QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Brough v Queensland Rail Limited* [2019] QIRC 039
PARTIES:	**Brough, Luke** (Complainant) **v** **Queensland Rail Limited** (Respondent)
CASE NO:	AD/2017/44
PROCEEDING:	Referral of complaint
DELIVERED ON:	5 March 2019
HEARING DATES:	11 June 2018 (Mention) 16 August 2018 (Hearing)
MEMBER:	Swan DP
HEARD AT:	Brisbane
ORDERS	**1. The Complaint is dismissed.**
CATCHWORDS:	ANTI-DISCRIMINATION - REFERRAL OF COMPLAINT - Discrimination on the basis of colour vision deficiency - Section 166 of the *Anti-Discrimination Act 1991* - Complainant's impairment at work "colour vision deficiency" - Complainant a Guard at Queensland Rail Limited (the Respondent) claiming impairment has prevented him from becoming a Driver before introduction of *Transport (Rail Safety) Act 2010* - Section 83, Complainant would have qualified to be Driver as Transitional provisions referred to employees having previously satisfied qualifications for a particular position retaining that position - Under new legislative scheme Respondent required to implement a health and safety management program - National Standard for Health Assessment of Rail Safety Workers - New mandatory requirement for Category 1 workers (i.e. Drivers) were to pass the eye vision tests "Ishihara Test" or "Railway LED Lantern Test" - Complainant failed both those tests - Complaint that the Respondent had

not sought an "exemption" under the *Anti-Discrimination Act 1991* concerning "Operational requirements" of the job - As far as s 83 of the *Transport (Rail Safety) Act 2010* is concerned it is taken to have impliedly repealed or excluded the operation of the *Anti-Discrimination Act 1991* - *MacDonald & Ors v Queensland Rail* distinguished - Application dismissed.

LEGISLATION:

Anti-Discrimination Act 1991

National Transport Commission Act 2003 (Cth)

Rail Safety National Law (Queensland) Act 2017

Rail Safety National Law Regulations 2012

Transport (Rail Safety) Act 2010

Transport (Rail Safety) Regulations 2010

National Standard for Health Assessment of Rail Safety Workers 2012

National Standard for Health Assessment of Rail Safety Workers 2017

CASES:

Ferdinands v Commissioner for Public Employment [2006] HCA 5.

Goodwin v Phillips (1908) 7 CLR 1; [1908] HCA 5.

MacDonald & Ors v Queensland Rail [1998] QADT 9 (1 May 1988).

State of Queensland v Attril & Anor [2012] QCA 299.

APPEARANCES:

Mr P. Allen of the Rail Tram and Bus Union of Employees, Queensland, for the Complainant Mr Luke Raymond Brough.

Mr Dan Williams of Minter Ellison and Ms Deanna McMaster of Minter Ellison Lawyers for the Respondent, Queensland Rail Limited.

Reasons for Decision

Background to the Complaint

[1] Mr Luke Brough (the Complainant), filed a complaint pursuant to s 166 of the *Anti-Discrimination Act 1991* (the AD Act) with the Anti-Discrimination Commission, Queensland (ADCQ) on 11 March 2017. The ADCQ accepted the complaint under s 141 of the AD Act on 29 June 2017.

[2] An unsuccessful conciliation before the ADCQ resulted in this matter being referred to the Queensland Industrial Relations Commission (the Commission) on 24 August 2017.

[3] The Complainant alleges that Queensland Rail Limited (the Respondent) discriminated against him unlawfully as a result of an impairment (see s 7 of the AD Act). The impairment is "colour vision deficiency". The discrimination occurred at the workplace when the Complainant was denied promotional opportunities to the rank of Trainee Driver as a consequence of his impairment.

[4] It is not contested that the Complainant has jurisdiction to bring the complaint before the Commission.

Witnesses

[5] Witnesses for the Complainant were as follows:

- Mr Luke Raymond Brough, the Complainant; and
- Mr *Troy Mark Prebble, Train Operations Inspector, Queensland Rail.

[*Mr Prebble held various positions with the Respondent and at the time of giving evidence held the position of Train Operations Inspector.]

[6] Witnesses for the Respondent were as follows:

- Mr Anthony Paul Nelson Manager, Train Service Delivery Operations, Queensland Rail;

- Mr Mark John Raumer, Senior Rail Safety Adviser City Network and Chair of Queensland Rail Signal Sighting Committee; and

- Ms Keryn Anne Pauley, Principal Human Factors Advisor, Queensland Rail.

The Complainant's submissions as to the nature of the Complaint and the Relief Sought

[7] The AD Act prohibits direct discrimination on the grounds of impairment at work. In denying the Complainant promotional opportunities, the Complainant contends that the Respondent, because of his impairment, is in breach of the AD Act.

[8] The Complainant says that the Respondent does not have an "exemption" pursuant to s 25 the AD Act to permit them to discriminate in the manner in which they have done.

[9] The Complainant accepts that the Respondent must adhere to all legislative Guidelines in determining one's fitness for work but submits that those Guidelines cannot be the basis for discrimination as has occurred in this matter.

[10] The accepted Guidelines require a candidate to satisfy a test named the "Ishihara Plate Test" (Ishihara) or the "RailCorp LED Lantern Test" (LED Test) rather than accepting a practical assessment of the Complainant's ability.

[11] The Complainant had undertaken both of those tests and had failed both.

[12] The Complainant states that the Respondent should be concentrating upon the actual requirements of a position and whether a person is capable of performing those duties rather than relying upon "a crude means of testing to determine fitness for work."[1]

[13] The clarifying paragraph of the Complainant's case was that where the relevant Guidelines do provide specifically (i.e. in the transitional provisions from old guidelines to current) there is provision made for the Complainant's previous successful colour vision testing to be deemed adequate to allow the Complainant the career progression he seeks and has been denied.

The Complainant's submissions on the outcome sought

[14] The Complainant seeks the following outcome:

(a) That the Commission find that the Respondent has no entitlement to discriminate against the Complainant such that it denies his career advancement; and

(b) That the Commission order the Respondent to desist from discriminating against the Complainant on the basis of his impairment and reinstate the Complainant to the Drivers' Training School for which he was selected, partially completed, but was subsequently removed.

(c) That the Commission order the Respondent to reimburse the Complainant the difference in pay he would have been entitled to had he continued on to become a train driver unhindered by the alleged unlawful discrimination.[2]

Statement of Agreed Facts

[15] The parties provided a Statement of Agreed Facts to the Commission on 2 July 2018, as follows: [footnotes omitted with the exception of 1(b)]

1. At all material times the:

(a) *Anti-Discrimination Act 1991* (Qld) (AD Act) applied to the Respondent in regard to the Complainant's employment;

(b) The Respondent was required to comply with the *Transport (Rail Safety) Act* 2010(Qld) (TRS Act)*;

[1] Complainant's submissions, p 2, [8].
[2] Complainant's submissions, p 2, [10].

(c) the TRS Act and TRS Regulations placed obligations on the Respondent and its executive officers to ensure rail safety including in relation to health assessments.

[*See Note below as was footnoted to 1(b) of the Statement of Agreed Facts]

NOTE: From 1 July 2017, the Rail and Safety National Law (RSNL) (as recorded in the Rail Safety National Law Queensland) was a law in Queensland. This replaced the TRS Act and TRS Regulations. The provisions of the RSNL that relate to the obligation to have a health and fitness management program (s 114 of the Rail Safety National Law (Queensland), and s 27 of the Rail Safety National Law Regulations 2012 are in substantially similar terms to the former TRS Act. Section 264 of the Rail Safety National Law (Queensland) makes the Rail Safety National Law Regulations 2012 (SA) the regulations under the Rail Safety National Law (Queensland). On 1 February 2017, the 2017 version of the National Standard for Health Assessment of Rail Safety Workers replaced the NS 2012. The relevant requirements with respect to health assessments and testing for colour vision have not materially changed.

2. The Complainant is employed by the Respondent as a Tutor Guard (Guard).

3. The Complainant has defective colour vision, an impairment within the meaning of the AD Act.

National Standard for Health Assessment of Rail Safety Workers

4. Under section 83 of the TRS Act and s 17 of the TRS Regulations, the Respondent was required to have and implement, a health and fitness management program that complied with the National Standard for Health Assessment of Rail Safety Workers (NHS 2012):

5. The NHS 2012 required that for a safety critical role that requires normal colour vision (eg Drivers and Guards), the worker must pass either an Ishihara Test or a LED lantern test, without the use of colour lenses or sunglasses, to be fit for duty.

6. The NHS 2012 required rail transport operators to "consider national and local anti-discrimination legislative requirements" when implementing health assessment systems.)

7. In order to discharge its duty, the NHS 2012 required the Respondent to:

(a) determine whether rail safety workers were ‘safety critical workers'. A rail safety worker is a safety critical worker if their action or inaction may lead directly to a serious incident affecting the public or the rail network.

(b) if a worker is a safety critical worker, determine whether the worker is a category 1 or category 2 safety critical worker.

(i) a worker is a category 1 safety critical worker if sudden incapacity or collapse (for example, from a heart attack or blackout) may result in a serious incident affecting the public or the rail network. An example of a category 1 task is single-operator train driving on the commercial network; and

(ii) a worker is a category 2 safety critical worker if fail safe mechanisms or the nature of their duties ensure that sudden incapacity or collapse does not affect the safety of the rail network. For example, in many instances signallers are classified as category 2 safety critical workers because fail-safe control systems protect the safety of the network in the case of worker incapacity; and

(c) conduct risk assessments of individual tasks to identify task specific requirements, which are to be communicated to the health professional conducting the health assessment (Authorised Health Professionals).

8. Persons performing the roles of Driver and Guard were rail safety workers under the TRS Act.

9. The Tasks of Drivers involve category 1 safety critical work, requiring normal colour vision.

10. The tasks of Guards involve category 2 safety critical work requiring normal colour vision.

Testing for normal colour vision

11. If a role is identified as requiring normal colour vision, the NHS 12 provided that:

    (a) the worker must be screened as using 12 Ishihara plates, with three or more errors out of 12 being a fail. The NHS 2012 provided that "No colour lenses or sunglasses should be used when testing. Workers who fail the Ishihara screening test do not meet the criteria for Fit for Duty, and

    (b) for a worker who fails the Ishihara test, the worker must be screened using the Railway LED Lantern Test 6 metres.

12. The NHS 2012 stated that a rail safety worker is unfit for duty for a normal colour vision role if they fail both the Ishihara test and the Railway LED Lantern Test 6 metres.

Transitional Arrangements

13. The NS 2012 contained transitional arrangements to set out how the NS 2012 was to take effect when it was introduced. Specifically, s 26.6 of the NHS 2012 provided that:

> "Workers who were previously assessed by a rail transport operator under the former Standard using a practical test, and who have been working safely, may continue to perform their duties. However, if such a worker applies for a position with different colour vision demands or if the colour vision demands of the role change, they should be assessed against this Standard (refer to s 19.2, Vision and eye disorders)"

14. The parties do not agree about whether the roles of driver and guard have the same or different colour vision demands.

Complainant's Employment History

15. The Complainant commenced employment with the Respondent on 12 January 1998 as an Apprentice Carpenter.

16. The Complainant applied for, and was accepted into, the Respondent's Guard School in 2003. The Complainant successfully completed a practical colour vision test in April 2003, which allowed him to work as a Guard under the health standards at the time.

17. Upon completion of the Guard School the Complainant exited with a qualification as a Guard and Driver's Assistant.

18. Driver's Assistants are required to be able to call signals both in conjunction with the Driver as well as independent of the Driver in certain shunt operations.

19. Having successfully completed a practical colour vision test in April 2003, when the NHS 2012 came into effect, the Complainant was able to rely on the transitional provisions at s 26.6 of the NHS 2012 and continue in his role as a Guard without having to pass an Ishihara test or the LED Lantern Test.

20. On 20 February 2015 the Complainant underwent a Category 1 Safety Critical Worker Assessment for the position of Driver. As part of this assessment, the Complainant

underwent and failed Ishihara test. After that failure, the Complainant underwent a LED Lantern test and failed that test.

21. The Complainant commenced training as a Locomotive Train Driver Class 11 in February 2015.

22. During the course of the training the Complainant gained competencies towards the qualification of Train Driver Class 1 namely: SPAD Prevention, Shunt Rollingstock; Traffic Processes; Train Management, Ops Processes. The competencies require the ability to correctly distinguish coloured signals. The competencies held by the Complainant remain current with the exception of Shunt Rollingstock and Train Management.

23. The Complainant successfully completed a practical Route Tutor assessment in 18 April 2015 which requires the unassisted ability to discern coloured signals correctly. This assessment remains valid.

24. On 2 February 2016, the Complainant received advice from the Aphrodite Livanes Optometrists, which stated that "[the Complainant] has a mild deutan defect with his colour vision. With IRO Colour Corrective lenses he passed the Ishihara test."

25. The Respondent replied to the Complainant (through the Rail Tram and Bus Union) by email dated 2 March 2016, stating that the NHS 2012 does not permit colour corrective lenses to be used when assessing colour vision.

26. On 28 October 2016 the Complainant applied for Driver School to become a Locomotive Train Driver Class 11.

27. On 7 November 2016 the Respondent informed the Complainant that it had rejected his application because he did not meet the statutory requirements under the TRS Act and TRS Regulations in relation to colour vision.

28. The Respondent's reasons for rejecting the Complainant's application for a Driver role is because he has failed to meet the requirements of s 19.2.3 of the NHS 2012.

[See note at [21] re: NHS and NS *viz.,* National Standard for Health Assessment of Rail Safety Workers]

Legal Framework

***The Anti-Discrimination Act 1991* (the AD Act)**

[16] One of the purposes of the AD Act is the protection of individuals from direct and indirect discrimination on specified grounds, which include impairment, in certain areas of activity, including work, unless an Exemption in Part 4 or 5 of the AD Act applies (see s 6 of the AD Act).

[17] Section 7 of the AD Act prohibits discrimination on the basis of prescribed attributes, including impairment (see ss 6, 24 and 103 of the AD Act).

[18] Section 15 of the AD Act prohibits discrimination by, amongst other things, denying or limiting access to opportunities for promotion, transfer, training or other benefits to a worker, or by treating a worker unfavourably in any way in connection with work.

[19] Discrimination is not unlawful if an exemption in the AD Act applies. Section 25 of the AD Act allows for the imposition of an exemption (of a genuine occupational requirement for a position).

[20] A contravention of the prohibition on discrimination entitles a person to complain to the ADCQ. If the complaint cannot be resolved by conciliation, the Complainant may require the ADCQ to refer the matter to the Commission which may make certain orders if the complaint is proven (see ss 166 and 209 of the AD Act). [3]

The *Transport (Rail Safety) Act 2010* (the TRS Act)

[21] At the time during which the Complainant had raised his claims, the TRS Act applied to the Respondent. The *Rail Safety National Law (Queensland) Act 2017* (RSNL) replaced the TRS Act from July 2017 and the 2017 edition of the National Standard for Health Assessment of Rail Safety Workers replaced the National Standard for Health Assessment of Rail Safety Workers 2012 in February 2017.

[***Note:** The **National Standard for Health Assessment of Rail Safety Workers** will be referred to in this Decision as **NS** (2012 and/or 2017 respectively). However, in parts where directly quoted, is also referred to as "NHS" and "National Standard".]

[22] Ultimately, the Respondent submits that its obligations under the RSNL and the NS 2017 are primarily the same obligations which were in place at the time of this complaint. Consequently, those obligations continue to prohibit the Complainant from becoming a Driver unless he passed the two colour tests (*viz.,* the Ishihara and LED Lantern Test).

[23] The focus of the TRS Act related to rail safety and regulatory efficiency in identifying and managing risks associated with railway operations. Examples of this included the mandatory requirement to have and implement health and fitness management programs. In s 83 of the TRS Act, the National Standard for Health Assessment of Rail Safety Worker (NS), was developed by the National Transport Commission. The National Transport Commission means the National Transport Commission established under the *National Transport Commission Act 2003*.

[24] The NS was subsequently implemented by Australian states and territories as a mandatory requirement.

[25] The NS 2012 required the Respondent to perform risk assessments of rail workers, including their risk category and health assessment requirements (see s 6 of the NS 2012). This included:

(a) Determine whether rail safety workers were "safety critical workers". A rail safety worker is a safety critical worker if their action or inaction may lead directly to a serious incident affecting the public or the rail network; (see s 5.1 of the NS 2012)

(b) If it was determined that a worker fitted into this category, then a determination of whether that worker was classified as a category 1 safety critical worker or a category 2 safety critical worker was made.

(i) A worker is a category 1 safety critical worker if sudden incapacity occurs which may result in a serious incident affecting the public or the rail network.

[3] Respondent's submissions, p 3, [8]-[11].

The provided example is that of a single-operator train driving on the commercial network.

(ii) A worker is a category 2 safety critical worker if fail safe mechanisms or the nature of their duties ensure that sudden incapacity or collapse does not affect the safety of the rail network. The provided example is that in many instances signallers are classified as category 2 safety critical workers because fail-safe signal control systems protect the safety of the network in the case of worker incapacity.

(c) Conduct risk assessments of individuals tasks to identify task specific requirements, which are to be communicated to the health professional conducting the health assessment.[4]

Testing for normal colour vision

[26] If the role was identified as requiring normal colour vision, the NS 2012 provided that:

(a) The worker must be screened using 12 Ishihara plates, with three or more errors out of 12, being a fail. The NS 2012 provided that:

> No colour lenses or sunglasses should be used when testing. Workers who fail the Ishihara screening test do not meet the criteria for Fit for Duty. [5]

(b) For a worker who fails the Ishihara test, the worker must be screened using the Railway LED Lantern Test 6 metres.[6]

(c) The NS 2012 stated that a rail safety worker is unfit for duty for a normal colour vision role if they fail both the Ishihara test and the Railway LED Lantern Test 6 metres.

Transition Arrangements

[27] The NS 2012 contained transition provisions. These set out how the NS 2012 was to take effect when commenced. Section 26.6 of the NS 2012 provided that:

> Workers who were previously assessed by a rail transport operator under the former Standard using a practical test, and who have been working safely, may continue to perform their duties. However, if such a worker applies for a position with different colour vision demands or if the colour vision demands of the role change, they should be assessed against this Standard.[7]

The Transition arrangements in the NS 2012 in relation to the Complainant's circumstances

[28] The Respondent submits that as the Complainant performs the current role of a Guard, then he is not required to undertake the Ishihara Test or the Railway LED Lantern Test 6 metres.

---

[4] Respondent's submissions, p 5, [18].
[5] NS 2012, s 19.2.3, p 147.
[6] NS 2012, s 19.2.3, p 147 and Figure 29, p 148.
[7] NS 2012, s 26.6, p 200.

[29] However, if the Complainant wishes to apply for a position with different colour vision demands to his current position, then that worker would have to meet the requirements of the colour demands. The colour demands of a Driver are different to that of a Guard, including Guards who are qualified as a Driver's Assistant.

[30] The Respondent outlined the rationale behind that provision as follows:

> 26. The key issue is that a Driver remains ultimately responsible for the safe operation of the train, including ensuring that the train complies with all signals (including colour signals). A Guard or Driver's Assistant may be used as a secondary control (among other controls including technology solutions) to assist the Driver to correctly identify signals and comply with them, but the ultimate responsibility for ensuring that the train complies with signals on the network remains with the Driver. As a result the demands on the colour vision of a Driver are more onerous than on a Guard or Driver's Assistant acting in a secondary role.[8]

Witness Evidence

[31] The essence of the evidence of Messrs Raumer and Nelson and Ms Pauley is replicated throughout this decision as it relates to the specific points of difference between a Driver's position and that of a Guard and whether the roles of Driver and Guard have the same or different colour vision demands. The evidence given supports the Respondent's submissions on those critical points i.e. that there were discernible differences between those two positions and on the specific issue of colour vision demands for both positions.

[32] The evidence of Mr Prebble differs to the extent that he submits that the colour vision required of a Driver is the same as that required of a Guard.

[33] Witnesses all acknowledge the actual type of work performed by the various categories of employee. This includes circumstances where:

- The angle of the curve of the track is such that a Driver's Assistant may have better vision of the track to that of the Driver;
- When a locomotive (i.e. a non-passenger train) travels in reverse to attach to a train;
- Some shunting operations, where a Driver's Assistant is the only member of the rail traffic crew who can see a signal, and is required to interpret and relay the signal to the Driver; and
- Noted was that it was always the prerogative of the Driver to accept or otherwise such information as the Driver remains in control of the train and the primary colour vision demand remains with the Driver.

[8] Respondent's submissions, p 7, [26].

Respondent's submissions

Colour vision demands of Drivers

[34] A Driver must be able to identify signals on the network up to 800 metres away at speeds of up to 140 km/hour (electric trains) and 80 km/hour (diesel trains).

[35] As well, a Driver's responsibilities include driving trains on the rail network in association with set timetables. In the course of these duties, Drivers are required to identify and interpret signals on the network. Being "route competent" means that Drivers are required to operate rail traffic safely over particular routes. This competency involves understanding which signals apply to the route, as there may be multiple signals that are adjacent to the track.

[36] The Respondent submits that Drivers' Assistants and Guards may be required to assist a Driver with signals from time to time. However, neither Guards nor Drivers' Assistants are trained to be or are required to be route competent.

[37] Primarily Drivers have the ultimate control of a train and are required to understand and interpret signals of the network at speed which includes identifying and observing colour light signals.

Colour vision demands of Guards

[38] Submitted is that a Guard must be able to detect coloured signals and signs at distances up to 200 metres.

[39] A Guard's primary role in relation to signals is to provide "right away" to the Driver before a stationary train departs from a station. Guards are trained in departure signals, but are not trained in signal observance generally. This role entails giving "right away" if the signal at the end of the platform has a "proceed" aspect (i.e. the aspect is not red) or if the station has a Signal Indicator which is illuminated. The Signal is a white bar against a black background and when it is illuminated that is the sign to "proceed".

[40] When the Guard gives a Driver "right away", the Driver must confirm that the signal displays the "proceed" aspect (that is, that the signal is green, single yellow, flashing yellow or double yellow) before departing the Station.

[41] In the event that a Guard is called upon by the Driver to assist, if, for example, there has been an incident, the Guard may be required to confirm signals with the Driver. Further confirmation of signals may be required by the Guard if the Automatic Warning System fails or in circumstances where the train is being reversed where the Driver has no vision of the rear of the train.

[42] In all of these circumstances, the Driver is the ultimate decision maker, and has the ultimate responsibility to avoid a "Signal Passed At Danger" [SPAD].

Colour vision demands of Drivers' Assistants

[43] The Complainant performs work as a Guard who, from time to time can work as a Guard/Driver's Assistant.

[44] The Driver's Assistant is not responsible for the overall safe operation of the train. The role of the Driver's Assistant is to confirm signals for the Driver. The Driver can choose to accept or reject that confirmation.

[45] Examples of occasions when this assistance is required include if the train is moving backwards or when shunting. In these circumstances, there are a wide range of duties performed by the Driver's Assistant, but it is the Driver who is always responsible for the safe operation of the train.

[46] In *MacDonald & Ors v Queensland Rail*[9] a similar matter had been considered by the Anti-Discrimination Tribunal Queensland. The Complainant submits that the reasoning adopted in that decision should be accepted by the Commission.

[47] Submitted by the Respondent is that the decision is not relevant to this matter. Its lack of relevance relates to the fact that the legislative regime in place at that time for similar workers with the Respondent had now been surpassed. The regime provided in the TRS Act and Regulations and the NS 2012, post-dated the *MacDonald* decision and, from the Respondent's perspective, "must be taken to have been intended to alter the law as established in *MacDonald*".[10]

[48] The Guidelines which existed at the time of *MacDonald* provided:

> ***Obligations About Government Supported Transport infrastructure***
>
> The Chief Executive, Queensland Rail must ensure that:
>
> (a) The construction, maintenance and operation of all Government supported transport infrastructure for which the entity is responsible is carried out in accordance with standards published by the entity that are designed to achieve:
>
> (i) Efficiency; and
> (ii) Affordable quality; and
> (iii) Cost effectiveness.
>
> (b) Construction, maintenance and operation is carried out in a way that -
>
> (i) Takes into account national and international benchmarks and international best practice; and
> (ii) Promotes, within overall transport objectives, the safe transport of persons and goods; and
> (iii) Encourages efficient and competitive behaviour in the construction and maintenance of transport infrastructure; and
>
> …

[9] [1998] QADT 9.
[10] Respondent's submissions, p 11, [44]-[49].

Develop or comply with the Draft Guidelines for Health Assessment on the Respondent

[49] The Respondent submitted that the TRS Act specifically requires train transport operators to have and implement a health and fitness management program that complies with the requirements prescribed in a Regulation, and makes a failure to do so an offence punishable by a maximum fine of 200 penalty units. Likewise, the RSNL continues to impose similar obligations on the Respondent in this regard.

[50] I accept that there is no real correlation between the decision made in *MacDonald* on the available facts and legislative regime at that time and the current circumstances.

The Respondent's submissions as to the facts in this claim.

[51] The matter to be considered does not relate to whether the Complainant is physically capable of driving a train or that he meets the occupational requirements of the role of a Driver. It is the case that, the surrounding context of employment must also be considered. This must all be considered within the context of the TRS Act (or, currently, the RSNL).

[52] The relevant mandatory regulations have been previously mentioned (see Regulation 17 of the TRS Act).

[53] Had the Complainant been appointed as a Driver when he was unable to pass the mandatory testing regime (the Ishihara and or LED Lantern Test), the Respondent would be contravening the NS 2012 and would be exposed to criminal penalties. The failure to pass those "tests" renders the Complainant unfit for duty as a Driver.

[54] The Complainant's claim that the AD Act requires the Respondent to permit him to be appointed as a Driver, and its absence to approve his appointment constitutes unlawful discrimination.

[55] The Respondent states:

> The AD Act does not impose such an obligation, because (as submitted) an exemption under s 25 of the AD Act applies as a consequence of the legislative obligation in the TRS Act. However, if it would otherwise impose such an obligation, it is impliedly repealed to that extent by the operation of s 83 of the TRS Act and the command in it on both parties to comply with the Regulation and the NS 2012.[11]

[56] The Respondent states that:

> It is well established that where the provisions of two enactments are wholly inconsistent with each other, the later statute must be read as impliedly repealing the earlier statute.[12]

[57] In furtherance of that submission, the Respondent referred to *Goodwin v Phillips*[13] *where Griffiths CJ* summarised the "general rule" as:

---

[11] Respondent's submissions, p 14, [61].
[12] Respondent's submissions, p 14, [63].
[13] (1908) 7 CLR 1; [1908] HCA 5.

> … where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.[14]

[58] In the abovementioned matter, the High Court considered a lease which contained terms inconsistent with earlier legislation and it was held to impliedly repeal the earlier Act.

[59] In *Ferdinands v Commissioner for Public Employment*, Gummow and Hayne JJ,[15] in a joint judgment, summarised the authorities as follows:

> It has long been recognised that even though one statute does not expressly repeal an earlier statute, the later statute must be read as impliedly repealing the earlier if the two are inconsistent. Inconsistency lies at the root of this principle. But, as Isaacs J pointed out in 1907, "it is very hard to formulate a rule that will apply to every case of implied appeal". There are, however, two cardinal considerations. First, as Gaudron J said in *Saraswati v R* "there must be very strong grounds to support [the] implication, for there is a general presumption that the legislature intended that both provisions should operate". Secondly, deciding whether there is such inconsistency, ["contrariety" or "repugnancy"] that the two cannot stand or live together (or cannot be "reconciled") requires the construction of, and close attention to, the particular provisions in question.

[60] Their Honours went on to say:

> No conclusion can be reached about whether a later statutory provision contradicts an earlier without first construing both provisions. If, upon their true construction, there is an "explicit or implicit" contradiction between the two, the later Act impliedly repeals the earlier.[16]

[61] The Respondent provided a number of examples where Courts or Tribunals have applied the principles of implied repeal. One example related to the Chief Executive of a Department's ability to require a public service employee to submit to a medical examination under s 175 of the *Public Service* Act *2008* (Qld). This was not subject to the prohibitions in the AD Act, because it permitted a discriminatory exercise of power that could not sensibly operate in conjunction with the AD Act.[17]

[62] In these circumstances, the Respondent submits that "the statutory command relevant to this matter comes from s 83 of the TRS Act, and the Regulation and NS 2012 operates simply as a conduit for that command.

[63] Against that background, it is contended by the Respondent that it is not necessary for the TRS Act to explicitly repeal the AD Act. Submitted was that:

> Consequently, the legislative scheme established by s 83 of the TRS Act must be taken to have impliedly repealed or excluded the operation of the AD Act so far as s 83 of the TRS Act is concerned. The two cannot stand together if they impose differing and irreconcilable obligations on QR and Mr Brough.[18]

---

[14] Goodwin v Phillips (1908) 7 CLR 1; [1908] HCA 5.
[15] [2006] HCA 5 at 18.
[16] Ibid..
[17] State of Queensland v Attril & Anor [2012] QCA 299.
[18] Respondent's submissions, p 17, [75].

Conclusion

[64] I accept that if the Complainant was granted a place in the Driver School when he had been unable to pass the mandatory Ishihara Test or a Railway LED Lantern Test without colour lenses or sunglasses, then the Respondent would be in breach of the TRS Act. If the Respondent acted in this fashion it would not be complying with the requirements prescribed under a Regulation.

[65] On this point, the Respondent, rightly in my view, states that the task of the maker of the Regulation was not to establish a new obligation sourced from an exercise of purely executive power, but rather to establish the conduit through which the primary command in s 83 of the TRS Act would operate.

[66] The Complainant's submissions have not been accepted. The evidence and the relevant Legislation do not permit the Complainant to attain the position of Driver for the Respondent because of his failure to pass the mandatory requirements imposed by the regulatory framework in the TRS Act and Regulations and the relevant NS requirements. The basis of these requirements relate to "genuine occupational requirements" in the rail industry and a failure to adhere to those requirements/guidelines by the Respondent would render its actions an offence punishable by the requirements prescribed by Regulation.

[67] I have accepted that s 83 of the TRS Act is taken to have impliedly repealed or excluded the operation of the AD Act in relation to the Complainant's claim of discrimination.

[68] For those reasons above, the Complaint is dismissed.