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VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST VCAT REFERENCE NO. A12/2013

CATCHWORDS

Equal Opportunity – Discrimination in the area of goods and services on the grounds of disability – direct discrimination - whether Applicant's behaviour is a manifestation or symptom of his disability – whether treatment is unfavourable – meaning of unfavourable – whether disability is the reason for the conduct – whether exceptions apply – whether there has been a failure to make reasonable adjustments – *Equal Opportunity Act* 2010 ss 3, 4, 7, 8, 44, 45, 75, 76, 125, 194, *Charter of Human Rights and Responsibilities Act* 2006 ss 7, 8, 15, 18, 38, 39

APPLICANT	Paul Slattery
RESPONDENT	Manningham City Council
INTERVENER	Victorian Equal Opportunity and Human Rights Commission
WHERE HELD	Melbourne
BEFORE	G Nihill, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	7 August 2013, 8 August 2013, 28 August 2013
DATE OF ORDER	30 October 2013
CITATION	Slattery v Manningham CC (Human Rights) [2013] VCAT 1869

ORDERS

1 Under s 125 of the *Equal Opportunity Act* 2010 I find that the decision of the Respondent on 16 November 2012 to maintain the declaration prohibiting the Applicant from attending any building that is owned, occupied or managed by the Respondent constitutes direct discrimination in the area of provision of services on the grounds of disability, in breach of section 44 of the *Equal Opportunity Act* 2010. I further find that the decision was a breach of the *Charter of Human Rights and Responsibilities Act* 2006.

2 The claim that the Respondent has failed to make reasonable adjustments in accordance with section 45 of the EO Act 2010 is dismissed.

3 The proceeding shall be listed for a compulsory conference as to remedy, at a date and time to be fixed by the Principal Registrar.

G Nihill
Senior Member

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APPEARANCES:

For Applicant	Ms Fitzgerald, Counsel
For Respondent	Mr Wilson and Mr Wood, Counsel
For Intervener	Mr Fetter, Counsel

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REASONS

Background

1 Mr Slattery is a resident and rate-payer of the City of Manningham. He has lived in the City of Manningham for many years, and has been an active member of the community. Mr Slattery described his past and present community involvement as including the following: selling ANZAC Day badges for the Doncaster RSL, volunteering with the Lions Club, Park Orchards Scout Association and Park Orchards Ratepayers' Association, editing various self-published magazines and newspapers, and offering gardening courses through Park Orchards Community House. He had previously been a member of Headway Writers' Group, co-authored a book on Acquired Brain Injury, and had been an active member of Mood Works, a support group for those who suffer mental illness.

2 Mr Slattery was diagnosed with bipolar disorder, attention deficit hyperactive disorder and post-traumatic stress disorder in 1996. He had a stroke in 2001, which caused an acquired brain injury. In 2004 Mr Slattery was diagnosed with a hearing impairment.

3 What follows is a brief summary of the relevant events, which are considered in more detail later. Since at least 1998, Mr Slattery has made thousands of written and verbal complaints to Manningham City Council (the Council). Many of these complaints were about what Mr Slattery identified as safety issues, such as overhanging branches and tripping hazards. Many of these complaints contained remarks and comments that were critical of and insulting about Councillors and Council employees. Some of Mr Slattery's correspondence alleged corruption. Much of it contained language that Councillors and Council officers found offensive and inappropriate. There were several interactions between Mr Slattery and Council officers that were highly-charged, and extremely unsatisfactory for all involved.

4 From around 2005, Council put certain measures in place to moderate the nature of the exchanges between Mr Slattery and Council officers. These included a requirement that Mr Slattery communicate with Council in writing, and a decision by Council to respond only to those matters that directly affected Mr Slattery.

5 On 17 April 2009, the Council passed the following motion:

> That Council:
>
> a. Declare Mr Slattery a proscribed prohibited person; and
>
> b. Expel Mr Slattery from Council's Access and Equity Committee.

6 A document entitled 'Notice of Declaration of Proscribed Prohibited Person' was served on Mr Slattery. It stated as follows:

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> In order to uphold public safety and in reliance of its obligations to provide a safe working environment, until further notice, Manningham City Council declare Mr Paul Slattery of [address deleted by me] to be a proscribed person who is prohibited from attending any building that is owned, occupied or managed by Manningham City Council, including the municipal offices and Council chamber at 699 Doncaster Road Doncaster.
>
> For the purposes of enforcement, Victoria Police must be served with a copy of this declaration.
>
> Notice of this declaration must be personally served on Mr Slattery.
>
> Take notice that a breach of this declaration, which is made under section 9(1)(d) and (g) of the Summary Offences Act 1966, may result in arrest and a penalty of $2,500 or imprisonment for 6 months.

7 The effect of this document was to revoke Mr Slattery's licence to enter any building owned, occupied or managed by Council.

8 The ban on Mr Slattery's presence in any Council owned, occupied or managed building (the ban) has been maintained since that date. Mr Slattery has sought the right to attend at Council premises several times since that date, and on 5 November 2012 made a formal written request for a review of the ban. Mr Slattery was advised by letter dated 16 November 2012 that the ban remained in effect.

Some preliminary jurisdictional issues

9 Mr Slattery's claim of discrimination related to the decision to impose the ban in April 2009, and to the ongoing refusal to lift the ban in the four years since. This claim potentially related to a period of time covered by both the *Equal Opportunity Act* 1995 (EO Act 1995) and the *Equal Opportunity Act* 2010 (EO Act 2010). When Mr Slattery filed the application he was not represented. On the first day of the hearing the claim was amended so that it related only to the period of time since 1 August 2011, the date the EO Act 2010 came into effect. This occurred because the Respondent raised two issues in its outline of legal submissions.

10 The first jurisdictional issue was that Mr Slattery had made a previous application to the Tribunal about the same facts and circumstances. Mr Slattery had complained about the ban and the effects of the ban to the then Equal Opportunity Commission, and this complaint was referred to the Tribunal as was the process under the EO Act 1995. That proceeding had the Tribunal file reference number A21/2011. On 12 July 2011, the Tribunal made an order giving effect to Mr Slattery's decision to withdraw that proceeding. Under s 74(2)(d) of the *Victorian Civil and Administrative Tribunal Act* 1998, Mr Slattery could not make a further application in relation to the same facts and circumstances without leave of the Tribunal. The second issue was that Mr Slattery

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was unable to bring an application about events that occurred prior to the commencement of the EO Act 2010. Section 194 (2) of the EO Act 2010 is a transitional provision, providing, in part, that a person may make an application about an alleged breach of the EO Act 1995 if the person did not lodge a complaint under the EO Act 1995. Mr Slattery did lodge a complaint about the alleged breach under the EO Act 1995, and this was the complaint that came to the Tribunal as A21/2011. The combined effect of these jurisdictional issues was that it was not possible for Mr Slattery to now bring a claim about the matters that had been the subject of the earlier proceeding.

11 Mr Slattery said at the hearing that he had forgotten to tell his legal representatives about the earlier proceeding. The Tribunal had not identified that there had been an earlier proceeding. The Respondent did not alert the Tribunal or Mr Slattery's legal representatives to this issue. For all of these three reasons, at least, these jurisdictional issues did not arise until the first day of hearing. After some discussion, Mr Slattery's legal representatives amended the claim so that it related only to those events that occurred on and after 1 August 2011. No hearing time was lost, except for a brief period when I stood the hearing down so that Mr Slattery could give instructions about the amendments. The hearing was completed in the days allocated to it.

The effect of the amendments

12 Counsel for Mr Slattery put the amended claim (set out in final submissions) as follows:

> The Applicant alleges that the respondent has discriminated against him by:
>
> refusing him access to any building that is owned, occupied or managed by it on an ongoing basis and refusing him direct contact of any kind with the Respondent on an ongoing basis from 1 August 2011 onwards (collectively **the ongoing refusals**);
>
> limiting the terms upon which the Applicant may make contact with the Respondent from 1 August 2011 on an ongoing basis (**the contact terms**);
>
> failing to review the need for the ongoing refusal or the contact terms at reasonable intervals from 1 August 2011;
>
> refusing to revoke the declaration or reconsider the ongoing refusals or the contact terms when requested to do so in November 2012;
>
> failing to make reasonable adjustments for his disabilities from 1 August 2011.
>
> The Applicant alleges that the respondent has breached its positive duty to eliminate discrimination.
>
> The Applicant alleges that the Respondent has acted unlawfully towards him by not acting consistently with his rights under the

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Charter and failing to give proper consideration to his Charter rights when making decisions that affect his Charter rights.

13 Counsel for the Respondent submitted, in the Outline of Legal Submissions dated 6 August 2013[1], that:

> The applicant may complain about the conduct of Council following commencement day [2](i.e. about Council's "ongoing refusals" since that day, to adopt the phrase used by the applicant in his written submissions) but he must show that the continuing refusal amounted to "unfavourable" treatment "because of" his disability.

14 In final submissions,[3] Counsel for the Respondent noted that:

> For the reasons explained in the Council's original outline, the Tribunal has no jurisdiction to examine the legality of the 2009 decision. The Tribunal must presume that decision to be valid.

The issues

15 To succeed in a claim of discrimination Mr Slattery needs to prove, on the balance of probabilities, that he has been discriminated against on the basis of one or more of the attributes set out in section 6 of the EO Act 2010 in one or more of the areas set out in Part 4 of the EO Act 2010.

16 Section 7 of the EO Act 2010 defines discrimination as:

> Direct or indirect discrimination on the basis of an attribute; or
>
> A contravention of section 17, 19, 20, 22, 32, 33, 45, 54, 55, or 56

17 Section 8 of the EO Act states that:

> (1) Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.
>
> (2) In determining whether a person directly discriminates it is irrelevant-
>
> (a) whether or not that person is aware of the discrimination or considers the treatment to be unfavourable;
>
> (b) whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason.

18 Mr Slattery's primary claim is a claim of direct discrimination. He says that he has been discriminated against by the Respondent, on the basis of his disabilities (one of the attributes set out in s 6 of the EO Act 2010), in the area of services (one of the areas set out in Part 4 of the EO Act 2010).

19 The issues that must be resolved are as follows:

- What is the relevant attribute?

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[1] At paragraph 12.3
[2] 1 August 2011
[3] Outline of Closing Submissions 28 August 2013 paragraph 7

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- Which is the relevant area as set out in Part 4 of the EO Act 2010?
- What is the conduct, or treatment to which the application relates?
- Was the treatment unfavourable?
- Was the attribute the reason, or substantial reason, for the treatment?
- Does the Respondent establish that either of the exceptions relied upon apply?
- Has there been a breach of the obligation to make reasonable adjustments for a person with a disability?
- How, if at all, does the *Charter of Human Rights and Responsibilities Act* (Vic) 2006 (the Charter) apply?

The attribute – disability

20 Section 8 of the EO Act 2010 states that a person directly discriminates when they treat a person with an attribute unfavourably because of that attribute, whether or not the attribute is the only or dominant reason for the treatment, as long as it is a substantial reason for the treatment.

21 Disability is a protected attribute, defined in s 4 of the EO Act 2010 as:

> (a) total or partial loss of a bodily function; or
> (b) the presence in the body of organisms that may cause disease; or
> (c) total or partial loss of a part of the body; or
> (d) malfunction of a part of the body; including
> (i) a mental or psychological disease or disorder;
> (ii) a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder; or
> (e) malformation or disfigurement of a part of the body –
>
> and includes a disability that may exist in the future (including because of a genetic predisposition to that disability) and, to avoid doubt, behaviour that is a symptom or manifestation of a disability.

22 It is not in dispute that Mr Slattery has a number of diagnosed disabilities. These include post-traumatic stress disorder (PTSD), bipolar disorder (manifesting mostly as significant depression), a brain injury following a stroke, a hearing impairment, sleep apnoea.

23 What was in dispute was whether the conduct, the continuation of the ban on Mr Slattery's engagement with Council, was treatment that occurred because of Mr Slattery's disabilities, or for some other reason. This is considered from paragraph 58.

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24 I am satisfied that Mr Slattery has a disability (or disabilities) within the meaning given to that word in s 4 of the EO Act 2010.

25 The words included in the EO Act 2010 definition *'to avoid doubt, behaviour that is a symptom or manifestation of a disability'* were not in the EO Act 1995 until 21 June 2011. Until then, the definition of 'impairment' under the EO Act 1995 implicitly covered behaviour that was a manifestation of an impairment. The definition of 'disability' under the EO Act 2010 explicitly includes behaviour that is a symptom or manifestation of a disability.

26 This amended definition addressed issues raised in the High Court decision of *Purvis v New South Wales (Department of Education)*,[4] a case about a school student who had a number of disabilities as the result of an acquired brain injury, and whose behaviour led to his expulsion from school. One of the issues before the High Court was whether the student's behaviour fell within the definition of 'disability' under the *Disability Discrimination Act* 1992.

27 The High Court adopted a broad definition of 'disability,' which included behaviour resulting from a disability.[5] McHugh and Kirby JJ held that:

> To construe 'disability' as including functional difficulties gives effect to the purposes of the Act. Such a construction accords with the Act's beneficial and remedial nature. In this case, the damage to Mr Hoggan's brain is a 'hidden' impairment — it is not externally apparent unless and until it results in a disability. It is his inability to control his behaviour, rather than the underlying disorder, that inhibits his ability to function in the same way as a non-disabled person in areas covered by the Act, and gives rise to the potential for adverse treatment. To interpret the definition of 'disability' as referring only to the underlying disorder undermines the utility of the discrimination prohibition in the case of hidden impairment.[6]

<u>The relevant area</u>

28 One of the areas set out in Part 4 of the EO Act 2010 in which discrimination may not occur is the provision of services. Section 44 of the EO Act 2010 states that a person must not discriminate against another person:

> by refusing to provide goods or services to the other person; or
>
> in the terms on which goods and services are provided to the other person; or
>
> by subjecting the other person to any other detriment in connection with the provision of goods or services to him or her.

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[4] [2003] HCA 62.
[5] [2003] HCA 62 [27] and [80] (McHugh and Kirby JJ), [209-212] (Gummow, Hayne and Heydon JJ).
[6] [2003] HCA 62 [80] (McHugh and Kirby JJ).

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29 Council provides services to residents such as Mr Slattery. The definition of services in s 4 of the EO Act 2010 includes services provided by a government department, public authority, State owned enterprise or municipal council. In *Bayside Health v Hilton* [7] DP McKenzie described the definition as extremely broad, and as covering any act of helpful activity. While, as DP McKenzie noted, there are some exceptions to that generally wide interpretation, I am satisfied that the provision by Council of access to the local library, swimming pool, toilets in Council parks and other Council buildings and facilities is a service. In *Byham v Preston City Council* [8] the Equal Opportunity Board held that provision of access to council meetings was a service. I agree. Similarly, in my view, the provision of access to the customer service counter at the Council offices is a service, as is the assistance offered there to those who attend.

The conduct, or treatment

30 Mr Slattery is prohibited from attending any building that is owned, occupied or managed by Manningham City Council. The initial decision to impose this ban was made in April 2009. In final submissions, the Respondent argued that, since the amendment of the application, I must presume the 2009 decision to be valid. On this basis then, submitted the Council, any implementation of the ban on or after 1 August 2011 was simply the result of Council officers doing what they were required to do, that is to implement lawful decisions of the Council.

31 The Applicant characterised the treatment as the ongoing refusal after 1 August 2011 of Mr Slattery's access to Council owned, occupied or managed premises, the ongoing refusal to allow direct contact with Council, failure to review the need for these arrangements, and failure to make reasonable adjustments on and after 1 August 2011.

32 I do not accept the submission of the Respondent that everything that occurred after 1 August 2011 was incapable of being challenged or considered by this Tribunal because it simply comprised of Council officers carrying out orders imposed on them prior to the relevant date, orders over which they had no control or to which they applied no thought. I do accept that it is not open to me to consider the legality of the 2009 decision, but do not accept that I must presume it to have been a valid decision. The reason why it is not open to me to consider the legality of the 2009 decision is that the transitional provisions in the EO Act 2010 operate in the way set out at paragraph 10.

33 In any case, since 1 August 2011, there is evidence that Council officers did consider the terms of the treatment and make ongoing decisions

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[7] [2007] VCAT 1483 Note that the definition of services is the same in the EO Act 2010 as in the EO Act 1995

[8] (1991) EOC 92 - 377

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about it. For example, on 17 September 2012, Mr Slattery was permitted to attend a session at Council offices conducted by the Victorian Electoral Commission. [9] Most significantly, on 5 November 2012, Mr Slattery wrote to the Council, requesting a formal review of the ban. On 16 November 2012, the Acting Chief Executive Officer wrote to Mr Slattery saying that he was not prepared to recommend revocation of the ban.[10]

34 It was open to the Council at any time on or after 1 August 2011, to review the ban. I find that the relevant treatment was the decision to leave the ban in place, and in particular the decision on 16 November 2012 to do so, following Mr Slattery's formal request for review of the ban.

Was this unfavourable treatment?

35 The EO Act 2010 differs from the EO Act 1995 in several important respects. One of those is the way in which the direct discrimination provision is set out, and the test for unfavourable treatment is formulated.

36 In the EO Act 1995 the definition of direct discrimination was as follows:

> Direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances.

37 The EO Act 2010 sets out the definition as follows:

> Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.

38 This change of wording was a significant change. The provision in the EO Act 1995 required a comparison between the way the person with the protected attribute was treated, and the way in which another person, without the protected attribute, would be treated in the same or similar circumstances. A real or hypothetical 'comparator' had to be posited. Under the EO Act 1995 it would have been necessary to ask whether a person without Mr Slattery's disabilities, who behaved in the same way, would have been subject to the same treatment.

39 The change appears to have been a purposeful one, not an inadvertent one. The Explanatory Memorandum for the EO Act 2010 states, in part, that:

> Clause 8 differs from section 8 of the Equal Opportunity Act 1995 as it removes the requirement to prove that the treatment was less favourable than the person would treat someone without the attribute or with a different attribute, in the same or similar circumstances, and

9 File note by Steve Goldsworthy 17 September 2013

10 Letter from Leigh Harrison, Acting Chief Executive Officer, dated 16 November 2012

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> replaces that "comparator test" with a new test based on unfavourable treatment. The intention of the new definition is to overcome the unnecessary technicalities associated with identifying an appropriate comparator when assessing whether direct discrimination has occurred.[11]

40 The Commission submitted that what is now required is consideration of the ordinary dictionary meaning of the word 'unfavourable', meaning that the question to be asked under the EO Act 2010 is whether or not the treatment is adverse to the person with the protected attribute, or causes disadvantage to that person.

41 The Respondent submitted that s 8 of the EO Act 2010 does not mean that no comparative analysis is required.

42 The Court of Appeal considered this question in *Aitken & Ors v State of Victoria*. [12]

> It is more doubtful whether such a comparison was required under the 2010 Act. The Explanatory Memorandum for that Act states that s 8 was intended to replace the 'comparator test applicable under the 1995 Act with a new test based on unfavourable treatment'.
>
> In Re Prezzi and Discrimination Commissioner and Quest Group, the Australian Capital Territory Administrative Appeals Tribunal held that the Discrimination Act 1991 (ACT) — s 8(1)(a) of which is similar to s 8 of the 2010 Act — does not require a comparison between the treatment of a person who has the relevant attribute with a person who lacks that treatment, but simply a consideration of whether the person has been treated unfavourably because of the relevant attribute. However, that decision is not binding on this Court. We would therefore accept that the question whether a comparator group is required under the 2010 Act remains an unresolved question of law in Victoria.[13]

43 The decision referred to by the Court of Appeal, *Prezzi v Discrimination Commissioner and Quest Group*[14] (*Prezzi*) considers the substantially similar provision in the *Discrimination Act* 1991(ACT). That provision is as follows:

> For this Act, a person discriminates against another person if –
>
> (a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in s 7;
>
> ...

44 The relevant findings of the ACT Administrative Appeals Tribunal in *Prezzi* are set out, in part, as follows:

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11 Explanatory Memorandum *Equal Opportunity Bill* 2010, 12-13

12 *Aitken & Ors v State of Victoria* [2013] VSCA 28 (22 February 2013)

13 *Aitken & Ors v State of Victoria* [2013] VSCA 28 (22 February 2013) at para 45 and 46

14 Re *Prezzi v Discrimination Commissioner and Quest Group* (1996) 39 ALD 729

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> The ACT Discrimination Act does not include any like definition, or any definition at all, of unfavourable treatment. Thus it does not invite a comparison between the way in which a person who has a particular attribute is treated compared with a person without that attribute or who has a different attribute. All that is required is an examination of the treatment accorded the aggrieved person or the conditions upon which the aggrieved person is or is proposed to be dealt with. If the consequence for the aggrieved person of the treatment is unfavourable to that person, or if the conditions imposed or proposed would disadvantage that person there is discrimination where the treatment is given or the condition is imposed because of the relevant attribute possessed by the aggrieved person. While the term "disadvantage" might be thought to imply comparison, it does not necessarily do so. The context in which it is used may invite comparison, as where it is clear that what is in issue is comparative treatment, but it may also be used in a context where comparison is absent. ..
>
> While it might have been thought that the use of the term 'discrimination' in the title of the Act would provide a context in which the concept of comparative treatment might have been read into section 8, there are clear indications in the Act that this is not the legislative intention. The absence of any reference to comparative treatment in section 8, compared with the definition of discrimination in like legislation in other jurisdictions, is compelling …
>
> It is thus unnecessary to inquire whether a complainant with a particular attribute has been dealt with less favourably, because of that attribute, than persons without that attribute. All that is required is whether the consequences of the dealing with the complainant are favourable to the complainant's interests or are adverse to the complainant's interests, and whether the dealing has occurred because of a relevant attribute of the complainant.

45 Most Australian discrimination legislation incorporates in the definition of direct discrimination the concept of '*less favourable'* treatment, as opposed to '*unfavourable*' treatment. Most authority, therefore, refers back to this concept. What the change, in Victoria, from the one concept to the other means is, as the Court of Appeal has said, unresolved law. Clearly the term '*less favourable'* in the EO Act 1995 asked for a comparator. The Macquarie Dictionary definition of 'unfavourable' is 'not favourable; not propitious; disadvantageous; adverse'. The decision in *Prezzi* is not binding on this Tribunal, just as it was not binding on the Court of Appeal. It is, however, helpful in considering this unresolved question.

46 In the Federal Court case of *Edgley v The Federal Capital Press of Australia Pty Ltd,*[15] Beaumont ACJ noted that:

> There is no special statutory definition of the verb "treat" and it is not a term of art. Its primary dictionary definition is "1. To act or behave

15 [2001] FCA 379

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> towards in some specified way: (e.g.) to treat someone with respect" (*Macquarie Dictionary*). That definition seems apposite here. Again, as noted in *Prezzi*, above, the adverb "favourably" appears to have its ordinary meaning. The dictionary definitions of the adjective "unfavourable" include "adverse" and this seems appropriate here. In other words, s 8 (1) (a) is directed at adverse behaviour towards a person, because of an attribute. I emphasise that the conduct must be aimed at, or towards, the person complaining of discrimination.

47 Section 35 (a) of the *Interpretation of Legislation Act* 1984 (Vic) states that a construction that would promote the purpose or object of an Act shall be preferred to a construction that would not promote that purpose or object. The objectives of the EO Act 2010 are set out in s 3, and include that of eliminating discrimination to the greatest extent possible, and promoting and facilitating the progressive realisation of equality, as far as reasonably practicable.

48 Section 35 (b) of the *Interpretation of Legislation Act* 1984 (Vic) states that consideration may be given to other material including explanatory memoranda or other documents laid before or presented to any House of the Parliament.

49 In the Second Reading Speech for the EO Act 2010 the Attorney-General spoke of the changed definition as follows:

> The bill clarifies the meaning of discrimination so that it is easier to understand for both duty-holders and complainants, and so that a complaint will no longer fail on unnecessary technicalities.
>
> The bill provides that direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute unfavourably because the other person has the attribute. This definition removes the technical difficulties associated with the current requirements to compare the treatment of the person with a person in the same or similar circumstances.

50 The Respondent submitted that I ought read s 8 of the EO Act 2010, together with the Explanatory Memorandum, as meaning, essentially, that what is required to be applied is not that comparator test, but a different comparator test.[16] The Respondent submits that it would be impossible to answer the question of whether or not someone has been treated unfavourably without engaging in a comparative analysis.

51 I accept that considering the treatment afforded to other people in the same situation may be of assistance in undertaking the task of assessing whether or not someone had been treated unfavourably, but I do not consider that the section *requires* me to do so. Unlike the previous provision, that in the EO Act 1995, which specifically required comparison, this provision does not. The Explanatory Memorandum

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[16] Respondent's outline of legal submissions 6 August 2013 paragraph 22ff, and in particular the emphasis given (underlining) to the Explanatory Memorandum.

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indicates that the shift away from the previously clearly expressed requirement to compare relative treatment was purposeful.

52 Under s 32 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (Charter) the Tribunal must interpret statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistent with their purpose. To do this, where the words of a statutory provision are unclear, or capable of more than one meaning, or the meaning is, as the Court of Appeal has noted, unresolved, I should give them whichever of the possible meanings is most compatible with human rights. The relevant human rights are set out at paragraph 161.

53 Taking into account the wording of s 8 of the EO Act 2010 on its face, the extrinsic materials, the available authority and s 32 of the Charter, it is my view that the definition of direct discrimination in the EO Act 2010 does not require a comparator. What it requires is an analysis of the impact of treatment on the person complaining of it. This analysis may be informed by consideration of the treatment afforded to relevant others, particularly in circumstances where it is not clear whether the treatment is unfavourable.

54 Was the treatment complained of unfavourable to Mr Slattery?

55 Mr Slattery has described the impact of the ban, and the continuing effect of the ban, in his own words. He wrote that:

> Not being able to take part in Council activities anymore is extremely disappointing to me. I have been very active in the community since the early 1980s, but now I am prevented from participating in my local community.
>
> I have grandchildren who often go to the local pool with my children. I am unable to go because I am banned from all Council premises.
>
> I feel like a second class citizen not being able to use public toilets or go to the local library.
>
> It has upset me greatly to be treated like this by the Council. I am determined to not be subservient to anyone because of my disability.[17]

56 The evidence before me suggested that Mr Slattery has an ardent desire to be involved in his community, to make a contribution. A list of his past and present volunteer activities is set out at paragraph 1. In evidence, he spoke proudly of his wife's recognition by Council for her volunteer contribution. He has what is described below as a compulsion to monitor health and safety in the local area. He has a strong interest in local government, and strong views about local government accountability.

57 In my view, the treatment – the decision to leave the ban in place, in particular after Mr Slattery's formal request in November 2012 for it to

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[17] Response to strike out application Paul Slattery 2 April 2013

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be lifted – is unfavourable treatment. I leave aside for the moment the questions of what is the reason for the treatment, and whether or not an exception applies which means that the treatment does not amount to discrimination. The treatment itself is *'not favourable, not propitious, disadvantageous, and adverse'* to Mr Slattery's clearly expressed wish to be involved in the activities of his local council, and to use the services offered to its residents. The fact that Mr Slattery is indefinitely prevented from accessing services in any Council owned, managed or occupied premises, regardless of what occurs in those premises or how he relates to others while in them, is unfavourable to a sufficiently clear extent, in my view, that it is not necessary to look to additional considerations to guide analysis.

What was the reason, or substantial reason, for the treatment?

Submissions

58 Counsel for Mr Slattery submitted that Mr Slattery's behaviour caused the Respondent to limit Mr Slattery's access to services or refuse its services to him, and that there was ample evidence that the behaviour resulted from Mr Slattery's disabilities.

59 The Commission submitted that behaviour that is a symptom or manifestation of each disability, as well as the combination of Mr Slattery's disabilities - acquired brain injury, effects of a stroke, and obstructive sleep apnoea - falls into the definition of 'disability':

> Given the complex interrelationship between these disabilities, the Commission submits that the manifestation of these disabilities should be looked at broadly and holistically.[18]

60 The Respondent submitted that there was no evidence that there was any link between Mr Slattery's medical conditions and the behaviour that caused the Council to take the action it did.

> At its highest, the applicant's medical evidence suggests only that the applicant has a compulsion to complain about safety matters. Yet the Council did not make its decision on the basis that the applicant complains about such matters, but about the abusive and unacceptable *manner* in which the applicant makes complaints and otherwise engages with Council, namely his "threatening, intimidating and aggressive" behaviour towards Council officers, at Council buildings and in correspondence.

Evidence as to disability

61 There was medical evidence available to the Tribunal. It was somewhat limited, perhaps because Mr Slattery does not, it seems, currently receive treatment for his various conditions. A report was prepared by Dr R W Farnbach, Consultant Psychiatrist, and Dr Farnbach attended at

[18] Submissions of the VEHRC at paragraph 9

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the Tribunal to give oral evidence. Dr Farnbach was Mr Slattery's treating psychiatrist from 1996 until approximately six or seven years ago. For the purposes of providing a report to the Tribunal, Dr Farnbach saw Mr Slattery again on 4 June 2013, and on two subsequent occasions.

62 Dr Farnbach set out his diagnoses in his report dated 13 June 2013, as follows:

> The diagnosis is bipolar disorder and post traumatic stress disorder. Mr Slattery also has a number of medical conditions, including his having the after effects of a left-sided cerebral stroke, and obstructive sleep apnoea, a condition which would exacerbate the symptoms of his psychiatric disorders.

63 With respect to the effect of the disabilities on Mr Slattery's behaviour, Dr Farnbach noted that:

> Mr Slattery had symptoms of post traumatic stress disorder (PTSD) when I was treating him, and he still has some symptoms of that condition. He said that he thought he was being driven to complain to the council about what he thought were matters of safety, because of his PTSD, the link there being that his PTSD was caused by his witnessing at least two accidents, one of which led to a severe injury to a work mate, and the other of which caused the death of a small child.

64 Dr Farnbach concluded that:

> Mr Slattery's compulsion to make complaints and to otherwise behave in a manner which the Manningham Council considers to be objectionable and unwarranted is the manifestation of a psychiatric condition, namely a compulsive disorder. Compulsive disorder is not a symptom of PTSD, and although bipolar patients often, when manic, behave compulsively, that is different from the kind of compulsive behaviour which Mr Slattery exhibits. At this point I am not sufficiently familiar with Mr Slattery's psychiatric condition to be able to state that his compulsive behaviour is a manifestation of PTSD or bipolar disorder.

65 Dr Farnbach, in oral evidence, further described Mr Slattery as having compulsive disorder, or impulse control disorder. He said that Mr Slattery had strong views about public safety and about people doing the right thing. He experienced a strong and urgent compulsion to report, or complain about, what he saw as behaviour that created risk, and then a feeling of relief when he had made a phone call or sent a letter.

66 Dr Farnbach, in his oral evidence, described the symptoms of manic depression as including elevated mood, racing speech, profusion of thoughts, excessive energy and confidence, being fixated on new plans and schemes, and having downswings of depression. He described the symptoms of PTSD as including the experience of intrusive recollections of traumatic events. He said that, for Mr Slattery, these

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included nightmares and intrusive recollections of traumatic deaths he had witnessed. These recollections and nightmares affected his sleep.

67 Dr Farnbach agreed with Counsel for the Respondent that what Counsel described as the incessant complaining would be unlikely to stop unless something changed. When asked what he would recommend as treatment that might cause such a change, Dr Farnbach said that cognitive behavioural therapy, looking at the patterns of thinking, the thoughts and beliefs leading up to the actions, may be an effective treatment. He agreed with Counsel for the Respondent that continuing to engage in persistent complaining behaviour would probably not assist Mr Slattery's recovery.

68 The Applicant tendered a report from Bernadette Walsh, Psychologist, dated 26 April 2006. This report does not carry great weight, as Ms Walsh was not called to give evidence and so was not cross-examined. Also, the report is over seven years old, and so did not directly address the issues before this Tribunal. It was written to the Accident Compensation Conciliation Service for the purpose of confirming the diagnosis of PTSD. I have noted it, however, as it does refer to two of the specific incidents that gave rise to the PTSD suffered by Mr Slattery, in December 1986 and November 1987. The report offers the opinion that, for Mr Slattery, a symptom of his PTSD is a compulsion to lodge complaints about potentially hazardous situations.

69 Also submitted, with no accompanying oral evidence, was a report written in 2001 by Dr Paul Brown, a psychiatrist engaged by the Council in late 2000 to assess the level of risk posed to Council by Mr Slattery, following an incident, and to make recommendations to the Council as to how best to negotiate the relationship with Mr Slattery. This referral occurred in the context of an ongoing dispute between Mr Slattery and the Council about him keeping two pigs when he had a permit for only one. The report has less probative value than Dr Farnbach's, being many years old, and being offered without the opportunity for the writer to give oral evidence, but it does bear some relevance, as it directly addressed the issues between Mr Slattery and the Council. I note that Mr Slattery objected to the reference to Dr Brown's report, as he objected to the Council calling for Dr Brown's involvement when it did so in 2000. The report is, however, before the Tribunal, and I have read it. In the report Dr Brown states:

> It was known at the Council that Mr Slattery was suffering from a psychiatric illness, and that he was in psychiatric treatment.

70 The incident which led to Dr Brown's involvement, a heated exchange at the customer service desk, appears to have arisen because of the attempt by Council to contact Mr Slattery's treating psychiatrist. The engagement of Dr Brown appears to have been in recognition of the fact

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that, to some extent at least, the difficulties arising between Council and Mr Slattery related to Mr Slattery's disabilities.

71 Dr Brown, having previously referred to Mr Slattery's PTSD, noted that:

> From the mid-1990s, Mr Slattery developed a second, even more serious mental disorder, Manic Depression, which accounted for subsequent irrational and anti social behaviours.
>
> I suggested major adjustments to the patient's medication that had immediate positive benefits, in particular reducing paranoia and aggressivity.[19]

72 I note also an email sent from Mr Goldsworthy on behalf of the Council to Ombudsman's Office on 9 October 2009, as to why the decision was taken to impose the ban. It states, in part, that:

> A consideration in this is that Mr Slattery from his own admission has an Acquired Brain Injury...
>
> Council's position is that the notice and protocol are required to:
>
> - Provide a healthy and safe work environment; and
> - To ensure the prudent use of scarce Council resources.

73 In his own evidence, Mr Slattery described his acquired brain injury as affecting his capacity to sort things out. He said that since having the ABI he had lost skills, and the ability to handwrite. He said that the PTSD left him feeling hyper-vigilant. As to his hearing loss, Mr Slattery said that it was very frustrating being in situations where he could not hear properly. He said that he felt respected, and less frustrated, when he could hear properly and could be understood.

74 Mr Slattery's wife was present for the whole of the hearing. At the end of his evidence, in a moment of reflection, Mr Slattery noted that, at the lunch break which had recently concluded, his wife had been horrified when hearing about all the things Mr Slattery had said and written to people at the Council. He said that he had told her that this was 'part of the package', an effect of his brain disorder. He said that he realised, on reflection, that he had offended people, and that he wished to 'unequivocally' apologise for doing so.

75 The definition of disability, as set out above at paragraph 21, includes *behaviour* that is a symptom or manifestation of a disability.

76 The Respondent submitted that I should conclude that there is no relationship between the behaviour that caused the Council to make the decisions it did, and Mr Slattery's disabilities, that is that Mr Slattery's behaviour (which the Respondent characterised as rude, offensive, threatening, aggressive) was not a symptom or manifestation of his disability. The Respondent said that the reason it made the decisions

[19] Report of Dr Brown dated 20 April 2001 at page 4

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was not because of Mr Slattery's disabilities, but to protect the health and safety of its employees and the wider public.

77 I agree with the Respondent that it is necessary to identify what are the relevant symptoms of Mr Slattery's disabilities, based on the evidence, and then to consider whether the Council treated him unfavourably because of those symptoms.

78 I do not accept the submission that I may infer that Mr Slattery experiences symptoms typical of people with the disabilities he suffers from.[20] Mr Slattery must establish, on the evidence available to the Tribunal, what are the symptoms he experiences consequent to his disabilities.

79 It is sufficiently clear from the evidence, in my view, that Mr Slattery's compulsive complaining is a symptom of his disabilities. Dr Farnbach's report is clear on this point, and his oral evidence supported this finding.

80 I am satisfied that, to at least a significant extent, Mr Slattery's 'irrational and anti social behaviours'[21] are a manifestation of his disabilities, in particular his bipolar disorder. I am satisfied that, to at least a significant extent, Mr Slattery's 'aggressivity'[22] is a manifestation of his disabilities, in particular his bipolar disorder and PTSD.

81 I note that Dr Farnbach's evidence is that it is the combination of symptoms – 'Mr Slattery's compulsion to make complaints and to otherwise behave in a manner which the Manningham Council considers to be objectionable and unwarranted' that are a manifestation of his psychiatric condition.

82 I find that this combination of symptoms – compulsion to complain, irrational and anti social behaviours, aggressivity, behaviour that is considered objectionable and unwarranted - constitute the relevant symptoms and manifestations of disability, based on the evidence.

83 The definition of disability in s 4 of the EO Act, as discussed, includes behaviour that is a symptom or manifestation of a disability. There is no qualification in this definition. By this I mean that it does not address the situation where some other cause in addition to the disability *may* be operative. On the available medical evidence I am satisfied that the relevant behaviour is symptomatic of disability to at least a significant extent. I cannot say for certain, on the evidence, that there is no other possible contributing factor. I read the definition in the context of the way in which the rest of the Act operates to require something a little less than absolute and total certainty, for example s 8, which requires that an attribute be a substantial reason for treatment, not the only

[20] Submissions of VEOHRC at paragraph 9
[21] Report of Dr Brown dated 20 April 2001 at page 4
[22] Report of Dr Brown dated 20 April 2001 at page 4

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reason, for discrimination to occur. I also take into account s 32 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (Charter) which requires that the Tribunal interpret statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistent with their purpose. To this end, I take into account, also, the objectives of the EO Act 2010 set out at s 3.

84 Did the Council treat Mr Slattery unfavourably *because of* these symptoms, or for other reasons?

85 I have found that the conduct, or treatment, is the decision to leave the ban in place in the period from 1 August 2011, in particular after Mr Slattery's formal request for this to occur in November 2012. In order to understand what was the reason for the conduct, or treatment, it is necessary to look at what took place during this period, but also at what took place prior to the ban being imposed in 2009. This is because Council decisions subsequent to 1 August 2011 were informed by what had occurred prior to that date. The parties agreed that it was relevant and necessary to consider events that occurred prior, as it would not otherwise be possible to understand the context in which the claim stands. Most of the evidence given related to the period prior to 1 August 2011.

Evidence about the incidents

86 There were three witnesses who gave evidence for the Council. The first witness was Mr Steve Goldsworthy, Executive Manager, Corporate Services. The full summary of Mr Goldsworthy's evidence as submitted prior to hearing was as follows:

> In September 2012, at an election candidates' briefing, the Applicant pushed Steve Goldsworthy.
>
> The Applicant sought out the home address of Steve Goldsworthy, and, further, sent a defamatory letter to Steve Goldsworthy's wife.
>
> That because of the Applicant's conduct the Respondent was required to implement various organisational protocols for dealing with the Applicant to mitigate OH&S risks and allocate Council resources efficiently.
>
> The Respondent maintains a website on which there is a variety of publicly available information.
>
> The Respondent maintains a Customer Feedback System which logs requests from ratepayers.
>
> In connection with matters raised by the Applicant's material in reply and accompanying documents and the Respondent's material exchanged in response, that is within Steve Goldsworthy's area of responsibility at the Council.

87 In his oral evidence, Mr Goldsworthy recounted an incident in 2009 when Mr Slattery had allegedly held his hand in the shape of a gun and

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pointed it at the Mayor of the time. Mr Goldsworthy said that he did not actually see this occur, but heard about it. He also spoke about a conversation he had with Mr Slattery, during which Mr Slattery noted that Mr Goldsworthy was on record as living in one place and his wife in another. Mr Goldsworthy said that he found this conversation disturbing, because it indicated that Mr Slattery had sought out his home address. He was also distressed when Mr Slattery sent a letter to Mr Goldsworthy's wife at home. He also gave evidence about an incident at the Council in 2012, when Mr Slattery was permitted to attend a meeting for prospective candidates for election, because he had nominated to be a candidate. Mr Goldsworthy attempted to give Mr Slattery a letter but he refused to take it, pushed Mr Goldsworthy, then tore the letter up.

88 Mr Goldsworthy noted that the Council had a device that assists people with hearing impairment, and also that there was comprehensive material available on the website for any person to access. He agreed that the many thousands of complaints from Mr Slattery, as well as the insulting comments in letters, were a drain on Council resources.

89 Mr Goldsworthy said that he had always treated Mr Slattery with respect, and tried to remain calm and non-reactive. He agreed that, once or twice, he "*might have been human*".

90 In his evidence, Mr Slattery said that he had not pointed his hand in the shape of a gun. He said that he had taken note of the apparently different addresses of Mr Goldsworthy and his wife, because he found this interesting. He agreed that he had written to Mr Goldsworthy's wife at home, and had contacted some other Council officers at home, because he was frustrated at not being able to contact anyone at the Council offices. He disagreed as to what occurred at the Council meeting in 2012, saying that he was simply attempting to enter the Council chamber and Mr Goldsworthy blocked his entrance. He agreed that he tore up the letter.

91 The second witness was Mr Zahid Anver, a former Local Laws Officer with the Council. The full summary of his evidence as submitted prior was as follows:

> Zahid Anver first came to know the Applicant in about 1996/97 in attending to the Applicant's complaints.
>
> In July 1999, while Zahid Anver was attending the Applicant's property to assist with extinguishing an illegal burn, the Applicant threw a brick at Zahid Anver.

92 In oral evidence Mr Anver said that he had visited Mr Slattery's home to ask him to put out a fire, and as he was leaving felt an object hit him on the back of the leg. When he turned around he saw there was a brick.

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93 Mr Slattery's evidence about this incident was that he had thrown a brick, but not at Mr Anver, though in his direction. He said the brick fell well short of Mr Anver, as he had intended.

94 The third witness was Mr Errol Wilkins, Manager of Health and Local Laws with the Council. The full summary of his evidence as submitted prior was as follows:

> Errol Wilkins first came to know the Applicant during the late 1990s in connection with the Applicant's breaches of local laws on his land.
>
> The Applicant exhibited violent behaviour towards Errol Wilkins' staff, including:
>
> a. In July 1999, an incident in which the Applicant threw a brick at a local laws officer, Zahid Anver;
>
> b. In October 2000, an attempted assault on Greg Thomas at the Respondent's offices.
>
> The Applicant has made racist and abusive remarks to Errol Wilkins personally.
>
> The Applicant has been abusive and sexist to other staff of the Respondent.
>
> The Respondent has OH&S procedures to identify and mitigate risks and these procedures were followed in respect of the OH&S risks posed by the Applicant.
>
> The Respondent was aware at an early stage of the Applicant's mental illness and responded appropriately at an organisational level.
>
> The Applicant caused a disproportionate amount of the Respondent's resources to be directed towards dealing with the Applicant.
>
> That because of the Applicant's conduct the Respondent was required to implement an organisational protocol for dealing with the Applicant to mitigate OH&S risks and allocate Council resources efficiently.
>
> In connection with the matters raised by the Applicant's material in reply and accompanying documents and the Respondent's material exchanged in response, that is within Errol Wilkins' area of responsibility at the Council.

95 In his oral evidence, Mr Wilkins described an incident with Mr Thomas that occurred on 18 October 2000. Mr Slattery came to the counter to see Mr Thomas, became agitated, and – according to Mr Wilkins – took a swing at Mr Thomas. The reason Mr Slattery was agitated, said Mr Wilkins, was because Mr Thomas had called Mr Slattery's psychiatrist for information.

96 It is unclear whether or not Mr Wilkins actually saw the incident. Mr Slattery's version of the incident was that he had been distressed because Mr Thomas had called his psychiatrist, and had also called the Office of Births Deaths and Marriages to find out if Mr Slattery's wife was really married to him. He saw these enquiries as breaches of

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privacy. Mr Slattery said that what occurred was that he was holding a piece of A4 paper and he threw it at Mr Thomas.

97 Mr Wilkins also gave evidence about difficulties he had experienced in the 1990s persuading Mr Slattery to relinquish his pigs.

98 Mr Wilkins said that he saw Mr Slattery in a shopping centre recently, and Mr Slattery spoke aggressively to him and threatened to sue him. Mr Slattery agreed he had seen Mr Wilkins.

99 Mr Wilkins said that in 2000 Mr Slattery told him that he had called one of his dogs 'Blackfella', and Mr Wilkins understood this to be a racial insult against himself. Mr Slattery said the name of the dog was not related to Mr Wilkins.

100 In addition to the evidence given by witnesses for the Council, there was considerable correspondence between Mr Slattery and Council tendered as evidence. This correspondence was tendered (and summarised in a chronology) to demonstrate the nature and tone of Mr Slattery's dealings with the Council. I will not restate all of it, but note that some examples include a letter to the then CEO saying that he was *'unsuitable by design, and unfit by stealth'*[23]; a letter to '*ladies of all shapes, sizes, indifferences and personalities… women don't know what they want but they are willing to fight dam hard to get it!*'[24]; a letter describing Council officers as '*pricks' and one officer as an 'incestuous malingerer*' and a *'self righteous pompous arse', 'weak as piss'*[25]; a letter that asks *'whatever happened to beautiful, well mannered secretaries?'*[26]; a letter that says that Mr Wilkins' *'greed and corrupt practices make me puke.'*[27]. Mr Slattery continued to send letters after the 2009 ban, including one to the CEO saying *'I will do everything I can to expose the cancer that is spreading from yourself, the inoperable tumour'*[28]; *'from our research the ugliness of the customer service desk and telephonist is of great concern to ratepayers!'*[29]; a letter that refers to the CEO as *'a liar, deceitful and can't be trusted'* [30]; an email to a Councillor stating *'… it seems you are deeper in the shit than ever before, why aren't you like a real man? I know you find it hard to find any semblance of one at the Council… I know headway is being made in clearing the blockages, with your freind Lydia Wilson being cleaned out from the blockage, however I have heard a few fish jokes lately and apparently the walrus is taking to the haddock like a fish out of water'*.[31] This is a sample of the correspondence, and is representative.

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[23] Letter from Mr Slattery dated 21 February 2006.
[24] Letter from Mr Slattery dated 21 March 2006.
[25] Letter from Mr Slattery dated 3 June 2006.
[26] Letter from Mr Slattery dated 3 February 2009.
[27] Letter from Mr Slattery dated 5 February 2009.
[28] Letter from Mr Slattery dated 17 February 2010.
[29] Letter from Mr Slattery dated 3 May 2010.
[30] Letter from Mr Slattery dated 4 June 2010.
[31] Email from Mr Slattery dated 29 June 2012.

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101 There was also evidence given as to personal interactions with Council, where the language used by Mr Slattery was in the same vein. The tendered document which provided the most detail was a comprehensive and transparent file note made by the then CEO Mr Bennie, on 21 February 2006. He agreed to meet with Mr Slattery who immediately told him *'You are not competent to hold your position'* and then showed him some asphalt and other materials inside a box he was carrying. This was the subject of a complaint Mr Slattery was making about a road in the municipality. The interaction was heated, and Mr Slattery said *'You're nothing but a fuck-wit'* to which Mr Bennie replied *'no, you're the fuck-wit'*. Mr Slattery said '*... why don't you come outside and say that?'* Mr Bennie then noted that he said *'On your way Paul'*. Mr Slattery said *'Why don't you just fuck off'* and Mr Bennie responded, *No, you fuck off*'.

The protocol and ban

102 When Council engaged the assistance of Dr Brown in 2000, it recognised that Mr Slattery had various disabilities that affected the way in which he related to Council. It sought Dr Brown's advice as to how best to manage its interactions with Mr Slattery. This followed the development of protocols that required Mr Slattery to communicate with Council in writing. According to Dr Brown's report, he maintained contact with Council about interactions with Mr Slattery, provided training and information to Council staff about mental illness and risk management, made recommendations about support and treatment options for Mr Slattery, and regularly met with Mr Slattery to negotiate solutions to the issue of the pigs. He notes in his report that:

> Mr Slattery has now complied with council by-laws. He wishes to apologise for his actions. In my opinion, Mr Slattery no longer constitutes a threat to Council.
>
> Mr Slattery is now adopting a positive attitude to civic issues. Thus, he and I are currently exploring ways in which he can move beyond urban pig farming, and civically contribute his urban gardening abilities.

103 There was no evidence as to any incidents occurring between this time and 2005.

104 In 2005 a protocol was introduced. The following reasons were given:

> …You have also made allegations including unfounded accusations of unlawful behaviour about senior staff…
>
> Furthermore there have been numerous instances over a number of years of you being abusive to Council staff. This abuse has been verbal, in writing, and in the general tone of your presentation and has taken the form of abusive language, personal insults and aspersions about the competence of staff…

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> In relation to your extensive dealings with Council – the quantum of your activity and the effect of that on Council's resources – you would be aware of the inordinate number of requests for service that you have logged with Council over a long period of time. The estimated annual cost of 'managing' those requests is conservatively $10,000.[32]

105 The protocol provided for a process by which matters raised by Mr Slattery would be dealt with in one way if he had a direct interest in them, and another way if he did not. Any communications from Mr Slattery that were abusive would not be dealt with:

> Both Council staff and Councillors must be afforded a safe working environment by Council as the relevant employer.
>
> Council is obliged to ensure that its resources are used efficiently.
>
> Mr Slattery's recent behaviour focuses attention on the adequate fulfilment of Council's statutory obligations outlined above.
>
> The current protocol does not effectively ensure that Council is meeting its obligations.

106 The then CEO of Council, Ms Wilson, wrote to Mr Slattery in January 2007 to reinforce the protocol,[33] noting that:

> The protocol was instituted to ensure effective co-ordination and management of information flow between yourself and the Council, and to ensure that Council's resources were, and continue to be, effectively utilised.

107 In 2009 Ms Wilson wrote again,[34] recording the same concerns and reinforcing the protocol. Ms Wilson noted that she was concerned at the tenor of recent correspondence, and noted that:

> If you continue with derogatory and offensive remarks in your correspondence, you will leave me no alternative but to take preventative action.

108 The minutes of the Council meeting at which the ban was imposed, dated 31 March 2009, record that Council had received the following legal advice:

> Both Council staff and Councillors must be afforded a safe working environment by Council as the relevant employer.
>
> Council is obliged to ensure that its resources are used efficiently.
>
> Mr Slattery's recent behaviour focuses attention on the adequate fulfilment of Council's statutory obligations outlined above.
>
> The current protocol does not effectively ensure that Council is meeting its obligations.
>
> Remedy

---

32 Letter from John Bennie, Chief Executive Officer, dated 12 September 2005

33 Letter dated 11 January 2007 from Lydia Wilson, Chief Executive Officer to Paul Slattery

34 Letter dated 6 January 2009 from Lydia Wilson to Paul Slattery

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> To provide a safe working environment for Councillors and staff, Council should consider declaring Mr Slattery a proscribed prohibited person, the effect of which will prohibit Mr Slattery from lawfully attending any Council building. If such a declaration were made, it would be an offence under the criminal trespass provisions of the Summary Offences Act 1966 for Mr Slattery to attend a Council meeting or to visit any Council office.

109 On 5 November 2012 Mr Slattery formally requested a review of the decision to maintain the ban. The Acting CEO replied by letter dated 16 November 2012. The letter recorded that the writer was 'not prepared to recommend to Council that it revoke the order.' The letter emphasised the reasons as being Mr Slattery's behaviour - the physical contact with a Council officer on 17 September, Mr Slattery tearing up the letter handed to him, and the correspondence containing derogatory and insulting comments.

Discussion

110 It is not for the Tribunal, given the jurisdictional issues and the consequent amendment to the application, to determine whether or not the 2005 to 2009 protocols were effective or appropriate, or whether the 2009 ban was lawful. The protocols and the ban do, however, provide a background to the conduct in respect of which this claim is made, that which has occurred since 1 August 2011. No evidence has been given to suggest that the reasons the ban has remained in effect since 1 August 2011 are any different from those relied upon earlier. Indeed the opposite is the case. Almost all of the evidence before the Tribunal relates to the period prior to 1 August 2011, apart from ongoing correspondence to the Council from Mr Slattery, and the interaction at the Council candidate information session, where Mr Slattery tore up the letter given to him by Mr Goldsworthy and there was the alleged physical contact between them. The evidence as to reasons for the ban informs my findings about the reasons for the decision to leave the ban in place since 1 August 2011, in particular after Mr Slattery's formal request for this to occur in November 2012. The 2012 letter emphasises the behaviour but does not suggest that a new ban, for new reasons, is what is in place.

111 It is clear that the ongoing interactions, between 1998 and the present, have been challenging for Council.

112 I am satisfied that one of the reasons for the decision to leave the ban in place, as best as I can understand those from evidence as to the reasons for the original ban, as well as the letter dated 16 November 2012, is because Mr Slattery was an inveterate, demanding, resource-consuming complainant. The letters setting out and reinforcing the protocols, and the legal advice upon which the Council says it relied, refer consistently to the Council needing to ensure that it did not continue to apply resources to managing the high volume of Mr Slattery's complaints.

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These documents set out concerns that Mr Slattery's complaints, over many years, had been costly and time consuming for the Council to manage. The 'inordinate numbers of requests for service' were a drain on Council resources, and Council took steps to 'ensure that its resources [were] used efficiently'.

113 To this extent, I am satisfied that the unfavourable treatment was due to the attribute of disability, as there is clear evidence from Dr Farnbach that Mr Slattery's compulsion to complain relates to his disabilities.

114 I am also satisfied, however, that Mr Slattery's tendency to complain was not the only reason for the treatment. I accept that Council took the steps it did for other reasons as well, those being the nature and tone of Mr Slattery's communication with Council. I accept that the way in which the complaints were made, the insults given and the aggressive and offensive language used, constituted a reason for the treatment, and that this was clearly expressed in the letter dated 17 November 2012.

115 The insults and comments were often incoherent and random. They were often nonsensical. They asserted unspecified corruption and incompetence. They demonstrated a lack of respect for the Council officers, certainly, and may well been troubling to read or hear. They were at odds with Mr Slattery's very occasional comprehensive apologies (via Dr Brown and in the hearing).

116 I note Dr Farnbach's evidence, discussed above, that '*one or more of Mr Slattery's disabilities manifested as a compulsion to make complaints and to otherwise behave in a manner which the Manningham Council considers to be objectionable and unwarranted…*' This opinion, offered by the expert who has had the most recent opportunity to assess Mr Slattery's condition, describes Mr Slattery's symptoms of disability as somewhat of a package. The compulsion to make complaints is associated with the compulsion to behave in a manner that is identified as objectionable (rude, offensive, insulting) and unwarranted.

117 I have noted above the evidence that, at least to a significant extent, Mr Slattery's 'irrational and anti social behaviours' [35] are a manifestation of his disabilities, in particular his bipolar disorder and acquired brain injury, and that, at least to a significant extent, Mr Slattery's 'aggressivity' [36] is a manifestation of his disabilities, in particular his bipolar disorder and acquired brain injury.

118 Based on this evidence, in particular the reports of Dr Farnbach and (to a lesser extent Dr Brown) what I find as to these aspects of Mr Slattery's behaviour is that it is more probable than not that, at least to a

[35] Report of Dr Brown dated 20 April 2001 at page 4
[36] Report of Dr Brown dated 20 April 2001 at page 4

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significant extent, Mr Slattery's style of communication with Council, as well as his compulsion to complain, was affected by his disabilities.

119 It is a complicated picture. Taking all of the above into account, I find that there is not the evidence before me such that I can be satisfied that the attribute of disability is the only reason for the treatment. I am, however, satisfied that the attribute of disability, including the combination of behaviours that constitute symptoms and manifestations of the disability or disabilities, is a substantial reason, a reason of substance, for the treatment.

Exceptions

120 Council submitted that, even if the conduct were discriminatory, s 75 and s 86 of the EO Act 2010 provided a complete defence. The Respondent has the burden of proving that an exception applies.[37]

121 Section 75 of the EO Act 2010 provides that a person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of another Act. Section 86 of the EO Act 2010 provides an exception for acts reasonably necessary to protect the health and safety of any person.

122 Council argued that it has a duty of care under statute, ss 21 and 23 of the *Occupational Health and Safety Act* 2004 (Vic) (OHS Act), and under common law, to its staff, and to members of the wider public, including Mr Slattery himself. Council noted that it may not assume that all its staff are psychologically robust and capable of absorbing anti-social behaviour.

123 Section 21 of the OHS Act states, in part, that:

> An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

124 Section 23 of the OHS Act states, in part, that:

> An employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.

125 The requirements set out in these provisions constitute a similar potential defence to that set out in s 86 of the EO Act 2010. Essentially, Council's submission was that any otherwise discriminatory conduct against Mr Slattery was warranted and justified by the duty on the Council to protect the health and safety of employees and others.

126 Council accepted that the principles articulated in *Hall v Victorian Amateur Football Association*[38] are helpful in guiding an assessment of

[37] Section 13(2) EO Act 2010
[38] [1999] VICCAT 333

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whether action is 'reasonably necessary' in the terms of s 86 of the EO Act 2010.

127 In *Hall v Victorian Amateur Football Association* the Tribunal set out the following factors as relevant in determining whether or not the equivalent of s 86 of the EO Act applied;

(1) What is the class whose health and safety are to be protected? What is the size of that class?

(2)What is the risk from which that class is being protected? What is the magnitude of that risk? What are the consequences to the class to be protected if the risk becomes reality?

(3) To what degree will the ban protect the health and safety of the class? Will it eliminate or reduce the risk to the health and safety of that class?

(4) Does the ban contain within itself any risk to the health and safety of the class?

(5) Are there measures currently in place to protect the health and safety of the class from that risk? Are they effective to protect the health and safety of that class from that risk?

Will the ban give that class a protection from that risk of a kind or degree that those current measures do not give?

(6) Are there non-discriminatory alternatives that will give the class protection from the risk that is equal to or better than the ban? If there are, is there any reason why it may be impracticable for the respondent to adopt these alternatives?

(7) Did the respondent, at the time of the ban, believe that the ban was reasonably necessary to protect the health and safety of the class? On what information or enquiries was this belief based? What information on the matter was reasonably available to the respondent?

These factors must be balanced against each other to arrive at a decision of whether or not, in all the circumstances, the ban is reasonably necessary to protect the health and safety of the class.

128 When these questions are asked of the situation before this Tribunal in this application, the answer becomes, in my view, sufficiently clear to say that the exception does not apply. The class is, primarily, the Council staff and Councillors who are, I certainly agree, entitled to a safe workplace. The class includes, according to the Council, members of the public. There is no evidence that the health or safety of members of the public is directly affected by Mr Slattery's complaints, or by his letters or visits to Council. Council also argued that Mr Slattery is a member of the class, that it is not good for him to be complaining so frequently, and that allowing him to do so is contrary to his interests. While Dr Farnbach did give evidence that continued complaining was likely to run counter to any effective treatment of Mr Slattery's

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compulsive tendency to complain, I do not accept that the maintenance of the ban can be said to be protective of Mr Slattery. His evidence is clear – the maintenance of the ban causes him considerable distress. Dr Farnbach, in suggesting cognitive behaviour therapy as a treatment option, did not give evidence that the current prohibitive environment provides the best possible conditions for such treatment.

129 The evidence as to the risk is slight. The following incidents allegedly occurred, over a period of fifteen years; one unproven incident fourteen years ago where a brick was thrown towards a Council officer; one heated interaction at the customer service counter in 2000; one alleged threatening hand gesture in 2009; one alleged incident of contact in 2012. There were innumerable letters from Mr Slattery containing unpleasant, somewhat incoherent, and no doubt offensive comments. These did not need to be read by all the class; indeed the original protocol proscribed how this correspondence was managed. The maintenance of the current ban has patently not eliminated or reduced such risk as there is; Mr Slattery continues to write to Council.

130 There was evidence that some individuals were offended, and angered, and frustrated by Mr Slattery's behaviour. This is understandable. Many of the comments were offensive and rude. There was no evidence that any person had suffered harm, or was afraid.

131 Are there non-discriminatory alternatives that will give the class protection from the risk, that is equal to or better than the ban? If there are, is there any reason why it may be impracticable for the Respondent to adopt these alternatives? These are questions that urgently need to be addressed. The ban cannot remain in place forever. It is disproportionately extensive and unspecified. It is blunt, broad and insufficiently tailored. It bars Mr Slattery from venues in the municipality where, on the evidence, he has caused no one any concern whatsoever. It is indefinite, and incorporates no transparent process of review. It is discriminatory, for the reasons set out above.

132 The Respondent tendered a document entitled *Managing Unreasonable Complainant Conduct Practice Manual,* published by the NSW Ombudsman in 2009. This is some years old now, and I understand that research and publication continues in this important area. Such challenges are faced by all public sector organisations. The document sets out comprehensive and detailed strategies for training and supporting staff; offering consistent, calm and structured responses in difficult situations; taking responsibility and apologising for any organisational departures from that consistent, calm approach; de-briefing; structuring contact with the person so that a few comprehensively trained staff members are the main point of contact,

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but ensuring that they are not isolated or unsupported. The document records the following considerations:[39]

> In the absence of very good reasons to the contrary, members of the public have a right to access agencies to seek advice, help or the services the agency provides.
>
> In a democracy, people have a right to complain. Criticism and complaints are a legitimate and necessary part of the relationship between agencies and their customers or communities, and may be dynamic forces for improvement within agencies.
>
> Nobody, no matter how much time and effort is taken up in responding to their complaints or concerns, should be unconditionally deprived of the right to raise those concerns and have them addressed.
>
> Agencies also have an obligation to use resources efficiently and effectively so, at some point, it may be necessary and reasonable for an agency to decide to limit the nature or scope of their responses to complainants whose conduct is unreasonable. However these situations should be the exception rather than the rule…
>
> It should be noted that agencies cannot develop policies that attempt to avoid or limit statutory rights.

133 Whatever was in place between 2001 and 2005 appears to have been effective in moderating the relationship between Mr Slattery and his Council. There was no evidence of concerns during those years. The protocols that were in place after 2005 were targeted specifically to the concerns themselves, for example if Mr Slattery's correspondence contained personally abusive comments it would be dealt with in a certain way. The ban from 2009, and relevantly, for the purpose of this application, from 1 August 2011, has been broad and untargeted.

134 The evidence is that the responses were not always calm, structured and consistent. While it is understandable that Council officers were, from time to time '*human*' as Mr Goldsworthy put it, and as Mr Bennie demonstrated in his file note, the NSW *Practice Manual* makes it clear that organisations need to provide structured support for staff so that these reactions are contained, and not permitted to exacerbate a situation. Apart from during the period of Dr Brown's involvement, there was no evidence before the Tribunal that staff were trained, supported, offered consistent de- briefing, or instructed as to how to respond.

135 In the context of the ongoing research into and development of processes to deal with interactions between public sector organisations and complainants, where conflict may arise, there are, more probably than not, non-discriminatory alternatives to the indefinite maintenance of the ban. Furthermore, any person who breaches the *Summary Offences Act* 1996, for example, or Council meeting procedure rules,

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[39] At page 19

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may be dealt with in accordance with those laws and rules in a non-discriminatory manner.

136 Balancing all the factors as set out in *Hall v Victorian Amateur Football Association* I find, therefore, that the exception in s 86 of the EO Act 2010 does not apply. This is not to say that it would be unreasonable, within the meaning of s 86 of the EO Act 2010, to implement proportionate and tailored strategies that are informed by research and training, that are regularly reviewed and that provide an appropriate and commensurate measure of protection from an identified level of risk.

137 The s 75 exception sought to be relied upon relates to similar considerations, that is whether or not Council was required make the decisions it did about Mr Slattery, in order to ensure, as far as reasonably practicable, the health and safety of staff and members of the public under the *Occupational Health and Safety Act* (Vic) 2004 (OHS Act). The Applicant referred me to the Court of Appeal decision of *HJ Heinz Company Australia Pty Ltd v Turner*[40] which considered the same provision from the EO Act 1995. President Winneke said that:

> Where an employer has introduced, pursuant to obligations imposed on it by the law of Victoria, a regime of work practices appropriately designed to secure, inter alia, the health and safety of a category of employees, it must, in my view, be authorised by the law to implement that regime without concern as to whether such implementation is operating discriminately or not. [41]

138 I accept that this test sets out a requirement of proportionality. For all of the reasons set out above in relation to the claim to the exception under s 86, I find that the regime established by the Respondent was not *appropriately* designed to secure the health and safety of employees, because it did not constitute an appropriate and commensurate measure of protection from an identified level of risk. The action taken was not, in my view, *required* in order, as far as is reasonably practicable, to provide and maintain a working environment that was safe and without risks to health. I therefore find that this exception does not apply.

139 The Applicant has made out his claim of discrimination under s 44. The Respondent has not made out its claim that the exceptions under s 75 and 86 apply to the conduct.

Reasonable adjustments

140 Section 45 of the EO Act 2010 provides that:

> Service providers must make reasonable adjustments for person with a disability
>
> (1) This section applies-

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40 [1998] 4 VR 872

41 At page 882

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(a) if a person with a disability requires adjustments to be made to the provision of a service by another person (the service provider) in order to participate in or access the service or derive any substantial benefit from the service;

(b) whether or not the services are provided for payment.

(2) The service provider must make reasonable adjustments unless the person could not participate in or access the service or derive any substantial benefit from the service even after the adjustments are made.

Example: A service provider may make reasonable adjustments for a person with a disability by-

- including subtitles in recorded audio-visual presentations;
- providing home delivery or making home visits.

(3) In determining whether an adjustment is reasonable, all relevant facts and circumstances must be considered, including-

(a) the person's circumstances, including the nature of his or her disability; and

(b) the nature of the adjustment required to accommodate the person's disability ; and

(c) the financial circumstances of the service provider; and

(d) the effect on the service provider of making the adjustment, including-

(i) the financial impact of doing so;

(ii) the number of persons who would benefit from or be disadvantaged by doing so; and

(e) the consequences for the service provider of making the adjustment; and

(f) the consequences for the person of the service provider not making the adjustment; and

(g) any relevant action plan made under Part 3 of the Disability Discrimination Act 1992 of the Commonwealth

(h) if the service provider is a public sector body within the meaning of section 38 of the Disability Act 2006, any relevant Disability Action Plan made under that section.

141 Section 45 is a stand-alone provision, meaning that contravention of it constitutes unlawful discrimination separate from any consideration of whether there has been direct or indirect discrimination. It requires service providers to make reasonable adjustments to the way they deliver services, so that service users can access the services despite disabilities.

142 The Applicant submitted that the Council had an obligation to make reasonable adjustments to the way it delivered its services so that Mr

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Slattery could access those services despite his disabilities. Reasonable adjustments proposed by the Applicant were that:

- Additional information about Council processes should be provided;
- The Local Law should be modified to allow for interjections by Mr Slattery;
- A case manager should be appointed to assist with management of Mr Slattery's interactions with Council.

143 The Commission submitted that reasonable adjustments could include providing a hearing loop for hearing impaired people to participate in Council meetings, and developing strategies to enable the Applicant's engagement with Council.

144 I do not have before me any evidence that these measures will be effective adjustments, or that they will constitute reasonable adjustments for Mr Slattery's disabilities, taking into account all of the factors set out in s 45(3). There was no evidence put to establish that a particular adjustment would accommodate Mr Slattery's disabilities, or as to what the consequences for Mr Slattery would be of such adjustments being made. Dr Farnbach gave no such evidence. Nor was there evidence provided as to the effects on the Council of making such an adjustment. Just as I needed to closely examine the evidence as to Mr Slattery's disabilities and the evidence as to the relationship between those disabilities and the behaviour that led to the decisions by Council, so I need to examine the evidence as to the requirement to make reasonable adjustments. As I see it, I cannot make unsupported assumptions and inferences about Mr Slattery, his disabilities or his needs.

145 I note that one of the remedies, or reasonable adjustments, sought by Mr Slattery, was a hearing loop. The Council gave evidence that there already exist facilities for ensuring that people with a hearing impairment can hear what occurs at Council meetings and so can participate in the meetings. I accept this evidence. It is unclear whether this meets, or could meet, Mr Slattery's need to communicate effectively with Council. It is unclear, for example, whether or not this, or some other form of assistive technology, is available to Mr Slattery and other people with hearing impairments who wish to attend at the service counter of the Council, or in other Council buildings. Mr Slattery noted in the hearing that he was greatly assisted by, and able to participate fully and calmly in the hearing because of, the small, relatively simple piece of equipment available to him at the Tribunal.[42] Mr Slattery did indeed engage with the hearing process in exactly the same perfectly appropriate way as did every other person present. There was no evidence as to what, if any, assisted hearing equipment is available to Mr Slattery and other people attending at the customer

[42] Oral evidence of Paul Slattery 7 August 2013

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service desk and other Council venues. Neither party raised this issue or provided evidence as to it. I note, however, that should such equipment not be available at the Council, it appears that it would not only be of considerable assistance to provide for it, but the lack of it could well constitute a failure to make reasonable adjustments.

146 I note that the document tendered by Council, the NSW Ombudsman's *Practice Manual*, sets out strategies for ensuring that public sector agency staff are supported and trained to offer consistent, structured and calm responses in situations where service users present challenges. These include strategies for ensuring that inflammatory exchanges such as that documented by Mr Bennie, and those Mr Goldsworthy described as occasionally being *'human'*, are minimised. The range of strategies set out in the *Practice Manual*, which possibly include, in effect, some of the strategies put in place by the 2000 interventions and the pre-2009 protocols, might allow for Mr Slattery's engagement with Council in a way that is non discriminatory yet moderates the effect on Council staff of Mr Slattery's behaviour and ensures that effective communication is maintained. I cannot see, however, that these could be described as reasonable adjustments. They would more likely be restrictive, rather than enabling, strategies, even though they might have the effect of enabling better communication and so more responsive service delivery. At this point, it would be speculative to infer that they might constitute reasonable adjustments.

147 If specific adjustments, supported by medical or other expert evidence, were proposed to the Council, the Council would have the opportunity to make a decision as to whether or not to make such adjustments.

148 I do not find the claim that the Council has failed to make reasonable adjustments proven, on the evidence before me.

Charter of Human Rights and Responsibilities Act (Vic) 2010

149 Sections 38 and 39 of the Charter provide, in part, as follows:

> 38. (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
>
> (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.
>
> 39. (1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter."

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150 The Respondent submitted that the Tribunal had no jurisdiction to consider a Charter claim because the applicant has not made a primary claim against the Council on the grounds that its act was unlawful. The Respondent referred to the Court of Appeal decision in *Director of Housing v Sudi*,[43] in which the Court of Appeal found that a decision made by the Director of Housing to apply for a possession order was not a matter which the Tribunal could review, because the decision was collateral to what was before the Tribunal. The Respondent noted that Chief Justice Warren said that:

> …VCAT did not, apart from the Charter, have power to review the validity of the Director's decisions on the ground of unlawfulness. Accordingly, s 39(1) does not operate to confer jurisdiction on VCAT to grant relief on 'a ground of unlawfulness arising because of this Charter'.

151 The Respondent also referred to the words of Maxwell P:

> Plainly enough, s 39(1) has an operation which is both conditional and supplementary. The condition to be satisfied is that a person be able to seek, independently of the Charter 'any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful.' If – but only if – that condition is satisfied, then s 39(1) enables that person to seek 'that relief or remedy' on a supplementary ground of unlawfulness, that is, unlawfulness arising because of the Charter.
>
> The condition for the operation of s 39(1) is clearly satisfied in the case of an application for judicial review…

152 Counsel for the Respondent submitted that an act is not unlawful under the Charter unless it is unlawful in an administrative law sense, and that the EO Act does not establish a scheme whereby the Tribunal reviews conduct in an administrative law sense. To come to any other conclusion about the limits on the power of the Tribunal, argued the Respondent, would be to leave open the absurd possibility that a remedy for breach of the Charter could be granted when a discrimination claim was dismissed.

153 In any case, submitted the Respondent, in accordance with s 38(2), Council could not reasonably have acted differently or made a different decision, because it was required to protect the health and safety of staff and members of the public.

154 Further, it could be argued, submitted the Respondent, that the acts were of a private nature, in that the Council was acting in its capacity of a landlord or employer, rather than a provider of services to the public.

155 The Applicant and the Commission referred me to the decision of Senior Member Steele in *Caripis v Victoria Police* [2012] VCAT 1472, in which she said as follows:

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[43] [2011] VSCA 266

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> In *Sudi*, the Director's decision to bring the proceeding was not a matter which the Tribunal could review because the decision was collateral to the proceeding itself. In the present case, the Respondent's decision to retain the images of the Complainant is being directly considered by the Tribunal. The lawfulness of that retention is under review because it is said to be "unlawful" under section 14 of the IP Act.

156 In *Director of Housing v Sudi*, Weinberg JA stated that:

> There is no reason to doubt that VCAT, which deals with the overwhelming majority of legal proceedings in this State, is obliged to have regard to the Charter.
>
> Plainly, VCAT is obliged by s 32(1) of the Charter to interpret all statutory provisions 'in a way that is compatible with human rights', so far as it is possible to do so consistently with their purpose.
>
> In addition, VCAT can determine Charter issues in other ways. For example, such issues can arise directly in the course of proceedings. The question whether a public authority has acted unlawfully may be central to the resolution of a dispute where the lawfulness or otherwise of such conduct is an element of the cause of action in the proceeding. Alternatively, illegality on the part of that public authority may be the defence to that cause of action. In each case, the Charter issue arises directly in the course of the proceeding and must be resolved according to law. [44]
>
> …
>
> In my opinion, s39(1) cannot be invoked as the source of VCAT's power to engage in collateral review on Charter grounds. There are two reasons for this. First, as is plain, the section does not confer upon VCAT any power of judicial review. Secondly, the section does not expand any power of collateral review that VCAT might have under ordinary common law principles...
>
> Indeed, it can be argued that the legislative intention disclosed by s 39 is that Charter unlawfulness can be relied upon as a ground in – and only in – a proceeding the object of which is to seek 'relief or remedy in respect of an act or decision of a public authority on the ground that...[it] was unlawful'. That would, by definition, confine such relief to a direct challenge before VCAT, and would exclude any possibility of collateral review. [45]

157 Senior Member Steele interpreted the decision in *Sudi* as allowing that the Tribunal has jurisdiction to consider Charter unlawfulness when the lawfulness of the decision itself is before the Tribunal.

158 In *McAdam v Victoria University* & Ors[46] Senior Member McKenzie found that:

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[44] At paragraphs 150 - 152
[45] At paragraphs 281 - 282
[46] [2010] VCAT 1429

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> The effect of s39 is that, if otherwise than under the Charter, a person may seek relief or a remedy against an act of decision of a public authority on the ground of unlawfulness, that person may seek that relief or remedy on the ground of unlawfulness because of the Charter. While s39 does not confer an independent right of action, if there is on foot a proceeding claiming that some act or decision of a public authority is unlawful, that act or decision may also be challenged as unlawful because of the Charter.

159 This decision was made before *Sudi*, but the reasoning is consistent with the interpretation of *Sudi* as set out in *Caripis*.

160 I agree with this interpretation of the decision in *Sudi*. It is perfectly clear that the Tribunal has no power to conduct a review of administrative decisions that are collateral to the proceeding before it, but not that an act is only unlawful under the Charter if it is unlawful in an administrative law sense. In this case, the lawfulness of the decision of the Council to maintain the ban is before the Tribunal. The Tribunal is directly dealing with the question of whether or not that act or decision is lawful, or is in breach of the EO Act 2010. To refer again to Sudi: *"The question whether a public authority has acted unlawfully may be central to the resolution of a dispute where the lawfulness or otherwise of such conduct is an element of the cause of action in the proceeding… In (that) case, the Charter issue arises directly in the course of the proceeding and must be resolved according to law.*[47]

161 Has a Charter right been engaged? Mr Slattery has the following relevant rights under the Charter:

> Section 18
>
> Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives…
>
> …
>
> Section 15
>
> (1) Every person has the right to hold an opinion without interference.
>
> (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether:
>
> (a) orally; or
>
> (b) in writing; or
>
> (c) in print; or
>
> (d) by way of art; or
>
> (e) in another medium chosen by him, or her.

[47] At paragraph 152

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(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary –

(a) to respect the rights and reputations of others…

…

Section 8

…

(2) Every person has the right to enjoy his or her human rights without discrimination

…

162 Having determined that a right or rights are engaged, section 7 of the Charter then requires that I ask whether a limit or intrusion on the right is justified. It states in part that:

(2)A human right my be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society…taking into account all relevant factors including –

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

163 Section 7(2) raises the following questions: is the limit or intrusion on the right justified, or in other words, is the limit or intrusion sought in order to achieve a legitimate purpose, and were there any less restrictive means reasonably available to achieve the purpose? Section 7(2) requires an assessment of proportionality. Section 38(2) states that s 38(1) does not apply if, because of a statutory provision, the public authority could not reasonably have acted differently or made a different decision.

164 For the same reasons as those set out at paragraphs 127 to 138, I find that there were less restrictive means reasonably available to the Council to achieve the purpose for which it sought to limit Mr Slattery's rights, and the Council could reasonably have acted differently or made a different decision from that which it made on 16 November 2012.

165 I have found that the act or decision of Council on 16 November 2012 to leave the ban in effect is in breach of the EO Act 2010, and I find that it is in breach of s 38(1) of the Charter. At paragraph 26, I have explained why I consider that the act or decision occurred in the context of provision of services. It follows that I do not accept the submission of

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the Respondent that the acts are of a private nature and thus outside the scope of s 38 by operation of s 38(3).

Remedy

166 After careful thought I have decided that I do not yet have before me sufficient evidence to make a considered decision about what is an appropriate remedy. I have found that the response of the Council to the nature of Mr Slattery's engagement with it was blunt, broad and insufficiently tailored. I do not wish to compound this situation by making an order that is blunt, broad, and insufficiently tailored.

167 I make the following remarks.

168 In his application,[48] in the section of the application form asking what he wanted as the outcome of this proceeding, Mr Slattery wrote as follows:

> an explanation
>
> an apology
>
> mediation; this is critical before any proceedings commence at VCAT
>
> an admission of fault, in the total scheme of things
>
> a change, reversal of all decisions affecting me and made by COUNCILLORS, DIRECTORS and ALL CONSULTANTS involved in these actions
>
> I would like it to be acknowledged by every person involved in these actions that I do have MULTIPLE IMPAIRMENTS, and DISABILITIES, including an ACQUIRED BRAIN INJURY. Further all involved must recognise that they knew or should have known of my DISABILITIES and IMPAIRMENTS, whilst they were in the employ of MANNINGHAM CITY COUNCIL...
>
> I would like a change to all procedure, policies and practice to ensure better outcomes for all

169 Both parties, at different times, were keen to engage in mediation to resolve this matter. They were not, however, both ready to do so at the same time. Mr Slattery wanted a mediation from the beginning. At that stage, the Council declined to engage in mediation. On the first day of the hearing, the Council sought the opportunity to engage in a mediation or compulsory conference. After some discussion, Mr Slattery declined.

170 I have now made findings. That aspect of the proceeding is not open for negotiation and discussion, but the issue of remedy, and possibly what would constitute a mutually acceptable way in which Mr Slattery could engage with his Council, is open for negotiation between the parties best placed to determine with accuracy what will meet the need. The parties have the opportunity to seek to reach agreement as to what might be an appropriate and mutually acceptable resolution of this dispute, within

[48] Application of Paul Slattery 4 January 2013

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the context of the findings made. To that end, the proceeding will be listed for compulsory conference before a different Member of the Tribunal.

171 Section 125 of the EO Act 2010 sets out what the Tribunal may decide, once it has made a finding that a person has contravened a provision of Part 4, 6 or 7, as follows:

(i) an order that the person refrain from committing any further contravention of this Act;

(ii)an order that the person pay to the applicant, within a specified person, an amount the Tribunal thinks fit to compensate the applicant for loss, damage or injury suffered in consequence of the contravention;

(iii)an order that the person do anything specified in the order with a view to redressing any loss, damage or injury suffered by the applicant as a result of the contravention.

172 In final submissions [49] the Applicant invited me to take into account a very wide range of matters in considering the issue of remedies. I have not yet received submissions from the Respondent as to remedies. The outcome sought by the Respondent was simply that the application be dismissed, and no alternative submissions were made. If the issue of remedy is not resolved by consent, the parties will have an opportunity to put to me any further submissions they wish to make.

G Nihill
Senior Member

[49] Outline of oral submissions dated 28 August 2013 from paragraph 77

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