Hospital will end at the end of this month. Given the size of the Laidley Hospital and the limited number of staff employed there, Queensland Health cannot continue to maintain [the appellant's] placement there on day shifts only.
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> (b) From 1 December 2008, [the appellant] is required to work in Ward 7D at the Ipswich Hospital. [The appellant] has been verbally notified of the placement which will be treated as a rotation in the graduate program.
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> (c) The success of this position, and impact on [the appellant's] health and wellbeing, will be monitored throughout. Queensland Health will be as flexible as possible in this regard, and will not require her to perform work between the hours of 2.00am and 3.00am. However it is likely that for [the appellant] to successfully complete her graduate placement, she will have to work within a roster arrangement which includes night shifts. If [the appellant] is unable to work any roster arrangement which can be offered because of her medical condition, she may need to take sick leave. The terms of this leave would be discussed with her.
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> (d) Queensland Health will obtain and pay for a report from a neurologist. [The appellant] will be able to nominate the neurologist from a panel of three, as provided by Queensland Health.
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> (e) [The appellant] would be required to attend a consultation with the nominated doctor and cooperate reasonably with the process. She will be supplied with a copy of the report.
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> (f) Further decisions about [the appellant's] employment would be made having regard to the medical report."[34]

The appellant did not agree to the proposal.[35]

[20] The appellant's evidence was that upon commencing work at Ward 7D, the Director of Nursing told her that she was aware that the appellant was unable to work

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31 AB521-522.
32 AB371: appellant's affidavit sworn 21 October 2010 paragraph 57.
33 AB372: *Ibid* paragraph 63.
34 AB526.
35 AB374: appellant's affidavit sworn 21 October 2010 paragraph 67.

between 2 am and 3 am although this was not fully in accord with the opinions that had been provided by Dr Sandstrom and Professor Jackson.[36] In late December 2008, the appellant learned that some of her colleagues had been invited to indicate their preference for permanent placement for February 2009 upon completion of the Beginning Nurse Program. No such invitation was extended to her.[37]

[21] The appellant took the matter up with representatives of the respondent's Queensland Health Human Resources. Her evidence was that in a meeting with them she was told that enquiries of Dr Sandstrom indicated that he could not give a timeframe as to how long her condition might last or an assessment of the likelihood of her rehabilitation to a point of being able to do night duties, and that in those circumstances, a permanent place could not be found for her with the respondent.[38]

[22] On 4 February 2009, the appellant received correspondence from the chief executive officer of the District offering to extend her probation period to 4 March 2009 pending the receipt of a further report from Dr Sandstrom.[39] She gave the necessary authority for the report which Dr Sandstrom provided on 26 February 2009 and in which he expressed the following conclusions:

> "1. Although I have not assessed her neurologic status since the last assessment in November, 2008, I formed the opinion at that time, that she would be incapable of carrying out the requirements of her position including the requirement to work night shifts.
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> 2. At this stage, I suspect that her seizure disorder will remain under reasonable control with the aid of appropriate antiepileptic drug therapy although the post traumatic headache disorder may persist in the future. Importantly, in my opinion, she is incapable of pursuing employment in night shift segments. Indeed, in my opinion, the reduction of emotional stress and night shift activities would be important in controlling the effects of the post traumatic seizure disorder and headache pattern.
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> 3. At this point, I am uncertain of the duration of her existing incapacity."[40]

[23] In the meantime, the appellant was offered a position as a nurse with a private clinic. She decided to accept it, "given that [the respondent] was not willing to accommodate [her] inability to work night shifts". On 20 February 2009, she forwarded a letter of resignation to the chief executive officer to become effective on 27 February 2009.[41]

Statutory provisions central to the appeal

[24] Section 11 of the AD Act to which I have referred relevantly provides as follows:

> "(1) Indirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term—

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36 AB375: *Ibid* paragraph 68.
37 AB375 *Ibid* paragraph 70.
38 AB376-377: *Ibid* paragraph 73, 76.
39 AB527-529.
40 AB534.
41 AB378: Appellant's affidavit sworn 21 October 2010 paragraph 82; AB531.

(a) with which a person with an attribute does not or is not able to comply; and

(b) with which a higher proportion of people without the attribute comply or are able to comply; and

(c) that is not reasonable.

(2) Whether a term is reasonable depends on all the relevant circumstances of the case, including, for example—

(a) the consequences of failure to comply with the term; and

(b) the cost of alternative terms; and

(c) the financial circumstances of the person who imposes, or proposes to impose, the term."

[25] The other section central to the appeal is s 25 which, so far as is relevant to this appeal, states:

"(1) A person may impose genuine occupational requirements for a position."

Findings by the senior member

[26] It was admitted on the pleadings that the appellant's severe headaches disorder was an impairment within the meaning of s 7(h) of the AD Act. The senior member was satisfied on the evidence that the decision notified on 6 August 2008 not to confirm the appellant's employment as permanent but to extend her probationary period for three months was made because it was accepted that she could not work night shifts at the time on account of this impairment. So also for the decisions notified on 4 November 2008 to extend her probationary period until 11 February 2009 and the decision notified on 4 February 2009 to extend it further until 4 March 2009.[42] The senior member concluded that by virtue of these decisions the appellant had been treated less favourably than other graduate nurses on the Beginning Nurse Program at Ipswich Hospital "whose employment was not left at risk of summary termination".[43]

[27] It was found by the senior member that the respondent had imposed as a term within the meaning of s 11(2) of the AD Act, that the appellant, as a registered nurse, had to be able to participate in the rostering system in place for registered nurses engaged in roles that provided 24 hour care seven days a week.[44] The rostering system was one that would have required the appellant to work all shifts, including night shifts.

[28] Turning to the elements of indirect discrimination, the senior member found that by virtue of her impairment, the appellant was not able to comply with this term: s 11(1)(a);[45] that the proportion of nurses without an impairment who could participate in the roster for roles providing 24 hour care seven days a week was higher than the proportion of nurses with an impairment who could participate in it: s 11(1)(b);[46] and that the term was not reasonable: s 11(1)(c).[47] On the basis of these findings, the senior member concluded that by imposing the term on the appellant, the respondent had

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42 AB1805-1806; Reasons [65], [67].

43 AB1806; Reasons [69].

44 AB1809; Reasons [88]; adopted by the appeal tribunal: AB1896; Reasons [20].

45 AB1810; Reasons [97]. This finding was not challenged in the appeal to the appeal tribunal.

46 AB1814; Reasons [119].

47 AB1819; Reasons [150].

engaged in indirect discrimination against her on the basis of her impairment and, further, that by reason of the indirect discrimination, the respondent had treated the appellant unfavourably in contravention of s 15(1)(f) of the AD Act.[48]

[29] In the proceeding, the respondent had contended that it was a genuine occupational requirement that a registered nurse allocated to 24/7 wards, that is to say, wards in which patients require the availability of nursing care on a 24 hour seven days a week basis, must be capable of complying with the requirements of the rostering arrangements and that it was lawful for the respondent to have imposed that requirement pursuant to s 25(1) of the AD Act.[49] The senior member found that it was not a genuine occupational requirement that the appellant, "as a registered nurse working in 24/7 wards must be able to work all shifts" and that, consequently, the exemption in s 25 was not available to the respondent.[50]

The appeal to the appeal tribunal and its conclusions

[30] The respondent's appeal to the appeal tribunal challenged the application by the senior member of:

(a) the "comparator" test prescribed by s 11(1)(b);
(b) the "not reasonable" test prescribed by s 11(1)(c); and
(c) the provisions of s 25 in a number of respects.

Specifically, the respondent contended that the senior member had erred in holding that the prevailing requirement was not a genuine occupational requirement.

[31] Each of the members of the appeal tribunal reached their own separate conclusions with respect to these grounds of appeal. The presiding member considered the s 25 ground of appeal first. As to it, he concluded as follows:

> "[111] It was an error to find on the evidence that the requirement was not a genuine occupational requirement. The evidence was incapable of supporting that conclusion. The requirement that nurses employed by Queensland Health in this position be capable of being rostered for night shifts was and remains an integral part of the system, and there is nothing to suggest any lack of good faith or genuineness in its retention. The relevant employment is a frontline position in a profession founded on service.
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> [112] The onus is on the employer to show that s 25 is made out. Consistently with the principles stated by members of the courts of high authority in the cases cited above the evidence leads to only one conclusion, namely that it was a genuine occupational requirement. The employer's onus of showing that s 25 was made out was satisfied. It was an error of law to find otherwise."[51]

[32] The other member of the appeal tribunal reached a different conclusion, having adopted as the relevant frame of reference the appellant's employment in the

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48 AB1820; Reasons [154].
49 AB1820; Reasons [155].
50 AB1823; Reasons [165].
51 AB1911.

Beginning Nurse Program. She concluded that the requirement was not an inherent requirement of the appellant's engagement to participate in the program "in order to achieve certain clinical skills and to perform the work of a Registered Nurse".[52]

[33] Having upheld the s 25 ground of appeal, the presiding member considered discussion of the other grounds to be unnecessary.[53] Notwithstanding, he expressed his view on the other two grounds of appeal. He was of the view that an inappropriate "comparator" test had been applied by the senior member.[54] However, he agreed with the other member of the appeal tribunal who, being of a like view,[55] went on to conclude that on the evidence before the tribunal, the appellant could not comply with the term with the consequence that the test in s 11(1)(b) was satisfied.[56]

[34] With respect to the "not reasonable" test, the presiding member was of the view that the evidence was incapable of supporting the conclusion reached by the senior member that the term was not reasonable and that it was an error of law on her part to have so concluded.[57] The other member of the appeal tribunal was of the contrary view.[58]

The appeal to this court

[35] The appellant's notice of appeal sets out the following grounds of appeal:

> "1. The Presiding Member of the Appeal Panel of the Queensland Civil and Administrative Tribunal ('the Appeal Panel') in *The State of Queensland (Queensland Health) v Rebecca Louse (sic) Chivers*[59]) erred in law in that it misapplied section 25 of the AD Act, in that it applied the wrong test to determine the meaning of genuine occupational requirements. The High Court in *Qantas Airways Limited v Christie*[60] held that in determining the inherent requirements of an employee's position reference is to be made to not only the terms of the employment contract but also by reference to the function the employee performs. The Appeal Panel failed to have proper regard to the essential features or defining characteristics of [the appellant's] position and as a result the Appeal Panel erroneously held that section 25 was satisfied (Reasons [79]).
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> 2. The Appeal Panel erred in law in that in applying section 25 of the AD Act it failed to have proper regard to the contractual obligation imposed by the Reasonable Adjustment Policy (Reasons [96]).
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> 3. The Appeal Panel erred in law in that in applying section 25 of the AD Act 1991 it failed to have proper regard to the exceptions or arrangements made for some other employees (Reasons [106]).

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52 AB1931-1932; Reasons [235], [240].
53 AB1911; Reasons [113].
54 AB1913; Reasons [122].
55 AB1922; Reasons [177].
56 AB1913; Reasons [123]; AB1922-1923; Reasons [181], [182].
57 AB1915; Reasons [135].
58 AB1927; Reasons [206], [207].
59 [2013] QCATA (Case No APL 158-12).
60 (1998) 193 CLR 280.

4. The Appeal Panel erred in law in that in applying section 25 of the AD Act it failed to have proper regard to the expert evidence accepted by the Queensland Civil and Administrative Tribunal ('the Tribunal') that there was no particular clinical skill that could only be learned on night duty (decision at first instance[61]).

5. The Appeal Panel erred in law in that in applying section 25 of the AD Act 1991 it had regard to matters that were not findings of fact before the Tribunal, that is that the roster system, 'if not applied produces difficulties in the provision of service and tends to produce resentment among other nurses' (Reasons [79]).

6. The Appeal Panel erred in law in failing to find that the term was not reasonable when applying section 11(2) of the AD Act, in that it failed to take into account all the relevant circumstances of the case (Reasons [129] and [133]).

7. The Appeal Panel erred in law in failing to find that the term was not reasonable when applying section 11(2) of the AD Act, in that it failed to have proper regard to the contractual obligation imposed by the reasonable adjustment policy (Reasons [134]).'"[62]

[36] On 4 November 2013, the respondent filed a notice of contention[63] whereby it contends that a decision of the appeal tribunal should be affirmed on the further ground that the "comparator" test in s 11(1)(b) had not been satisfied by the appellant. The notice of contention alleges that the appeal tribunal itself erred in six respects in failing to uphold that ground of appeal. The alleged errors are that it:

"(a) Included in the 'comparator group' persons who on the Tribunal's findings of fact did not possess [the appellant's] impairment;

(b) Included in the 'comparator group' persons who did not possess [the appellant's] impairment but shared the characteristics, consequences or effects of her impairment (Reasons [117] – [119]);

(c) Misapplied the test prescribed by s 11(l)(b) in that it did not decide what proportion of persons who had [the appellant's] impairment were able to comply with the term held by the Tribunal to have been applied;

(d) Found that other persons with [the appellant's] impairment would also be unable to work night shift for the purposes of the 'comparator group', in the absence of any evidence about the likely effects of [the appellant's] impairment on other persons (Reasons [180] – [182]);

(e) Misapplied the test prescribed by s 11(1)(b) in that it did not decide what proportion of persons who did not have [the appellant's] impairment were able to comply with the term held by the Tribunal to have been applied;

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61 *Chivers* v *State of Queensland* [2012] QCAT 166 at [139] - [141].

62 AB1934-1935. Harmonized to references used in these reasons.

63 AB1937-1938. Harmonized to references used in these reasons.

> (f) Misapplied the test prescribed by s 11(l)(b) in that it did not decide whether a higher proportion of persons who did not have [the appellant's] impairment were able to comply with the term held by the Tribunal to have been applied."[64]

(Paragraphs (a), (c), (e) and (f) repeat paragraphs (a), (b), (c) and (d) respectively of Ground 1 of the respondent's appeal to the appeal tribunal. The reference to "the Tribunal" therein is to be understood as a reference to the tribunal constituted by the senior member. Paragraphs (b) and (d) concern additional errors which the respondent attributes to the appeal tribunal.)

[37] I propose to consider first the grounds of appeal. In written and oral submissions, the appellant grouped Grounds 2 and 3, Grounds 4 and 5, and Grounds 6 and 7 together. It is convenient to consider them in the same way.

Ground 1

[38] The expression "genuine occupational requirements" is not defined for the purposes of the AD Act. Nor does that legislation list facts or circumstances which must or may be taken into account in determining whether a given requirement is a genuine occupational requirement.

[39] In developing this ground of appeal, in both written and oral submissions, the appellant referred to two decisions of the High Court of Australia concerning Commonwealth legislation in which the expression "inherent requirements" in relation to employment are used. They are *Qantas Airways Ltd v Christie*[65] where the expression was considered in the context of s 170DF(1)(f) of the *Industrial Relations Act* 1998 (Cth) which excepted from a prohibition against termination of employment on account of age, a termination "based on the inherent requirements of the particular position", and *X v The Commonwealth*[66] where it was considered in the context of s 15(4)(a) of the *Disability Discrimination Act* 1992 (Cth) which excepted from unlawful discrimination by dismissing an employee on the basis of a disability, a dismissal where, because of the disability, the employee "would be unable to carry out the inherent requirements of the particular employment".

[40] The appellant submitted that the expressions "inherent requirements" in those statutes and "genuine occupational requirements" in s 25 are so similar in meaning that tests formulated by the High Court as applicable to the former are applicable to the latter. This submission is not a contentious one in this appeal. Nor was it so before the appeal tribunal. It is clear from the presiding member's reasons that he regarded "the principles discussed in *Christie*" as applicable to the matter before him.[67]

[41] In particular, the appellant referred to the test formulated by Brennan CJ in *Christie* as follows:

> "The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation."[68]

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64 AB1937-1938.
65 [1998] HCA 18; (1998) 193 CLR 280.
66 [1999] HCA 63; (1999) 200 CLR 177.
67 AB1906; Reasons [79].
68 At [1].

Also cited was the practical method proposed by Gaudron J for determining whether or not a requirement is an inherent requirement in the ordinary sense of the expression, namely, "to ask whether the position would be essentially the same if that requirement were dispensed with".[69]

[42] Turning to *X*, the appellant referred to the following observations of McHugh J:

> "Whether something is an 'inherent requirement' of a particular employment for the purposes of the Act depends on whether it was an 'essential element' of the particular employment. However, the inherent requirements of employment embrace much more than the physical ability to carry out the physical tasks encompassed by the particular employment."[70]
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> "…employment is not a mere physical activity in which the employee participates as an automaton. It takes place in a social, legal and economic context. Unstated but legitimate employment requirements may stem from this context. It is therefore always permissible to have regard to this context when determining the inherent requirements of a particular employment."[71]
>
> "…the inherent requirements of a particular employment go beyond the physical capacity to perform the employment."[72]

[43] Although this ground of appeal proposes that the presiding member applied "the wrong test", the appellant did not succinctly articulate any single test which she contended the presiding member had applied or explain why it was wrong. Instead, the error on which the ground is based, as expressed in the ground itself, is that the presiding member failed to have regard to the essential features or defining characteristics of the appellant's position. This ground is referenced to paragraph 79 in the reasons of the appeal tribunal.

[44] It is appropriate at this point to summarise the presiding member's discussion of the "genuine occupational requirement" issue which occupied some forty-eight paragraphs of the reasons.[73] The summary has relevance for consideration not only of this ground but also Grounds 2 to 5 inclusive.

[45] Having identified the requirement, the presiding member referred to evidence concerning five of the 3,358 registered nurses in the relevant district who, by virtue of *ad hoc* arrangements, were working on other than a full-time 24 hour continuous shift basis and whose circumstances were relied on "heavily" by the senior member in deciding this issue, and also relied on by her in deciding the s 11(1)(b) "comparator" test issue and the s 11(1)(c) "not reasonable" test issue.[74] He then summarised the situation of each of these nurses[75] and noted that the senior member had regarded one of them as not relevant,[76] that another was a nurse whose preference was for night shifts,[77] that two others were not exceptions at all, being examples of re-arrangements for

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69 At [36].
70 At [31].
71 At [33].
72 At [35].
73 AB1902-1911; Reasons [65]-[112].
74 Reasons [68]-[75].
75 AB1904; Reasons [71].
76 *Ibid* Reasons [72].
77 *Ibid* Reasons [73].

a different basis of employment in order to side-step the shift requirement,[78] and that the fifth exemplified a temporary accommodation in favour of a person with an impairment. His view was that this body of evidence failed "to suggest that the requirement was not a genuine one or that it was not an integral part of the system" but, instead, tended to indicate that the roster system had been "firmly applied, accompanied by attempts to accommodate persons with problems".[79]

[46] The presiding member then turned to consider *Christie*. He cited passages from the judgments of Brennan CJ, Gaudron J and McHugh J in which each of their Honours explained why in their opinion the ability to participate effectively in the roster system equally with other pilots of similar seniority was an inherent requirement of Mr Christie's position. Those passages included the following three:

> "There would have been a continuing possibility of bidding successfully for the flights from which he is now compulsorily excluded. But his inability to bid and be selected for some flights skews the equitable operation of the system."[80]

> "If, notwithstanding the limited destinations to which he can now fly, Mr Christie can comply with the Qantas roster system, his position will be essentially the same as that previously occupied by him. However, it will not be the same if Qantas excepts him from the general roster requirements, for that would transform a position no different from that of any other B747-400 captain into a special position for him."[81]

> "[T]he conclusion that it was an inherent requirement of Mr Christie's position as a Qantas Captain of international B747-400 flights that he be able to fly to a reasonable number of Qantas' numerous overseas destinations is inescapable."[82]

[47] The presiding member then said that he found "unconvincing" the basis on which the senior member had distinguished the facts of *Christie* from the present case, namely, that the appellant could work the same number of hours as other rostered nurses by working shifts other than night shifts. He continued:

> "…It is helpful to note the considerations that led the members of the High Court in *Christie* to conclude that a requirement of an employment was essential to a position, and an inherent part of it. It is appreciated the legislative base in *Christie* was different although the underlying ideas and objectives are similar. No differences in the legislation were referred to which would tend to require a different approach to be taken. The above quoted comments are in my view highly persuasive if not actually binding (in view of the different legislation involved) as to the proper reading and application of s 25 of the AD Act. Obviously the facts are different, but in principle I do not think that the decision is properly distinguishable."[83]

[48] Immediately following are two paragraphs to the first of which, this ground of appeal is referenced. They are:

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78 AB1905 Reasons [74].
79 *Ibid* Reasons [76].
80 At [5] per Brennan CJ.
81 At [38] per Gaudron J.
82 At [86] per McHugh J.
83 AB1906; Reasons [78].

> "[79] When the principles discussed in *Christie* are applied to this important contractual term around which the practices of hospital employed nurses are centred, around which the system has functioned for many years, and which, if not applied, produces difficulties in the provision of service, and tends to produce resentment among other nurses, the conclusion that it was a genuine occupational requirement is difficult to resist.
>
> [80] It is also difficult to think that the burden of performing night duty shifts has not been factored into the level of pay that is provided in respect of 24 hour continual shift employment in the relevant industrial award."[84]

[49] Having criticised the basis of distinction of *Christie* adopted by the senior member, the presiding member undertook a critical analysis of her characterization of the exceptions made in the case of the five nurses as a "critical factor".[85] He repeated his view that that evidence was "incapable of leading to a conclusion that the requirement was not a genuine occupational requirement".[86]

[50] In the course of this analysis, the presiding member referred to the case of *X*. He cited two passages from the joint judgment of Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed) concerning the process of identification of the requirements of a particular employment. In the second of them, their Honours explained that in that case, "confining attention to tasks and skills for which a soldier is specifically prepared was too narrow a focus" because "it left out of account where, when, in what circumstances and with whom those tasks and skills were to be performed or used." Those were not to be treated as mere incidents of the employment rather than "as inherent (in the sense of characteristic or essential) requirements of the employment".[87] As well, the presiding member cited from the judgment of McHugh J the observation that appropriate recognition must be given "to the business judgment of the employer in organising its undertaking" and that, accordingly, "in *Christie*, Qantas had no obligation to restructure the roster and bidding system which it utilised for allocating flights to its pilots in order to accommodate Mr Christie".[88]

[51] The presiding member observed that the fact that exceptions are made from time to time in order to administer humanely a system that is essential to a particular employment, does not deprive it of its genuineness or its essentiality.[89] As an illustration of this, he referred to the observations of a Full Court of the Federal Court of Australia in *Cosma v Qantas Airways Ltd*[90] to the effect that to have retained the disabled employee in his position whilst he received the benefit of rehabilitation training and treatment did not change his duties or the requirement that he participate in rotation of tasks within his work gang.

[52] In concluding his analysis of the exceptions, the presiding member expressed the view that the senior member's primary error in reasoning on this issue was to place

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84 AB1906.
85 AB1822; Senior member's Reasons [162].
86 AB1906; Reasons [83]; AB1908; Reasons [90].
87 At [106].
88 At [37].
89 AB1908; Reasons [91].
90 (2002) 124 FCR 504 at 512 per Black CJ, Finn and Dowsett JJ.

substantial reliance on the fact that "the organisation and deployment of staff did not fail when (the five nurses and the appellant) provided nursing services on some but not all available shifts".[91] In his opinion, the existence of the *ad hoc* arrangements, which the senior member had regarded as a "critical factor" bore no relevance to the appellant's position for the purposes of s 25 "having regard to the limited scope of the exceptions and their temporary nature".[92] He continued:

> "[106] …The number of exceptions able to be found in this large scenario (3358 registered nurses in the relevant district) suggests a relatively insignificant level, and is hardly surprising in such a large organisation. None of them received any permanent dispensation from working night shifts, although some of them might well have expected current arrangements to continue indefinitely.
>
> [107] Ms Chivers' case was different. Her medical evidence was that her condition was permanent, and that she simply lacked the ability to do night duty. She was asking for an employer to accept that she had successfully served her probation and confirm her as a permanent employee notwithstanding that she lacked the requisite ability. Her employer declined to accept her on that basis, and there is no evidence that it was prepared to do so on a permanent basis for anyone else."[93]

[53] Next, he identified a point of departure between himself and the other member of the appeal tribunal. He rejected a perspective of the case as one limited to the inability of a nurse in the Beginning Nurse Program to work night shifts during the program or as confined to that part of the contract as concerned the program, observing that such a case was never pleaded, litigated, decided or argued on appeal.[94] He regarded the relevant impositions of the requirement to be found in the successive extensions of the appellant's probation, noting that "The main sting in these extensions was the employer's refusal to confirm acceptance of her as a permanent employee, and in the implied threat of future dismissal if there were non-compliance with rostering requirements."[95]

[54] The presiding member's consideration of the "genuine occupational requirement" issue culminated with the conclusions I have set out at paragraph 31 of these reasons.

[55] As noted, this ground of appeal is referenced to paragraph 79 of the appeal tribunal's reasons. In written submissions, the appellant extracted from this paragraph a proposition that in deciding this issue, the presiding member considered **only** what he described as "an important contractual term"; whereas, the appellant submits, the correct starting point is to determine the nature of the position held by the appellant and in that context, ascertain the genuine occupational requirements for that position.[96] The appellant's amended reply contained the elaboration that the position held by the appellant "must, by definition, include the physical tasks and functions of a registered nurse".[97]

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91 AB1906; Reasons [82]; AB1910; Reasons [105].
92 AB1910; Reasons [106].
93 AB1910-1911.
94 AB1911; Reasons [108].
95 *Ibid*: Reasons [109].
96 Appellant's amended outline of argument paragraph 19.
97 *Ibid* paragraph 5.

[56] I am unable to accept the appellant's proposition as accurately stating the approach of the presiding member. A reading of paragraph 79 reveals that he did not attach importance to the contractual term in isolation. He did so in a context of its integral relationship with the roster system which has functioned for many years and around which practices of hospital-employed nurses are centred.

[57] Moreover, the approach the presiding member did take accorded with the authorities. The test proposed by Brennan CJ in *Christie* required him to refer to the terms of the employment contract. Furthermore, his analysis extended to a consideration of the role of the relevant contractual term in implementing the roster system and the centrality of that system to the operation of the respondent's hospital services delivery undertaking. The observations of McHugh J in *X*, to which the appellant referred, indicate that an analysis of that kind was both appropriate and necessary.

[58] The appellant's elaboration to which I have referred warrants cautious consideration. If it is meant to imply that the test to be applied involves a determination in the abstract of the physical tasks and functions of a registered nurse, then it does not reconcile easily with the observations of Gummow and Hayne JJ in *X* to which the presiding member referred. Moreover, it fails to give due acknowledgement to that aspect of Brennan CJ's formulation which speaks of the function which the employee performs **as part of the employer's undertaking**. Here it was of particular relevance that the appellant's nursing functions were to be performed in an undertaking in which the roster system for 24/7 wards was central. To have limited the frame of reference for identification of the genuine occupational requirements of a registered nurse employed in a 24/7 ward, to a review of physical tasks and functions of the nurse without regard for the working environment in which they were performed, that is to say, provision of nursing care in 24/7 wards, would have led to an error of the kind described by Gummow and Hayne JJ. The appellant's criticism made in the amended reply that the presiding member was "single minded" in considering the environment in which the appellant worked[98] is, in my view, misplaced.

[59] In the course of the hearing of the appeal, the appellant advanced two other submissions in the context of this ground. The first of them was that it was the position of a nurse in the Beginning Nurse Program to which the court should look in determining the genuine occupational requirements.[99] I reject that submission. The basis for not confirming the appellant's employment as permanent after completion of the Beginning Nurse Program was her inability to comply with the requirement with which, as a registered nurse employed in 24/7 wards, she would have had to comply, namely, that she work on all shifts. To have considered the requirement only as it applied to a registered nurse in the Beginning Nurse Program while undertaking it, would have resulted in a misdirected and incomplete enquiry.

[60] The other submission was that adoption of the practical method outlined by Gaudron J in *Christie* for determining whether or not a requirement is an inherent requirement, would yield an outcome which favoured the appellant. It was said that in the appellant's case "the position would be the same, the same work to be performed, the same level of competency required and the same level of accountability and responsibility if the requirement or term did not exist".[100] The appellant's application of this practical method is, in my view, incomplete. It

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98 *Ibid* at paragraph 5.

99 Tr1-10 LL44-45.

100 Tr1-11 LL31-34.

overlooks that her employment is one in an undertaking which provides hospital services to patients on a 24/7 basis; that in order to provide the services, it is necessary that employed nurses be rostered to work on shifts; and that, in order for shifts to be allocated equitably, it is a requirement that all employed nurses participate in any one of the three shift periods, as required. When account is taken of that, the appellant's position would not be the same if the requirement in question did not apply to her. She would not have to comply with it whereas other employed nurses would have to so comply. As the respondent submitted, to accommodate the appellant in that way would require that a "special position" be created for her, an outcome of the type deprecated by Gaudron J in *Christie*.

[61] For these reasons, I am unpersuaded by the appellant's arguments that the presiding member applied a wrong test. In my view, this ground of appeal has not been established.

Grounds 2 and 3

[62] Exhibit 50[101] in the proceedings is a document titled "Reasonable Adjustment" dated January 2003 ("the Policy") which sets out the principles and processes of reasonable adjustment to be applied by the respondent. In explaining what is required by the Policy, the document states:

> "Work-units facilities or branches are required to make appropriate and reasonable changes to organisational practices, workplace behaviours, access, job design, workplace design and/or provision of equipment to facilitate the employment of an individual, unless this imposes *unjustifiable hardship*. Failure to provide reasonable adjustment may constitute unlawful discrimination."[102]

The Policy document also sets out a process for managerial assessment of needs and possible solutions to be applied upon identification of a need for reasonable adjustment and a grievance and dispute resolution process.[103]

[63] It is common ground that this Policy was applicable to the appellant's employment by the respondent at all material times. Further, it is not in contention that the assessment process under the Policy had not been applied in the appellant's case before her resignation.

[64] The appellant characterises the respondent's obligations under the Policy as contractual obligations arising under the appellant's contract with the respondent. Neither the senior member nor the presiding member made a finding that the obligations were contractual ones. Failure to make such a finding was not a ground of appeal to the appeal tribunal; nor is it a ground of appeal to this Court. For the purposes of this appeal, the Court was not presented with submissions concerning the contractual status of the obligations. In the end, debate over that matter is a distraction. What is significant is that the Policy was applicable. As such, it fell to be considered in determining the issue of genuine occupational requirement. That, too, is common ground.[104]

[65] It is evident from his reasons that the presiding member was mindful of the Policy and that it applied to the appellant's employment.[105] Moreover, he referred to it in

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101 AB1543-1546.
102 Clause 3.6.
103 Clauses 3.2 and 4.
104 Respondent's amended outline of argument paragraph 14.
105 Eg Reasons [35], [36].

his consideration of whether the requirement in question was a genuine occupational requirement.[106] The appellant's criticism is that the focus of the attention given by the presiding member to the Policy was upon whether an occasion had arisen for application of it to her before the appellant resigned from her employment.[107] He was critical of an assumption which he understood the senior member to have made that its non-application was a breach of the Policy, although no express finding to that effect had been made by her.[108]

[66] The nub of the Ground 2 appeal is that in considering the matrix of the appellant's employment conditions, the presiding member failed to have regard to the existence of the Policy as one in which a process existed for reasonable adjustments to be made to accommodate the individual needs of persons with disabilities. The Policy, it was argued, was an illustration that the requirement to work all shifts was not a genuine occupational one.

[67] The appellant's argument implies that in order to have had proper regard for the Policy in applying s 25, the presiding member ought to have considered it as illustrating that the requirement to work all shifts was not a genuine occupational requirement. I am unpersuaded that it is legitimate to deduce from a policy of general application, as the Policy clearly is, that a particular requirement is not a genuine occupational requirement. It would not be correct, in my view, to reason that the mere existence of the Policy has the consequence that no requirement imposed by the respondent could ever be a genuine occupational requirement because there exists the possibility that, under the Policy, any requirement might be adjusted for the circumstances of a particular individual. Yet that appears to be the outcome to which the appellant's argument would inevitably lead. To my mind, the mere existence of the Policy is not decisive of whether a particular requirement is a genuine occupational one or not. Indeed, given its generality, the Policy has but limited relevance to that issue.

[68] It remains to note two matters. The first is that the presiding member recorded that the only basis of claim alive for consideration on that appeal was indirect discrimination under s 11. He then observed that the non-application of the Policy is a far cry from establishing that.[109] Specifically, it is not a ground of appeal to this Court that the appeal tribunal erred in failing to find indirect discrimination by virtue of a non-application of the Policy. The relevant appeal ground is referenced to the application of s 25.

[69] The second matter is that, in oral submissions for the appellant, it was proposed that it would have been a reasonable adjustment contemplated by the Policy not to have required the appellant to work night shifts and that that circumstance was not taken into account by the presiding member in considering whether the requirement was a genuine occupational one or not.[110] No finding was made by the senior member or the appeal tribunal to the effect that such an adjustment would have been a reasonable adjustment within the terms of the Policy. There is no ground of appeal contending for an error of law in failing to make such a finding. Moreover, such a finding, limited as it would necessarily be to the specific circumstances of the appellant,

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106 Reasons [93], [94].
107 Reasons [37]-[40] and [93]-[95].
108 Reasons [94].
109 Reasons [95].
110 Tr1-15 LL1-9.

would not be a sound basis from which to reason that the requirement in its application to all registered nurses employed in 24/7 wards was not a genuine occupational requirement.

[70] As to Ground 3, the appellant submitted that it is a relevant consideration in the application of s 25 whether the employer has allowed or permitted relief from the requirement.[111] The presiding member proceeded on the footing that it was relevant to have regard to that topic. As set out at paragraph 45 of these reasons, he did so by summarising the situation of the nurse involved in each of the five exceptions identified in the evidence and then explaining why, having regard to the respective situations, the exceptions did not collectively suggest that the requirement was not a genuine one or that it was not an integral part of the roster system. Moreover, as noted at paragraph 52 of these reasons, in concluding his analysis of the exceptions, the presiding member elaborated upon why he considered them as bearing no relevance to the appellant's position for the purposes of s 25 having regard to their "limited scope" and "temporary nature".

[71] The appellant has not challenged the factual accuracy of the summary by the presiding member of the situation of each of the exceptions. Nor has the appellant attempted to demonstrate a flaw in the reasoning of the presiding member from the basis of that summary to the conclusion that the exceptions did not detract from the characterisation of the requirement as a genuine occupational requirement. Rather, the appellant submitted at the hearing that because, notwithstanding each exception, the provision of patient care over a 24 hour, seven day per week period did not cease, then the requirement could not be a genuine occupational requirement.[112] That submission reprises what the presiding member had found was the primary error in the approach of the senior member. It does not illuminate any error on the part of the presiding member in arriving at the finding he made. In my view, the appellant has not established that the presiding member erred in law in failing to have proper regard to the exceptions made for those five employed nurses.

[72] For these reasons, neither Ground 2 nor Ground 3 can succeed.

Grounds 4 and 5

[73] The first of these grounds of appeal concerns expert evidence adduced in the appellant's case from Professor W Dawson and Ms S Fox-Young to the effect that there were no particular clinical skills that could only be learned or acquired on night duty. The senior member said that she "was not persuaded" that that was not the case.[113]

[74] At the hearing of the appeal, senior counsel for the appellant stated that the presiding member had made a contrary finding for which there was no evidence. That, it was said, was Ground 4.[114] However, no finding to the contrary on the part of the presiding member was identified in his reasons.

[75] This exposition of the ground differed from that in the appellant's amended outline of argument which was that the presiding member made no mention of this evidence, or the senior member's finding in relation to it, in the course of his reasons.[115] To have ignored this evidence, it was submitted, was not merely an error of law but also a jurisdictional error which invalidated any order or decision of the appeal tribunal which reflected it.[116]

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111 *Ibid* LL45-46.
112 Tr1-16 LL1-7.
113 AB1818; Senior member's Reasons [141].
114 Tr1-16 LL32-33.
115 *Ibid* para 31.
116 *Ibid* para 31, relying on *Craig v South Australia* (1995) 184 CLR 163 at 179.

[76] A perusal of the report prepared by Professor Dawson[117] reveals that his evidence that he was unaware of any research that indicated that nurses who did not work night shifts were deprived of essential learning opportunities or would lack skills necessary to undertake their roles effectively, was made in the context of a nurse in a graduate transition program.[118] So also for the context of the evidence of Ms Fox-Young in her report.[119] Had the appellant's case been limited to the inability of a nurse in the Beginning Nurses Program to work night shifts during the program, this evidence may have had relevance, but as the presiding member correctly noted, the case was not so limited. It concerned an inability to work night shifts in 24/7 wards beyond the program and on a permanent basis. Accordingly, this evidence was not germane to the issue which the appeal tribunal was required to consider. The presiding member was not in error in not having regard to it.

[77] Ground 5 is referenced to a statement of fact in paragraph 79 of the Reasons of the presiding member that the requirement in question "if not applied produces difficulties in the provision of services and tends to produce resentment among other nurses". The criticism made is that in having regard to those matters of fact, the presiding member went beyond findings of fact that had been made by the senior member even to a point of drawing conclusions that were in direct contrast to findings that she had made.[120]

[78] This criticism falls to be assessed by reference to the evidence before the senior member and her approach to it. As to production of difficulties in the provision of services, the senior member summarised evidence before her as follows:

> "Queensland Health relies on the evidence of the expert witnesses and its senior staff to argue that accommodating a request by a nurse to be permanently relieved of night duty is unlikely to be possible. The expert evidence from Bernadette Watson referred to the existence of dynamic factors in a workplace and to the fact that no work unit remains static because people's circumstances change over time. The Nurse Unit Managers consistently stated that accommodations departing from the roster could only be sustained for temporary periods and not permanently."[121]

[79] Immediately following, the senior member stated that this evidence was not "particularly relevant" to the appellant's complaint. That was because, as she conceived it, the appellant's case was not based on a claim "for permanent relief from night shifts". Significantly, the senior member did not reject the evidence as not factually accurate. The presiding member observed that the senior member seemed to have accepted it but not employed the facts to which it testified in her analysis on account of perceived irrelevancy.[122]

[80] With regard to a tendency to produce resentment among other nurses, there was the unchallenged and uncontradicted evidence of Ms Fletcher summarised at paragraph 13 of these reasons. The senior member made a glancing reference to evidence of this kind, observing:

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117 AB1514-1520.
118 At AB1515.
119 AB1530-1537 at (a), (d) and (e).
120 Appellant's amended outline of argument paragraphs 35-37.
121 Senior member's Reasons [130].
122 Reasons [42].

> "Evidence from her supervisors was somewhat speculative on this issue as it focussed on permanent relief from night shifts and what they as supervisors anticipated would be the reaction of the nursing staff."[123]

[81] I do not read this as a rejection of that evidence. Here, the senior member appears to have put it to one side as speculative of the future, without explaining why Ms Fletcher's evidence concerning actual experience at the Laidley Hospital during the appellant's rotation there would not have provided a reliable factual basis from which to draw an inference as to the future.

[82] A little later, and after referring to relief from night shifts that had been made on a temporary basis for pregnancies and in another case where the employee nurse changed her basis of employment to avoid the night shift requirement, the senior member said that she "was not convinced that a departure from the rostering system for a perceived sound reason would be universally regarded by nursing staff as unfair and unreasonable".[124] I understand from these remarks that the senior member was prepared to accept the substance of Ms Fletcher's evidence and to infer from it that resentments would arise, if not on the part of every nurse working in a 24/7 ward.

[83] Having regard to the evidence to which I have referred and the senior member's treatment of it, I do not accept that the presiding member drew conclusions which are in direct contrast to findings made by the senior member. The approach of the presiding member may well have been in direct contrast to that of the senior member in that he regarded both matters as relevant to the issue of whether the requirement in question was a genuine occupational requirement; however, in following that approach, he did not draw conclusions in direct contrast to findings made by the senior member.

[84] Nor do I accept that the presiding member had regard to evidence on matters which the senior member had rejected. As explained, for both matters, the senior member appears to have accepted the evidence as truthful but disregarded it as of no relevance, or as speculative. It was therefore open to the presiding member to have had regard to those matters in applying s 25. He was not precluded, as a matter of law, from doing so.

[85] For these reasons, I consider that the appellant has not established either Ground 4 or Ground 5.

The outcome of the appeal with respect to s 25(1)

[86] None of the grounds which allege error with respect to the application of s 25(1) by the presiding member have succeeded. The finding of the presiding member that the respondent had discharged its onus of showing that it had acted lawfully under that provision stands. In consequence, the orders made by the appeal tribunal setting aside the decision of the senior member and dismissing the appellant's claim also stand.

[87] This outcome renders it unnecessary to determine the other grounds of appeal or the issue raised by the notice of contention. Notwithstanding, I propose to deal briefly with those matters.

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123 Senior member's Reasons [133].

124 Senior member's Reasons [135].

Grounds 6 and 7

[88] These grounds are directed at the finding by the presiding member that the senior member had erred in concluding that the "not reasonable" test prescribed by s 11(1)(c) was satisfied. Ground 6 alleges a failure to take into account all the relevant circumstances of the case and is referenced to paragraphs 129 and 133 in the reasons of the presiding member. Ground 7 alleges a failure to have proper regard to the contractual obligation imposed by the Policy and is referenced to paragraph 134 of those reasons.

[89] At paragraph 129 of his reasons, the presiding member cited the decision of Sackville and Stone JJ in *Catholic Education Office v Clarke*[125] as authority for the proposition, accepted by the appellant, that the test of reasonableness is an objective one. At paragraph 133 he drew on his extensive reasons for finding that the relevant requirement, the term for the purposes of s 11(1), was a genuine occupational requirement as reasons which also precluded a finding that the term was not reasonable.

[90] In written submissions, the appellant identified as factors not taken into account, those listed in s 11(2) of the AD Act.[126] Those are not mandatory considerations for every case. Whether they are relevant for consideration and, if so, to what extent, in a given case will depend upon the nature of the term. In any event, the presiding member obviously did consider the consequences overall for the provision of nursing services in 24/7 wards of a removal of the requirement of availability for all shifts on the part of all nurses employed in such wards: s 11(2)(a). An alternative roster regime in which participation on the part of all in night shifts was voluntary was not seriously proposed as practicable for these wards: s 11(2)(b).

[91] So far as a contractual obligation is concerned, the appellant's submissions invoke those made on her behalf in respect of the Policy and contend that by virtue of the contractual force given to it, "the ability to accommodate the needs of the aggrieved person" must be taken into account in assessing the reasonableness of the term.[127] I agree with the presiding member's observation[128] that the existence of the Policy and consideration of how it might have applied in the appellant's case have little bearing upon whether the term itself is not reasonable.

[92] I do not regard these grounds of appeal as having been made out.

Notice of contention

[93] The "comparator" test in s 11(1)(b) imposed an onus upon the appellant to demonstrate that the respondent had required her to comply with a term with which a higher proportion of persons without the appellant's attribute were able to comply than for those with a like attribute. Speaking of the counterpart test in the *Disability Discrimination Act* 1992 (Cth), Black CJ in *The State of Queensland (Queensland Health) v Che Forest*[129] explained that that test "directs attention at the outset to groups of people: persons with the disability that affects the aggrieved person and persons without that disability". His Honour noted that those with the disability are conventionally referred to as the "comparator group", and those in the broader group as the "base group". Section 11(1)(b) speaks of impairment rather than disability and, here, the relevant impairment was the appellant's severe headaches disorder.

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125 [2004] FCAFC 197; (2004) 138 FCR 121 at [115].

126 Appellant's amended outline of argument paragraph 43; appellant's amended reply paragraph 27(a).

127 Appellant's amended reply paragraph 27(b).

128 At Reasons [133].

129 [2008] FCAFC 96; (2008) 168 FCR 532 at [7]; see also per Spender and Emmett JJ at [119].

[94] The respondent is critical of the application of the "comparator" test by the appeal tribunal in two respects. First, the respondent criticises the way in which the appeal tribunal had regard to the symptoms of the appellant's condition for the purpose of identifying the comparator group.[130] The presiding member considered that the range of symptoms caused by the appellant's severe headaches and their cumulative impact in preventing her from working night shifts were relevant to identification of the comparator group.[131] The other member of the appeal tribunal implicitly agreed.[132]

[95] The respondent submits that the correct approach to identification of the comparator group in every case is to have regard solely to the designation of the medical condition constituting the impairment. On that approach, the comparator group here would constitute any registered nurse diagnosed as suffering from a severe headaches disorder without regard for the range of symptoms experienced by the individual or their combined impact upon the ability of that individual to work night shifts. The respondent did not cite any authority which supports the approach for which it contends. I would not adopt it as the correct test. For a case such as the present, that approach would be an unrealistic one particularly since the appellant's probation was extended and permanent employment declined not because she had the diagnosed condition but because the impact of the symptoms of it upon her was that she was unable to comply with the term as found.

[96] The respondent's other criticism is of a process of inference adopted by the appeal tribunal in order to determine that no person with the appellant's impairment could comply with the rostering system term. For that inference, the appeal tribunal reasoned that a higher proportion of persons within the comparator group could not comply with the term than the proportion of persons in the base group who could not.[133] The appeal tribunal resorted to the inference in the absence of evidence concerning any other nurse diagnosed as suffering from a severe headaches disorder. In short, the respondent's point was that in the absence of such evidence, it was not open to the appeal tribunal to hypothesise with respect to persons with an impairment similar to that of the appellant.

[97] It is sufficient to dispose of this criticism by observing that the approach taken by the appeal tribunal finds express support in the observations of Black CJ in *Che Forest* at paragraph 8. It was permissible for the appeal tribunal to draw the inevitable inference that any nurse impaired similarly to the appellant would not be able to comply with the term that required her to work night shifts in 24/7 wards.

[98] In my view, the grounds advanced in the notice of contention cannot succeed.

Orders

[99] For these reasons, I would propose the following orders:

1. Appeal dismissed.
2. Appellant to pay the respondent's costs of the appeal on the standard basis.

[100] **DOUGLAS J:** I also agree that the appeal should be dismissed with costs for the reasons given by Gotterson JA.

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130 Tr1-34 L4-1-37 L36.

131 AB1912; Reasons [118], [119].

132 AB1922; Reasons [181], [182].

133 AB1922; Reasons [181], [182], adopted by the presiding member at AB1913; Reasons [123].