QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Patel v University of Queensland & Anor* [2019] QCAT 108
PARTIES:	**ROHAN PATEL** (applicant) **v** **UNIVERISTY OF QUEENSLAND** (first respondent) **ROBYN WARD** (second respondent)
APPLICATION NO/S:	ADL021-18
MATTER TYPE:	Anti-discrimination matters
DELIVERED ON:	12 April 2019
HEARING DATE:	10, 11, 12 December 2018
HEARD AT:	Brisbane
DECISION OF:	Member Kent
ORDERS:	**1. All complaints against the second respondent are dismissed.** **2. The complaint of direct discrimination against the first respondent is dismissed.** **3. The complaint of victimisation against the first respondent is dismissed.** **4. The complaint of indirect discrimination, except for allegation number two (examination 25 January 2017) are dismissed.** **5. The complaint of indirect discrimination relating to the applicant being required to sit the examination on 25 January 2017 is proven to the requisite standard.** **6. It is the order of the Tribunal that the first respondent pays the applicant the sum of $2,000 within one month of the date of publication of these reasons.** **7. The parties have one month from the date of publication of these reasons to file in the Tribunal and exchange with each other any submissions on costs.**

8. **The decision on costs will be on the papers on a date to be advised not before one month after the publication of these reasons.**

CATCHWORDS:	HUMAN RIGHTS – DISCRIMINATION LEGISLATION – GROUNDS OF DISCRIMINATION – DISABILITY OR IMPAIRMENT – EDUCATION INSTITUTIONS – where applicant was a student at the University of Queensland – where applicant diagnosed with psychiatric illnesses – where applicant disenrolled from the University – whether applicant subject by the respondents to direct and indirect discrimination based on an impairment when compared to a person in substantially the same position who does not suffer from this impairment – whether applicant victimised by the respondents
	Anti-Discrimination Act 1991 (Qld), s 7, s 8, s 9, s 10, s 11, s 39, s 125, s 129, s 130, s 204, s 205, s 209 *Anti-Discrimination Act* (NSW) 1977, s 96 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 93
	Bell v iiNET Limited [2017] QCAT 114 *BKY v the University of Newcastle* [2014] NSWCATAD 39 *Cook v The State of Queensland (Queensland Police Service) & Anor* [2018] QCAT 216 *JM v QFG and GK* [1998] QCA 228 *King v University of Notre Dame Australia* [2017] NSWCATAD 58 *Lyons v Queensland* [2016] HCA 38 *Lyons v The State of Queensland* (2016) 90 ALJR 1107 *Secretary Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 *TT and Ors v Lutheran Church of Queensland District and Ors* [2013] QCAT 48 *Woodforth v State of Queensland* [2018] 1 Qd R 289, [2017] QCA 100
APPEARANCES & REPRESENTATION:	
Applicant:	A Duffey QC, S Mackie instructed by Corey Lind Solicitors
Respondent:	C Murdoch QC, instructed by Norton Rose
WITNESSES:	
Applicant:	Rohan Patel
Applicant's Father:	Pankaj Patel

Psychiatrist:	Dr Ankur Gupta
Independent Observer:	Dr Elizabeth Fitzmaurice
Disability advisor:	Ms Sybilla Wilson
Academic Lead Phase One, Medical Faculty University of Qld:	Dr Tammy Smith
Chairperson of Senate Student Appeals Committee:	Professor Heather Wright
Associate Dean Academic Faculty of Medicine University of Qld:	Professor Paul Shaw
Acting Executive Dean Faculty of Medicine University of Queensland June 2016 to June 2018:	Professor Robyn Ward (second respondent)
Deputy Executive Dean and Medical Dean in the Faculty of Medicine, University of Qld:	Professor Stuart Carney

EXHIBITS:

1. Statement of Rohan Patel
2. Statement of Rohan Patel
3. MEDI2022 General Course Information, Semester 2 2016
4. Statement of Pankaj Patel
5. List of issues
6. Photocopy of medical certificate
7. Report of Dr Gupta
8. Supplementary report of Dr Gupta
9. Statement of Dr Elizabeth Fitzmaurice
10. Statement of Sybilla Wilson (with enlargements)
11. Statement of Dr Tammy Smith
12. Article by Jennifer Schafer (published 2016)
13. Statement of Professor Heather Wright
14. Statement of Professor Paul Nicholas Shaw
15. Statement of Professor Robyn Ward
16. Statement of Professor Stuart Carney

REASONS FOR DECISION

Overview

[1] The applicant alleges that he has suffered direct and indirect discrimination based on an impairment when compared to a person in substantially the same position as himself who does not suffer from those impairments. He also alleges that he has been subjected to victimisation by the first and second respondent.

[2] The applicant's primary submissions are that:

(a) the first respondent imposed an observer upon the applicant during his exam of 14 October 2017 and that this observer was directed at the applicant personally and observed him solely and no other students; it was alleged that the observer being imposed amounted to less favourable treatment because it affected his ability to successfully complete the exam. It was alleged that this was direct discrimination within the meaning of s 10 of the *Anti-Discrimination Act* 1991 (Qld) (the Act);

(b) additionally or alternatively the applicant also submitted that the observer constituted victimisation under s 129 of the Act as it was an act done to the detriment of the applicant because he in good faith alleged on several prior occasions that the first respondent had engaged in discrimination against him; and

(c) it was also alleged by the applicant that the actions of the first respondent amounted to indirect discrimination namely that there was a failure to provide the applicant with any feedback on prior attempts at the exam; the first respondent insisted that the applicant sit an exam on 25 January 2017 despite being a temporary inpatient at a psychiatric ward at that time;

(d) the first respondent failed to consider or grant the applicant's application for a supplementary exam on 10 November 2017 and that the first respondent terminated the applicant's enrolment on or about 14 November 2017.

[3] It was further submitted by the applicant that the respondent's evidence indicates that the decision to terminate his enrolment on 14 November 2017 was indirectly discriminatory when it determined to end the applicant's enrolment based upon his academic performance over the period that preceded him developing effective treatment strategies for the his condition of bipolar disorder.

Background

[4] The applicant commenced studying a Bachelor of Medicine, Bachelor of Surgery as part of the University Queensland – Ochsner Clinical School Program. This is a partner program between the University of Queensland and the Ochsner Healthcare organisation, a healthcare provider in the applicant's home country of the United States. The structure of the course anticipated that the first and second years of the course be conducted in Brisbane at the University of Queensland and then the next two years be undertaken in New Orleans at the Ochsner campus.

[5] The applicant moved to Brisbane in 2012 to undertake his studies and it was alleged by the applicant that his behaviour and academic results in 2012 were extremely out of character for him. He ended the year with a GPA of 2.5.

[6] On returning to the United States he sought medical assistance and as a result of doing so in January 2013 was diagnosed with Bipolar 1 and Social Anxiety Disorder with Panic Disorder. It is his allegation that these conditions significantly impacted on his academic performance in 2012 and 2013.

[7] In November 2013 the Medical Faculty at the University of Queensland terminated his enrolment. The applicant appealed to the University of Queensland Senate arguing as one of his submissions that his poor performance was due to his recently diagnosed psychiatric conditions. It is noted from material before the Tribunal that during a period where an appeal is pending a student remains enrolled in their course. On about 14 April 2014 his appeal was upheld by the University of Queensland Senate and he was permitted to continue his studies.

[8] It was alleged by the applicant that he had several "disagreements" with the Faculty of Medicine over his medical condition and this resulted in several University of Queensland Senate appeals.

[9] Despite having commenced in 2012, by October 2016 the applicant had not passed all the necessary subjects for him to progress in the degree. At this time, he alleged that he had one last course requirement; a single remaining exam that was a practical exam referred to as an OSCE.

[10] The OSCE was described as a complex clinical practice assessment with the aim of replicating real-life scenarios that may be faced by medical practitioners. The evidence of Professor Ward was that it was seen as a barrier exam as it was placed at the end of the first phase of study because phase two of the program involved working with what were described as real patients and it was important that the student had the capacity to work with real patients.

[11] The applicant was first scheduled to sit the OSCE on 14 October 2016 and it was his contention that had he passed his exam he would have been able to transition to the second phase of the course in the United States.

[12] An OSCE was described as a practical exam with a pass or fail grading and it was the applicant's understanding that students were given up to three opportunities to pass the exam. Evidence before the Tribunal indicated that it was what was called an "extended exam" so if a student failed the first attempt, they were then automatically entitled to sit what was referred to as a second or extended exam and if this was failed then the third attempt was referred to as a supplementary exam.

[13] The applicant stated he was unable to sit the exam on 14 October 2016 due to a panic attack and his exam was rescheduled for 11 November 2016. On 9 November 2016 the applicant was scheduled to attend an unrelated exam but alleged that due to another panic attack he was housebound. He produced a medical certificate from his then treating psychiatrist in Queensland, Dr Garg, and provided the certificate to the first respondent. The date referred to on the certificate was 9 November 2016, however the applicant contended that it covered both 9 and 11 November 2016 and that it covered his exams on both dates.

[14] Ultimately, the applicant sat the OSCE exam on 15 December 2016 but did not pass. He then returned home to the United States in accordance with his plans. He requested he be allowed to sit the exam again and that he be granted permission to do this at the Ochsner Campus in New Orleans. He was advised that was not possible and that he would have to sit the exam in Brisbane and this was scheduled for 25 January 2017

[15] On about 18 January 2017 the applicant returned to Brisbane to prepare for the exam. On or about 21 January 2017 the applicant suffered a manic episode. He was picked up by the Queensland Police Service on either the 21 or 22 of January 2017 "wandering the streets" and was admitted to a psychiatric ward at the Royal Brisbane and Women's Hospital. On 23 January 2017 the applicant's parents notified the University of his condition.

[16] On about 24 January 2017 the applicant was allowed temporary leave from Royal Brisbane and Women's Hospital to meet with a University of Queensland student counsellor. It was at this meeting that the applicant contends he requested that what he characterised as his second attempt at the OSCE exam be deferred due to currently being an inpatient at a psychiatric ward. It was the counsellor's evidence that she advised him that was not possible, but that he may be able to sit the exam in June 2017. This fact was contested and there were different versions from both parties.

[17] Ultimately and notwithstanding the undisputed fact that the applicant was still an inpatient of a psychiatric facility the applicant attended and was allowed by the University to undertake the exam on 25 January 2017.

[18] He failed the exam and on 2 February 2017 he received a letter from the University of Queensland stating he had failed and he was therefore refused further enrolment.

[19] The applicant sought a review of this decision on 31 March 2017 lodging an appeal with the University of Queensland Senate seeking both re-enrolment and the OSCE exam to be held in the United States.

[20] The relevant subcommittee of the University of Queensland Senate found against the Faculty on 28 June 2017. They decided that they could not be satisfied that the applicant had been advised by the counsellor of his option to defer the exam until June 2017. Further they declined the applicant's request to sit exam in the United States. This refusal was in part based on advice from Ochsner Healthcare, the United States partner of University of Queensland, that they were unable to provide such an examination. On 18 July 2017 the applicant was advised of the outcome of his appeal and his next exam was scheduled for 14 October 2017.

[21] The applicant indicated that he believed that he was disadvantaged by the long-time delay in finalising his appeal and alleged that he did not receive the same access to all of the course resources available to other students and that this had placed him at a serious disadvantage.

[22] The next significant event was on 5 October 2017, when the applicant was informed by email that the Faculty of Medicine had made a decision for an observer to be present to "monitor the conduct of the examination at each of your stations".

[23] Between 7 and 13 of October 2017 there was correspondence exchanged between the applicant's legal representatives and the University. The applicant's evidence was that although he did not wish to have an independent observer, as one was going to be

forced upon him anyway it was his wish that this person be independent from the University.

[24] On 14 October the applicant sat the OSCE exam. He did not pass this examination attempt. His next action was on 10 November 2017 was to apply for "supplementary assessment" and he asked to receive his marks on the OSCE. On 14 November 2017 the applicant received correspondence excluding him from enrolment in the course.

Number of Attempts

[25] It was the respondent's contention that the applicant had been given all of the opportunities to sit the OSCE that could be allowed to a student. In what became a very important exercise of calculation throughout the hearing it was the submission of the first and second respondents that the applicant had in fact had three opportunities to sit his examination – this was including the exam on 11 November 2016 that he did not attend. It was submitted that this was counted as an attempt as he had not provided a sufficient excuse for his failure to attend, for example a valid medical certificate that covered this date. The applicant contended that he had provided a medical certificate that covered this. It was the first respondent's submission that this in fact did not cover that date and therefore as he was absent without a reasonable excuse that exam should count as an attempt even though he did not attend the exam.

[26] Moving forward the University then counted his attempt on 15 December 2016 as his second attempt or "extended examination". The examination undertaken whilst he was still an inpatient at a psychiatric facility was considered to be invalid and not counted due to the applicant's successful appeal to the University Senate therefore his third and final allowable attempt was on 14 October 2017 and as he failed this exam there were grounds for exclusion.

[27] The applicant has a different system of reckoning the number of examination attempts. It was his counsel's submission that the three exam attempts allowed by the University rules should count from the first exam he physically undertook which was on 15 December 2016. It was the applicant's contention that the exam on 11 November 2016 that he did not attend should not be counted as an attempt. Similarly, it was submitted that the 25 January 2017 examination undertaken while he was still an inpatient of a psychiatric facility should not be counted. This is common ground with the first and second respondent's submissions. By the applicant's method of counting this meant that the 14 October 2017 examination was his second or "extended examination" attempt and therefore he was still in the position where he should be given the opportunity to pass a third or supplementary examination.

[28] It is on this point that the parties all diverged in evidence and it is on this basis that amongst others the applicant contends that he was discriminated against.

Discrimination/Statutory Framework

[29] The allegations made were that the first and second respondents discriminated against the applicant within the "educational area" and that this was prohibited by s 39 of the Act. The first respondent is both an "educational authority" and an "educational institution".

[30] The applicant submitted that the second respondent can be defined as an educational authority as she was a person administering an educational institution and further that the alleged discriminatory acts fell within s 39(a) to (d) of the Act.

[31] Indirect discrimination was alleged to have been committed by the first respondent. This was alleged to be characterised by the first respondent's behaviour around the time of 25 January 2017 exam. It was further argued that there was indirect discrimination on 10 November 2017.

[32] Regarding the 25 January 2017 exam the applicant submitted that the second respondent had also discriminated against the applicant. It was the second respondent's submission that she had nothing to do with that decision of 25 January 2017 and therefore she could not be held to be responsible for it.

[33] There were allegations of direct discrimination involving the observer during the exam on 14 October 2017 and further an allegation of victimisation alleged to be evidenced by the observer being in place on 14 October 2017. The applicant submitted that the sudden imposition and insistence upon the presence of an observer was victimisation in contravention of s 129 of the Act as it was an act engaged in by the first and second respondents and it was to the detriment of the applicant in that it interfered with his performance. It was submitted that it was engaged in because the applicant had in good faith alleged on multiple occasion (but particularly in a successful June 2017 Senate appeal) breaches of the Act.

Orders Sought

[34] The applicant sought the following orders from the Tribunal:

(a) A mandatory injunction requiring the first respondent to re-enrol the applicant in the course; to allow the applicant to undertake the OSCE exam; to make all reasonable attempts to allow the applicant to sit the OSCE exam at the Ochsner campus in the United States; and to amend the University of Queensland records to show that the applicant did not sit the OSCE exam on 10 November 2016, 25 January 2017 or 14 October 2017.

(b) It was submitted that such orders are necessary to ensure that the applicant could complete the course subject to his being allowed to pass the requirements without discrimination, including, without limitation, orders in relation to reasonable timeframes and facilities.

(c) An order was sought that the applicant be allowed to pass onto Phase Two of the course upon successful completion of the OSCE exam.

(d) The applicant wished to have a written apology from the first and second respondents with regard to their alleged discriminatory and or victimising conduct towards the applicant.

(e) An order that the first respondent financially compensate the applicant including general damages.

Statutory Framework

[35] Section 39 of the Act provides specifically in relation to discrimination by an educational authority, as follows:

> **39 Discrimination by educational authority in student area**
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> An educational authority must not discriminate –
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> (a) in any variation of the terms of a student's enrolment; or
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> (b) by denying or limiting access to any benefit arising from the enrolment that is supplied by the authority; or
>
> (c) by excluding a student; or
>
> (d) by treating a student unfavourably in any way in connection with the student's training or instruction.

[36] That provision supplements the prohibitions which appear in s 7 of the Act concerning discrimination on the basis of specified attributes. The definition of Discrimination in the Dictionary of the Act refers back to the definitions of direct and indirect discrimination in ss 9, 10 and 11 of the Act.

1. Unlawful discrimination

[37] The Act protects people from unfair discrimination in certain areas of activity by prohibiting direct or indirect discrimination on a ground set out in s 7 in an area of activity set out in Part 4.

[38] Here the ground was alleged to be the applicant's psychiatric illnesses, namely bipolar disorder and some other Axis II diagnoses i.e. panic disorder and social anxiety disorder which come within the ground of "impairment" in s 7(h). "Impairment" is defined to include a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.[1]

[39] Section 8 provides:

> **8 Meaning of discrimination on the basis of an attribute**
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> ***Discrimination on the basis of an attribute*** includes direct and indirect discrimination on the basis of –
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> (a) a characteristic that a person with any of the attributes generally has; or
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> (b) a characteristic that is often imputed to a person with any of the attributes; or
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> (c) an attribute that a person is presumed to have, or to have had at any time, by the person discriminating; or

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1 The Act, Schedule Dictionary.

> (d) an attribute that a person had, even if the person did not have it at the time of the discrimination.

[40] Direct discrimination is defined in s 10 as follows:

> (1) Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.

[41] In *Woodforth v State of Queensland*, the Queensland Court of Appeal held:

> Section 10 requires a comparison between a person with an attribute and a person without that attribute. The comparison is to be made by reference to a certain set of circumstances. In the case of the person with the attribute, that is the set of circumstances in which that person has been treated or the circumstances in which it is proposed to treat that person. In the case of the person without the attribute, who is commonly called in this context "the comparator", they are hypothetical circumstances which are assumed to be the same or not materially different from those in which the person with an attribute has been or will be treated. In the present case, those circumstances included the context of a complaint by a person to police of criminal offending against her.[2]

[42] If the comparison shows that the person with the impairment was treated less favourably, the further question must be asked as to whether the impairment was the "basis" for the less favourable treatment. The central question is therefore to ask why the aggrieved person was treated as he or she was?

[43] If there is more than one reason for treating a person less favourably than another, the less favourable treatment will be on the basis of the attribute only where the attribute is a substantial reason for the treatment.[3]

[44] Section 39 of the Act prohibits discrimination in the area of education. The terms educational authority and educational institute are both defined in the Act.[4]

Evidentiary Matrix

[45] I turn therefore to consideration of the basis for the treatment of the applicant including the treatment that lead to his ultimate disenrollment from the medical degree he was studying on 14 December 2017. This was the date that the period for making a submission to show cause why he should not be disenrolled expired. Mr Patel did not make submissions in response to the show cause request.

[46] Mr Patel has diagnoses of bipolar disorder, social anxiety disorder and panic disorder. There was little evidence provided as to the characteristics that a person with these attributes generally possesses or which is often imputed to a person with the attributes within the meaning of s 8.[5] Non-compliance with direction one of the Tribunal's

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2 [2018] 1 Qd R 289 at [29].
3 The Act, s 10(4); *Lyons v Queensland* [2016] HCA 38; *Bell v iiNET Limited* [2017] QCAT 114 at [11].
4 The Act, Schedule Dictionary.
5 *Lyons v The State of Queensland* (2016) 90 ALJR 1107, 1109 [2].

directions, made on 21 May 2018, was raised and the applicant's legal representative took the Tribunal to the document filed on 11 June 2018.[6] He referred to paragraphs 51(a), 53(a), 60 and 62(b). It was his submission that the word attribute "referred back" to the detail of the attribute which is at paragraph 7 of the 11 June document. This paragraph sets out the psychiatric or psychological conditions already listed. Further, in written submissions made to the Tribunal filed on 21 November 2018, a reference was made at paragraph 63(d) to "an episode of mania recovering from the mania and/or being on medication to resolve the episode". In the context of the overall factual matrix it was submitted that a characteristic of Mr Patel's psychiatric conditions is that he is unable to academically perform when he is suffering from these conditions e.g. mania, being a characteristic of Mr Patel's bipolar illness when he is experiencing an acute episode. The submissions referred to panic attacks without any further description of the characteristics of those, paragraph 73(b) of the same document lists the applicant's conditions as anxiety, bipolar disorder, social anxiety disorder and attention deficit hyperactive disorder.

[47] There was little information relating to the characteristics of these illnesses, however the Tribunal notes the applicant's submissions contained in the 11 June 2018 document. I accept that the relevant attributes were described as bipolar disorder, social anxiety disorder and panic disorder and I accept those submissions. I find that these conditions are an impairment for the purposes of s 7.

[48] The applicant argues he was treated unfavourably in relation to the number of attempts he was allowed to undertake of the OSCE examination, his enrolment and his undertaking appeals to the University of Queensland Senate due to perceptions arising from the knowledge of his impairment. Mr Patel's legal representatives submit that the comparator for the purposes of assessing whether he was treated unfavourably is "another medical student without impairment such as those caused by his psychiatric illnesses".

[49] The comparator in my view is a fellow student without bipolar disorder, social anxiety disorder and panic disorder. These were the conditions most consistently referred to throughout the submissions and evidence. The fact that the applicant is a medical student in the Ochsner program, undertaking a practical examination known as an OSCE is relevant in providing context to the comparator, in particular, as part of determining if the "circumstances that are the same" within the meaning of s 10 of the Act.

[50] The comparison required therefore is between his treatment as a medical student with bipolar disorder, social anxiety disorder and panic disorder and a medical student without those disorders. The relevant "treatment" was the conduct of the University (through its staff) and the second respondent, a staff member, in relation to the application of University rules and policies as to the number of attempts at an examination that can be undertaken before a student is excluded from further enrolment due to failure and in the case of the OSCE undertaken on 25 January 2017 the time and date when such attempts must be undertaken. The other relevant conduct was the employment of an independent observer for the OSCE attempt in October 2017 and the lack of examination feedback post the December 2016 OSCE attempt.

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6 T1-5.

Direct Discrimination – Observer

[51] It was a submission of the applicant that by the imposition of a personal observer and the requirement for the personal observer itself for the applicant's final OSCE attempt on 14 October 2017, the first respondent and second engaged in direct discrimination within the meaning of s 10 and in contraventions of s 39(b) and (d) of the Act.

[52] The respondent submitted that the Tribunal is required to consider whether the action that is alleged to have been the basis of the direct discrimination was taken on the basis of an impairment and also consider whether the person was treated less favourably than another person without that attribute would be treated in the same or not materially different circumstances. Evidence before the Tribunal indicated that there were observers in OSCE's however the only observer assigned to a particular student's stations at the OSCE was Dr Fitzmaurice and she was assigned to the applicant's stations.

[53] Dr Gupta's evidence was that the presence of an observer for any length of time would be anxiety provoking for any person and this was particularly so in the circumstances of someone suffering from the illnesses that the applicant was diagnosed with. It was the respondent's submission that if anyone would be made anxious by the presence of an observer then this did not amount to less favourable treatment compared to other people. They submitted that Mr Patel did not suffer more than anyone else would in the circumstances. The Tribunal's attention was drawn to the evidence that there had been no complaint about the observer until after he failed exam. Dr Fitzmaurice gave evidence that the applicant told her after the exam that he had not been distracted by her presence. In evidence before the Tribunal there was a series of email exchanges between Dr Fitzmaurice and the Medical Faculty and from these emails Dr Fitzmaurice appeared to exhibit a degree of interest in the outcome of the examination. The overall impression given by these emails was that Dr Fitzmaurice wished for the University to not be criticised over the outcome. Counsel for the respondents submitted that the Tribunal should accept the evidence of Dr Fitzmaurice that the applicant did not appear to be in an anxious state when he spoke to her. The applicant's evidence was that he could barely recollect talking to the observer other than exchanging pleasantries.[7] Dr Gupta said that he couldn't speculate on how exactly Mr Patel would have been affected in the circumstances.

[54] A central question for the Tribunal was whether or not the applicant's impairment was the reason for the independent observer being put in place, i.e. the reason for less favourable towards the applicant due to his impairment than a person without the applicant's impairments would be treated. It was the evidence of Professor Ward that the recommendation for an independent observer to be put in place for Mr Patel's October attempt at the OSCE came from the University Senate Student Appeals Committee. She said that she accepted it on the basis that the Committee had formed a view that the applicant had lost trust in the proceedings and that this was evidenced by correspondence to the Committee by the applicant's legal representatives. Therefore an independent observer was intended to be a measure to assist to deal with this perceived lack of trust.

[55] It was the evidence of the Chair of the Student Appeals Committee, Professor Wright, that the Committee had made the recommendation and despite it being couched in

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7 Transcript, pages 62 and 63 Day 1, line 45 on page 62 to line 3 on page 63.

what she referred to as "polite academic language" it was expected that such a direction would be followed by Professor Ward. The intention was to ensure that the University met a rigorous standard in conducting the examination and that it would be beyond reproach and therefore go some way to assuage the applicant's issues with what it is he perceived to be the University's treatment of him. This was characterised as the applicant having a trust issue with the University and the goal of having an independent observer was to make sure that the University conducted the examination undertaken by Mr Patel to the highest possible standard.

[56] The weight of evidence appeared to favour the proposition that the observer was put in place not because of any impairment that the applicant suffered or any attribute of his but rather because he had lost trust in the institution due to their dealings with him over his previous assessment attempts and there was a desire by the University to ensure that the exam process was robust so as to reassure the applicant and perhaps regain his trust and/or to ensure that the University was not criticised for the conduct of their examination.

[57] It was thus submitted by the respondents that the basis for the discrimination was not an attribute of an impairment e.g. Mr Patel's psychiatric/psychological impairments but rather his lack of trust. It was submitted that if the Tribunal was required to consider a comparator in response to this such a comparator would be a student who had not had a lack of trust, therefore this was not related to an impairment. It was the respondent's submissions that a lack of trust was not a characteristic of any of the impairment suffered by the applicant.

[58] The Tribunal accepts the reasoning put forward in the submissions by the respondents as supported by the evidence outlined. Thus the Tribunal accepts the submission from the respondents that the case of *Woodford* does not assist as there was no less favourable treatment due to an impairment, or an attribute including a characteristic of the attribute that was the basis for the less favourable treatment.

[59] It was submitted that the issues canvassed in *Woodford* did not arise in terms of the direct discrimination alleged in this case. This was due to the applicant submitting that the comparator was another student taking the OSCE. The respondents submitted that there were no characteristics that intrude in respect of the question of lack of trust. The lack of trust was something that was perceived by the Student Appeals Committee based upon submissions made by the applicant's solicitors. There was no evidence and certainly no psychiatric or medical evidence to suggest that a lack of trust by the applicant was a characteristic of his impairment. It is on this basis that the Tribunal was satisfied that no direct discrimination had occurred. The Tribunal finds that neither the first respondent nor the second respondent had treated the applicant less favourably than a comparator due to the applicant's impairment.

2. Victimisation

[60] In a decision of Member Traves, the relevant legislation and its application were described as following:[8]

> Section 129 of the Act provides; "that a person must not victimise another person. "Victimisation" is defined in s 130…

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8 *Cook v The State of Queensland (Queensland Police Service) & Anor* [2018] QCAT 216.

The victimisation provisions are in Part 4 of Chapter 5 of the Act, headed "Associated highly objectionable conduct (complaint and penalty)". The first provision in Part 1, s 125, provides:

> **125 Act's freedom from associated highly objectionable conduct purpose and how it is to be achieved**
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> (1) One of the purposes of the Act is to promote equality of opportunity for everyone by prohibiting and penalising certain highly objectionable conduct that is inconsistent with the other purposes of the Act.
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> (2) This purpose is to be achieved by –
>
> (a) prohibiting certain conduct; and
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> (b) allowing a complaint under chapter 7 to be made against a person who has engaged in that conduct; and
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> (c) making that conduct an offence; and
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> (d) using the agencies and procedures established under chapter 7 and the relevant Tribunal Act to deal with the complaint or offence.

[61] In the decision of *TT and Ors v Lutheran Church of Australia Queensland District and Ors*:[9]

> Section 129 of the Act makes it an offence to victimise another person. Victimisation is defined in s 130 of the Act as follows:
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> **130 Meaning of victimisation**
>
> (1) Victimisation happens if a person (the respondent) does an act, or threatens to do an act, to the detriment of another person (the complainant) –
>
> (a) because the complainant, or a person associated with, or related to, the complainant –
>
> (i) refused to do an act that would amount to a contravention of the Act; or
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> (ii) in good faith, alleged, or intends to allege that a person committed an act that would amount to a contravention of the Act; or
>
> (iii) is, has been, or intends to be, involved in a proceeding under the Act against any person; or
>
> (b) because the respondent believes that the complainant, or a person associated with, or related to, the complainant is doing, has done, or intends to do one of the things mentioned in paragraph (a)(i), (ii) or (iii).

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9 [2013] QCAT 48, at [108] – [110].

> (2) In this section, a reference to involvement in a proceeding under the Act includes –
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> (a) making a complaint under the Act and continuing with the complaint, whether by investigation, conciliation, hearing or otherwise; and
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> (b) involvement in a prosecution for an offence against the Act; and
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> (c) supplying information and producing documents to a person who is performing a function under the Act; and
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> (d) appearing as a witness in a proceeding under the Act.
>
> In simple terms, in this case the first complaint of victimisation specifically alleges that it was either the fact of, or the suggestion or likelihood of a complaint being made concerning either the Googa Camp incidents or the "*detention room*" issue, that lead to the decision to direct staff not to communicate with her. For ss 129 and 130 to operate, there must be three elements shown; first that a person has done an act or has threatened to do an act, secondly that that act is to the detriment of another, and finally that there is a causal nexus between any detriment suffered and the matters stated in s 130 of the Act. It seems to me at least strongly arguable that a direction that College staff who might be the teachers of a parent's pupil at a school who are directed not to communicate with that parent is detriment sufficient to invoke the definition in s 130. It is on the issue of causal nexus that the complaint of victimisation stumbles.
>
> There is a body of authority which supports the view that to establish the relevant causal nexus, it is sufficient if the relevant Act which would amount to victimisation within the meaning of s 130, was a substantial or operative factor or reason for the detrimental conduct.[10]

[62] It is for the applicant to prove, on the balance of probabilities, that the respondent contravened the Act.[11] If the Tribunal decides that the respondent contravened the Act, the Tribunal may make one or more of the orders in s 209, which relevantly include an order requiring the respondent to pay to the complainant an amount the Tribunal considers appropriate as compensation for loss or damage caused by the contravention.[12]

[63] The Tribunal considered whether the applicant has proved, on the balance of probabilities, that he was victimised by the first and second respondents.

[64] Victimisation happens, relevantly, if a person does an act to the detriment of another person (to the complainant) because the complainant alleged or intends to allege that a person committed an act that would amount to a contravention of the Act.[13]

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10 See *Morrison-Liddy v The Director of the Department of Technical and Further Education* (1999) EOC 92-246*; Bogie v The University of Western Sydney* (1990) EOC 92-313; *Cockin v P and N Beverages Pty Ltd* [2006] QADT 42; *Damiano and Another v Wilkinson and Another* [2004] FMCA 891 at par 22; *Narda Tapia v Lagoon Seafood Restaurant* [2003] NSWIR COMM 341 at 108-113; *Wadsoworth v Akers and Woolworths Ltd trading as Big W Discounts Stores* [2007] QADT 17.

11 The Act, s 204.

12 The Act, s 209(1)(b).

13 The Act, s 130(1)(a)(ii).

[65] The applicant claimed that the sudden imposition and insistence upon the presence of an observer amounted to victimisation. It is alleged that the imposition of the independent observer was due to the allegations of discrimination raised by the applicant in his 2017 Student Appeals Committee appeal and such an imposition caused the applicant detriment during an OSCE examination attempt.

[66] The respondents argued that the presence of an observer for the 14 October 2017 OSCE examination was for the purpose of ensuring the OSCE process was "beyond reproach". Further the imposition of the independent observer was alleged by the University to be for the benefit of Mr Patel following issues raised in his appeal regarding his lack of trust in the University of Queensland Faculty of Medicine, i.e. it was to reassure him that the process was fair as it was being overseen by an independent observer. It was the evidence of Professor Ward that she had implemented an independent observer on the basis of a directive from the Senate Student Appeals Committee. She described herself as acting on the strong advice of the Senate Appeals Committee about the importance of an observer for Mr Patel.[14] It was the evidence of Professor Wright that Professor Ward was expected to comply with what was considered to be a directive from a higher body in the hierarchy of University management.

[67] It was the evidence of Dr Fitzmaurice, the independent observer, that she had been spoken to by Rohan Patel at the end of his exam. It was her evidence that as she was an experienced observer, she was delighted to be reassured by Mr Patel that she had achieved what she considered to be main object of her involvement i.e. to ensure that Mr Patel had a fair OSCE and was not in any way distracted by the process.[15]

[68] The evidence of Dr Gupta indicated that Mr Patel had an increased perception of humiliation and embarrassment which made him more vulnerable to poor performance in the exam due to having an independent observer assigned to him. In his second statement Dr Gupta[16] cited a number of studies on situations where an observer was present to observe the examiner and not the examinee and even in those circumstances it was shown that anxiety increases for the examinee. It was his evidence that if there is a situation where there is an exam candidate, an examiner in the subject and then another person observing, that this triggers a mechanism. It was his evidence that if the person being observed knows there is an observer in the room they tend to have a reaction, a sort of anticipatory anxiety and a high arousal state.[17]

[69] It was the respondent's submission that the imposition of the observer was for the reason relied upon under the discussion of *direct discrimination* in these reasons (*supra*) namely that the University was imposing an independent observer upon Mr Patel for the purposes of ensuring that the University's processes were beyond reproach. It was submitted by the respondents that the test relating to victimisation is threatening or acting to someone's detriment because they allege a contravention of the Act or are involved in a proceeding under the Act. They argue:

(a) That the observer was imposed to ensure University standards were upheld and to overcome a lack of trust on the behalf of the applicant;

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14 Witness Statement of Professor Patel, lines 17 to 19.
15 Transcript evidence of witness Dr Fitz, page 1 of 29, lines 35 to 41.
16 Supplementary statement of Dr Gupta, exhibit 8.
17 Evidence of Dr Gupta, page 9 of day 2, lines 15 to 36.

(b) The observer was not imposed due to an allegation of a contravention of the Act;

(c) Nor was the observer imposed due to there being a proceeding under the Act already underway.

[70] As previously discussed the Tribunal accepts that imposition of the observer was due to what was perceived to be a lack of trust in the process and an attempt to make sure that the process was robust. It is necessary, for victimisation to be found, that there is an allegation of a contravention of the Act or involvement in a proceeding. These things must be the substantial or operative reason for the detrimental conduct for the allegation. It was contended that there was no connection between any proposed discrimination proceeding or complaint and the imposition of an observer. The observer was engaged on the basis of the recommendation of the Senate Student Appeals Committee based upon what that body perceived to be the applicant's apparent lack of trust of the faculty. In coming to this conclusion it was Professor Wright's evidence that the University Senate Student Appeals Committee relied upon information contained in correspondence from the applicant's lawyers.

[71] The Tribunal finds, on balance, the independent observer was engaged as a measure to prove the robustness of the examination process as a means of addressing the trust issues the applicant was perceived to have. This was the reason provided by the witnesses of the respondents. I accept the submissions and evidence on this point by the first and second respondents. Accordingly, I find this did not constitute a contravention of s 129 of the Act i.e. the allegation of victimisation is not made out with respect to the first or second respondents.

3. Indirect Discrimination claims

[72] The test for indirect discrimination was discussed by Member Roney SC (as he then was) in the decision of *TT and Ors v Lutheran Church of Queensland District and Ors*:[18]

> **11 Meaning of indirect discrimination**
>
> (1) Indirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term –
>
> (a) with which a person with an attribute does not or is not able to comply; and
>
> (b) with which a higher proportion of people without the attribute comply or are able to comply; and
>
> (c) that is not reasonable.
>
> (2) Whether a term is reasonable depends on all the relevant circumstances of the case, including, for example –
>
> (a) the consequences of failure to comply with the term; and
>
> (b) the cost of alternative terms; and

[18] [2013] QCAT 48.

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

(3) It is not necessary that the person imposing, or proposing to impose, the term is aware of the indirect discrimination.

(4) In this section –

term includes condition, requirement or practice, whether or not written.

Example 1 –

An employer decides to employ people who are over 190cm tall, although height is not pertinent to effective performance of the work. This disadvantages women and people of Asian origin, as there are more men of non-Asian origin who can comply. The discrimination is unlawful because the height requirement is unreasonable, there being no genuine occupational reason to justify it.

Example 2 –

An employer requires employees to wear a uniform, including a cap, for appearance reasons, not for hygiene or safety reasons. The requirement is not directly discriminatory, but it has a discriminatory effect against people who are required by religious or cultural beliefs to wear particular headdress.

As has been often recognised in this context, it is important that the term which it is alleged was imposed be formulated with some precision; *Australian Iron and Steel Pty Ltd v Banovic* (1989-1990) 168 CLR 165 at 185.

It has also been recognised that the language of s 11 and its analogues is somewhat difficult to apply, not only by itself, but also in conjunction with other sections of the Act, particularly s 39 of the Act concerned with discrimination by educational authorities in student area; *Australian Iron and Steel Pty Ltd v Banovic* (1989-1990) 168 CLR 165 at 177 and 195*; I on behalf of BI v State of Queensland* [2005] QADT 37.

Claim of indirect discrimination by the first respondent in relation to 25 January 2017 exam – lack of feedback

[73] The term relied upon here is that the applicant was required to sit the exam on 25 January 2017 without having received any feedback from his failed attempt at the examination on 10 December 2016.

[74] The indirect discrimination case alleges that the first respondent imposed terms, or proposed to impose terms:

(a) with which the applicant with his attribute of impairment was not able to comply;

(b) with which a high proportion of students who did not have the attribute were able to comply; and

(c) that was not reasonable.

[75] The term which it is said was imposed with which he was not able to comply was that a person will only receive feedback on a failed exam attempt before the next exam attempt if their exam timetable was not delayed such as the Christmas period which falls between the two exam dates.

[76] The impairments of the applicant have already been referred to in earlier parts of these reasons and I will not repeat this information.

[77] It was submitted by the legal representative for the applicant that the higher proportion of people without the applicant's impairments with regard to this alleged term would be able to comply with that term because they would not have had their exams delayed due to, *inter alia*, panic attacks.

[78] The respondent submitted that that there was no relationship between the pleaded term and the higher proportion of people as they were "different concepts". Essentially what was being discussed was a high proportion of people who would not find themselves in that situation because they would not have had their exams delayed by panic attacks.

[79] It was submitted that on this basis the first indirect discrimination allegation ought to be rejected.

[80] Based on the evidence, it is the Tribunal's finding that the University did not impose a term that a person would only receive feedback on a failed exam attempt before the next exam attempt if their exam timetable was not delayed such as the Christmas period between the two exam dates.

[81] It was the Tribunal's view even if the University had imposed such a term, it does not constitute discrimination against the applicant on the basis of an attribute, nor did it fall within the definition of treatment of a student unfavourably in any way in connection with the student's training or instruction within the meaning of s 39(d). The un-contradicted evidence before the Tribunal was that there are no policies, procedures or rules of the first respondent that outline any obligation to provide feedback to students before assessments. There are no terms that relate to this requirement and no evidence pointed to a term having been imposed that the feedback would not be provided over the Christmas break.[19]

[82] Even if the Tribunal concluded that there was a relevant term within the meaning of s 11 of the Act, the Tribunal would need to turn its mind to whether or not the imposition of that term was reasonable within the meaning of that term in s 11(1)(c). The first respondent bore the onus of establishing that it was reasonable pursuant to s 205 of the Act and in these circumstances the respondent has discharged such an onus. The relevant tests for this are enunciated by the Court of Appeal in the decision of *JM v QFG and GK*.[20] In that case it was said that the test of reasonableness is an objective one, requiring the weighing of the nature and extent of the discriminatory effect, on the one hand against the reasons advanced in favour of the term, on the other hand all the circumstances, including those specified in s 11(2), must be taken into account. To similar effect are comments in *Secretary Department of Foreign Affairs*

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19 First respondent's submissions, paragraph 78.

20 [1998] QCA 228.

and Trade v Styles,[21] where it was said that the test of reasonableness is less demanding than one of necessity, and is more demanding than a test of convenience.

[83] The evidence before the Tribunal, in particular, the statement and oral evidence of Dr Smith indicated that there had been an unusual set of circumstances where the applicant had emailed Dr Margot Lane, who had been the course coordinator for clinical practice, on 4 January 2017 asking about where he could get personal feedback about his OSCE. Dr Lane at that stage had resigned from the University and accepted a job at another university. On 5 January 2017 Dr Tammy Smith received an email from Scott Peters, Ochsner Clinical School Senior Operations Students' Affairs Administrator, requesting an update on the academic progress of the applicant. On 5 January 2017 an email from Mr Peters contained the email from the applicant to Dr Lane regarding his request for feedback. On 5 January 2017 Dr Smith emailed Dr Dan Park, Clinical Practice Coordinator University of Queensland, and Carlin Yarrow, Senior Administration Officer Assessment Unit University of Queensland, regarding the applicant's supplementary OSCE and his request for feedback. In that email Dr Smith asked Ms Yarrow whether the feedback requested was available and Ms Yarrow confirmed that the applicant would receive feedback on 6 January 2017. This did not occur.

[84] The applicant contacted Dr Lane by an email a second time on 6 January 2017 as a standalone email, but it was alleged by the respondents that the applicant's actions were remiss due to his failure to more explicitly and consistently seek feedback concerning his 15 December 2016 attempt at the OSCE. Dr Lane notified the applicant that she no longer worked for the University of Queensland School of Medicine and she forwarded the email to another representative of the University.

[85] On 16 January 2017 Dr Smith received an email from Ms Yarrow which requested she provide an email address which students could use to query the feedback they receive from their OSCE results. Dr Smith sent an email to Dr Park the same day to follow-up on Ms Yarrow's request. Dr Park provided an email which contained an email address that students could use to query the feedback they had received. The Tribunal notes that this process appeared to assume that students had already received feedback that they could "query". Dr Smith had considered that prior to 16 January 2017 the applicant had been provided with the requested feedback. The 16 January 2017 email from Ms Yarrow indicated that the feedback had not been sent however Dr Smith considered the feedback would be sent, as an email address for student enquiries had been provided. On 30 January 2017, post the 25 January 2017 examination attempt, the applicant sent Dr Smith an email which confirmed that he had received the result of his most recent OSCE. This email said that despite his request, the applicant did not receive feedback from his initial December 2016 OSCE attempt and that the feedback would have been critical for improving his performance. Dr Smith sent an email to Ms Yarrow to ask whether the applicant had received feedback and noted that she had been under the impression that the student had. Dr Smith received a response from Ms Yarrow that afternoon which said that the applicant did not receive feedback because of "unresolved issues with the system and his feedback request was inadvertently overlooked during this time".[22] On 31 January 2017, a date after the 25 January attempt, Dr Smith sent the applicant an email which

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21 (1989) 23 FCR 251 at [263].

22 Statement of Dr Smith, paragraph 46.

said that Dr Park would be putting together feedback which would be "provided soon".

[86] It was the submission of the first respondent's legal representative that the applicant could have "done more" to seek feedback and that he needed to consistently follow-up with the University. The Tribunal considered on balance, the applicant had made a reasonable attempt to receive feedback and it would be unrealistic to accept the view that a student continuing to repeatedly ask for feedback would have made a difference in the success or otherwise of eliciting information from a large bureaucracy such as the University of Queensland, particularly in the circumstances of January 2017 when the relevant person, Dr Lane, had resigned. Due to unfortunate errors and breakdowns of communication the applicant was not provided with feedback. It is evident that other students would have been in the same position as the applicant and he was not disadvantaged due to an attribute or an impairment, rather any issues were merely due to an unfortunate sequence of events that led to his not receiving feedback. The Tribunal notes that the University did not have an obligation within its own rules to provide feedback before an assessment piece was undertaken again. Mr Patel was not treated less favourably than a person without Mr Patel's impairment would have been in the same or not materially different circumstances.

[87] However the discussion of reasonableness or otherwise of the term is largely moot as it is the finding of the Tribunal that such term was not imposed.

Indirect discrimination allegation in relation to 25 January 2017 exam – impermissible term

[88] It was alleged by the applicant that the first respondent imposed a term, namely that if a person in the applicant's position wished to pass the course they needed to be able to attend and pass the OSCE exam on the specified day (relevantly, 25 January 2017).

[89] It was alleged that the applicant had an attribute within the meaning of s 7 of the Act being an impairment, namely his psychiatric conditions including bipolar disorder and that at the time of 25 January 2017 the applicant was an inpatient of a psychiatric ward at the Royal Brisbane and Women's Hospital and as such was suffering an acute exacerbation of his impairment, in particular his bipolar disorder (manic episode). It was submitted that the applicant was a person with an attribute and as such was not able to comply with this term and that a higher proportion of people without the applicant's psychiatric conditions would be able to comply with the term because they would not have a disturbed thought process due to an episode of mania, nor would they be recovering from a manic episode, nor would they be on medication to resolve the episode. Further it was submitted that the term was not reasonable because the University could have rescheduled the exam to a later date such as June 2017.[23]

[90] It was alleged that the first respondent contravened s 39(a), (b) and (c) of the Act on 24 January 2017 when it denied the applicant's request to defer the exam. It was further submitted that the first and second respondents did not comply with s 39 (a), (b) and (c) of the Act when they subsequently terminated the applicant's enrolment in reliance upon his performance in the OSCE undertaken on 25 January 2017.[24] The Tribunal finds that the evidence supports the allegations regarding this indirect

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23 Applicant's written submissions, paragraph 63, page 10.

24 Applicant's written submissions, paragraph 63, page 10.

discrimination and finds that the first respondent alone was responsible for this indirect discrimination.

[91] Post a successful appeal to the University of Queensland's Senate Student Appeals Committee, the applicant was allowed to sit another OSCE which was scheduled for 14 October 2017. The applicant submitted that this attempted remedy was insufficient because the applicant was forced to engage in a lengthy appeals process and that meant that the applicant had to wait till October 2017 to undertake the OSCE again. Additionally, it was alleged the applicant had not been given access to all course materials and resources that would ordinarily be available to a student. It was submitted that these factors caused the applicant to be materially disadvantaged in the October 2017 exam. It has been the finding of the Tribunal that the evidence did support a material disadvantage as described by the applicant. It was also alleged that the rescheduling did not overcome the issue as the applicant was "singled out" by the second respondent by her subjecting him to a personal observer in his examination in October 2017.[25] The Tribunal reiterates that the second respondent has not been found to be responsible for any discrimination or victimisation of the applicant based on the evidence. The Tribunal has found that the use of an observer was based not on the applicant's impairment but to enable the process of examination to be rigorous and to address the perception that the applicant had lost trust in the institution and its processes.

[92] The respondents' counsel submitted that the Tribunal should accept the evidence of Ms Wilson that she told the applicant on 24 January 2017 that he had the opportunity to not sit the exam on 25 January 2017 and to sit the exam at a later date, being mid-2017. It was the first and second respondents' legal representative's submission that should the Tribunal accept such evidence then this allegation of indirect discrimination "simply falls away".

[93] Alternatively, it was put to the Tribunal that there was a dispute between the evidence of Mr Patel and Mr Patel Senior with regards to what occurred at the meeting between themselves and Ms Wilson on 24 January 2017. It was also submitted that the Tribunal should be influenced by Ms Wilson's evidence being supported by her contemporaneous case notes that were attached as exhibits. It was further submitted that there was a difference between the applicant and his father on the chronology of events,[26] and that the Tribunal should view their evidence as less reliable because of this difference. It was submitted that the opportunity to take the exam at a later date, namely the middle of the year, had been offered to the Patels but that Mr Rohan Patel had chosen not to accept this outcome as he wished to progress his study in the United States and therefore complete the OSCE as soon as possible.

[94] The respondent submitted that although the University Senate had found that they could not be satisfied that such an offer was made by Ms Wilson to Mr Patel on 24 January 2017, the Tribunal should take a different view from the Senate Committee on the basis of having the opportunity to assess the credit of the witnesses before it, unlike the Committee.

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25 Applicant's written submissions, paragraph 66.

26 Transcript, pages 3 to 97, paragraphs 5 to 10.

[95] The Tribunal did have the valuable opportunity of assessing not only the witness, Ms Wilson, but also Mr Patel and Mr Patel Snr.

[96] The applicant, Mr Patel, gave his evidence in a forthright and truthful manner. He did not shy away from the fact that at the time of the meeting on the 24 January 2017 he was a very unwell person and was at that time a current inpatient of a psychiatric ward. He did not attempt to camouflage the reality that he did not remember very much of this meeting due to his illness, however he denied that he was offered an opportunity to take the examination later in the year.

[97] Ms Wilson's "contemporaneous" note was made the next day. According to the records dated 25 January 2017, it states that the meeting took place between Mr Patel and Mr Patel Snr and herself on 25 January 2017 when all evidence before the Tribunal, including Ms Wilson's own evidence, was that it took place on 24 January 2017. It does not record any liaison or discussion with Dr Park (something the witness gave evidence of occurring), it only refers to liaising with Tammy Smith. The note states that the student was offered an exam in June 2017, but he had declined it and sought an urgent extension which was refused. Further, the note indicated that she had implemented some exam adjustments.

[98] Ms Wilson did not impress as a witness of great reliability. When giving evidence she appeared to rely almost completely on her written statement for a recollection of what she was or was not able to recall about the matter. Ms Wilson indicated her view was that it was unreasonable for the student or his family to have not contacted the University staff to advise them of his relapse in his bipolar illness at an earlier date than when his parents were able to email around 23 January 2017.[27] The Tribunal was of the view that this displayed a rather unusual lack of understanding of what being an inpatient in a psychiatric ward would entail. Ms Wilson appeared to place great importance upon Mr Patel, an adult, having his father with him at the meeting of 24 January 2017 despite there being no evidence of Mr Patel Snr being a substituted decision-maker in any way for Mr Patel.[28] Ms Wilson also displayed a lack of understanding or misunderstanding of the terms voluntary and involuntary patient. She referred to Mr Patel's status as voluntary patient as an indication that he would be able to make his own decisions in all domains. Ms Wilson admitted that she made no assessment about his capacity.

[99] She was of the view that the patient had admitted himself to hospital although she did not elaborate on why she considered that this was important. It was clear from other evidence that the patient had in fact been taken to the psychiatric ward by the Queensland police after he had been found wandering the streets. Ms Wilson appeared to suggest that the patient had not complied with his end of the bargain with his Student Disability plan in that he had not contacted the University on 22 January 2017 when he was an acutely unwell patient in a psychiatric ward despite the fact that this was a time that was out of business hours. On that date Ms Wilson had not returned to the University from leave so even if any communication had been made it could not have been actioned by her.

[100] Ms Wilson's evidence was that she filed his medical certificate away and that she did not advise anyone other than the members of the medical faculty that she spoke to

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27 Lines 20 to 23.

28 Evidence of Ms Wilson, page 45 of the transcript, lines 10 to 33.

about the certificate. It seems that once received by the University very little if anything was done with the medical certificate provided. It was certainly not passed on to anyone who was conducting the examination i.e. the invigilators, the examiners and the mock patients. As supported by Professor Smith's evidence there was no risk assessment undertaken to ensure the safety of both the applicant and others while he was undertaking an examination atthe same hospital that he was a current inpatient of.[29]

[101] Under cross-examination Ms Wilson said it was not up to her to advise anyone despite her title at that time being "disability advisor". She stated that she saw her role as not being a decision-maker but rather she was employed because people in her position possessed a range of experience across disabilities and mental health issues. She said very clearly that she was not a clinician and she was not a doctor. She saw her role as advising and providing information to the course coordinators and students. Ms Wilson gave evidence that providing information to the University is the most important part of her task.[30] However she used terms such as "recovery based client focused practice"[31] and terms such as this were never clarified by Ms Wilson or any other witness and added to confusion about her actual role. Ms Wilson could at times appear to be evading answers and throughout her evidence used unexplained jargon such as the example already referred to in this paragraph.

[102] From the evidence before the Tribunal it would appear that the only time the offer, claimed to be made by Ms Wilson, to allow Mr Patel to undertake another attempt at the exam in June 2017, was documented was in the note made by Ms Wilson the day after her appointment with the Patels and presumably at the same time as or after Mr Patel had already undertaken the examination. Given the amount of correspondence and emails between the applicant and the University one may consider it curious that something as important as an offer to defer an examination until July 2017 due to illness had not been put in writing at any stage and nor was it supported by any other documentation save for a note made by a disability advisor at a time after her meeting with the applicant and his father.

[103] Professor Wright was cross-examined about the decision of her committee and the following exchange occurred:

> Mr Duffy: All right now if we then go over two more pages to 210, this is dealing with the question of whether there has been offer made to Mr Patel to sit the exam in 2017, and the committee noted there was no written evidence and noted it had been submitted that all the evidence pointed to the contrary. Was that a conclusion the committee agreed with, that is that the written evidence point and pointed to the contrary of there having been an offer?
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> Prof Wright: This was quite important point in the committee's deliberations, as I recall there was some dispute here about whether Mr Patel was advised. The committee felt strongly that in the absence of evidence to the contrary, Mr Patel should be given all the benefit

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29 Professor Smith's evidence, lines 24 to 33.

30 Evidence of Ms Wilson cross-examination by Mr Duffy QC, she gave evidence at that she considered "a voluntary patient had suffered a psychiatric breakdown could possibly still be capable of…" page 144 of transcript, lines 28 to 30.

31 Cross-examination of Ms Wilson by Mr Duffy, page 145 of transcript, lines 21 to 24.

> of the doubt in this instance. I don't think the – the committee noted that the lawyers had said the evidence pointed to the contrary, and the committee could not find any written evidence of that.[32]

[104] By contrast to Ms Wilson, the applicant and his father appeared to be giving their best recollection of what had occurred in the circumstances. The applicant and his witness openly stated that such recollections were influenced by the fact that the patient himself was extremely unwell at the time of this interview on 24 January 2017 (not 25 January 2017 as recorded by Ms Wilson) and by his own evidence Mr Patel Snr advised that he was exhausted having just flown to Australia from the United States: "I was so tired ,jetlagged and Rohan, we just wanted to get back to a hotel and just you know rest".[33]

[105] In the face of cross-examination Mr Patel Snr remained adamant that Ms Wilson had acknowledged that his son was not in a fit state to undertake his OSCE. He gave evidence that Ms Wilson stated that she thought there would be no issue in deferring the OSCE. Ms Wilson denied these remarks however she did refer to being empathetic to Mr Patel's situation.

[106] On balance, all of the information before the Tribunal leads to the finding that there is a lack of satisfactory evidence to enable it to conclude that the offer to allow Mr Patel to sit the examination again in June 2017 was conveyed to Mr Patel and his father at the meeting of 24 January 2017. This finding impacts upon assessment of the term relied upon namely that for a student to pass the OSCE they would be required to attend the OSCE on 25 January 2017. It is accepted that the criteria of indirect discrimination is met in these circumstances because:

(a) The applicant has an attribute within the meaning of s 7 of the Act, being an impairment namely his psychiatric/psychological conditions;

(b) The first respondent imposed a term that if the applicant wished to pass the course they needed to be able to attend and pass the OSCE exam on the specified date, relevantly 25 January 2017;

(c) The applicant, who is a person with an attribute, was not able to comply with the term;

(d) A higher proportion of people without the applicant's psychiatric/psychological conditions would be able to comply with the term because they would not have a disturbed thought process due to an episode of mania, be recovering from a manic episode or be on medication to resolve the episode.

[107] The Tribunal is satisfied that the applicant has discharged the burden of proof found in s 204 of the Act and finds that the term relied upon was imposed by the University upon students. The first respondent is the only party that imposed such a term and the second respondent attracts no liability in relation to this particular term.

[108] In cases of indirect discrimination the respondent must prove on the balance of probabilities that a term complained of is reasonable. In these circumstances the

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32 Evidence of Professor Wright under cross-examination, page 77 of transcript, lines 1 to 11.

33 Mr Patel's evidence, page 178 of transcript, line 9.

Tribunal finds that the first respondent did not discharge this onus. Further the Tribunal finds that the term was not reasonable due to the first respondent's ability to have rescheduled the exam to a later date e.g. June 2017.

[109] Following on from the above, the Tribunal finds that the first respondent contravened to ss 39(a), (c) and (d) of the Act.

[110] The applicant submitted that as part of this event of indirect discrimination the first and second respondents did not comply with ss 39(a), (c) and (d) of the Act when they terminated the applicant's enrolment in reliance upon his exam performance on 25 January 2017. The date for this occurring was listed in submissions by the applicant as 24 January 2017, however it would appear that the applicant was not advised of the termination of his enrolment until the later date of 2 February 2017, when the first respondent notified him via letter that because he had failed the OSCE on 25 January 2017 he was being refused further enrolment.

[111] It was submitted by the applicants that although the first respondent attempted to remedy this indirect discrimination by rescheduling the exam later in 2017, this attempted remedy was insufficient because it required that the applicant engage in a lengthy appeals process. Additionally, it was submitted that because of the length of time it took to undertake the appeal, the applicant missed the June/July exam block and had to wait till October 2017 to sit another OSCE, also the applicant was not given access to all course materials and resources that would have been made available to a students enrolled in the subject in that semester. The applicant submitted that he was materially disadvantaged due to this.

[112] The applicant bears the onus of proving the allegation of indirect discrimination and has done so with regard to the allegation relating to the requirement to sit the examination on 25 January 2017.

[113] The applicant made allegations that amounted to him having been inadequately able to prepare for the exam in October 2017 due to his lack of access to resources. The submissions were made in reference to the University's attempts to remedy the issue caused by requiring that the applicant sit an examination in January 2017 when he was so unwell. This included the lengthy appeals process and also the issue of lack of access to resources. The resourcing issue raised by the applicant was not borne out by the evidence. There was evidence of the applicant accessing some of the resources of the University via its online services.[34] Dr Smith indicated that the applicant had accessed the UQ blackboard site which was the gateway to online resources on multiple occasions. It was also noted that the Clinical Coaching Summative Assessments to which the applicant requested access were not resources but were exams that students completed as part of their assessment in year one of the clinical practical courses. It was submitted that the applicant had been given prior access to the course materials in 2016 and tutored in that year. The University refuted that the applicant had not had sufficient resources to prepare himself for the examination and based on the evidence before the Tribunal it would appear that the applicant did have access to many of the resources he stated that he did not have access to, although it

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34 Statement of Tammy Gail Smith, exhibit 11; and Annexure TS 18.

was taken into account that the access to some of these resources had occurred in 2016 and not 2017.

[114] Therefore, whilst the Tribunal did find that the term imposed upon the applicant regarding the requirement to sit his examination on 25 January 2017 was indirect discrimination within the meaning of the Act, such a finding amounts to a somewhat Pyrrhic victory for the applicant. What is meant by this term is that although indirect discrimination did occur by the University's own processes, that included appeals and a subsequent resitting of the examination, the Tribunal cannot conclude that the applicant should be compensated beyond nominal compensation.

[115] In considering what loss is compensated for under this finding of indirect discrimination the Tribunal has to consider the overall circumstances of the case. One factor is that the calculation of examination attempts does not include the 25 January 2017 attempt in the overall number of attempts. Therefore this particular attempt has not contributed to the number of failed examinations that lead to the applicant's final disenrollment from the course in December 2017. Ultimately it would appear that the applicant's disenrollment was caused by his multiple failures of OSCE, a piece of assessment described as a barrier exam due to the importance of making sure that any student that progressed to phase two of the course was competent to deal with patients. Therefore whatever loss was caused by the term imposed that the student sit the examination on 25 January 2017, it did not play a starring role in the overall narrative of his disenrollment from the University. The first respondent's own appeals process attempted to correct the wrong caused by the applicant being required to sit the examination when he was so medically unwell. This occurred by the exam being rescheduled to October 2017. The applicant alleged that he could not prepare due to a lack of resources however on the balance of probabilities the evidence before the Tribunal did not support this allegation.

Indirect Discrimination – 10 and 14 November 2017 and disenrollment

[116] The applicant alleged indirect discrimination by the first respondent occurred on 10 and 14 of November 2017. It was submitted that the first respondent impliedly ignored the applicant's 10 November 2017 request for a supplementary exam or a third attempt at the examination and relied upon an allegedly flawed premise to terminate his enrolment on 14 November 2017.

[117] It was alleged that by failing to consider an application for supplementary examination on 10 November 2017 the first respondent engaged in indirect discrimination within the meaning of s 11 of the Act because:

(a) the applicant had an attribute within the meaning of s 7 of the Act;

(b) this impairment was his psychiatric/psychological conditions;

(c) the first respondent imposed a term that an application for a supplementary OSCE exam would only be considered or approved if the student had no more than two prior exam attempts, including where the exam was not physically attended;

(d) the applicant's attribute caused him to be unable to comply with the term;

(e) a higher proportion of people without the applicant's psychological/ psychiatric conditions would be able to comply with the term because they would not be suddenly and involuntarily unable to attend an exam due to an incident such as a panic attack; and

(f) the term was not reasonable because the University could reschedule exams to a later date.

[118] It was also alleged that by terminating the applicant's enrolment on or about 14 November 2017 the first respondent engaged in indirect discrimination within the meaning of s 11 because:

(a) the applicant had an attribute within the meaning of s 7 of the Act as discussed above;

(b) the first and second respondents terminated the applicant's enrolment on 14 November 2017 on the basis that the applicant's exam attempt of 19 November 2016 (where he did not attend) was to be counted towards the total number of attempts at an exam, so the applicant was considered to have reached the maximum permitted number of attempts under the University's rules;

(c) it was submitted that the first respondent had imposed a term that the application for a supplementary OSCE would only be considered or approved if the student had no more than two prior exam attempts, even in the situation where one of the student's attempts included non-attendance due to illness. It was the applicant's counsel's submission that there was no contest on the evidence that the applicant was in fact sick on 19 November 2016. Counsel submitted: "the nub of applying the rules against him seemed to be about the form of a particular certificate. The termination of his enrolment on or about 14 November, 2017 really turns on the same considerations";[35]

(d) the applicant being a person who has an attribute was not able to comply with the term;

(e) a higher proportion of students without the applicant's psychiatric/ psychological conditions would be able to comply with the term because they would not be suddenly and involuntarily unable to attend an exam due to an incident such as a panic attack; and

(f) that it was not unreasonable for the University to reschedule exams to a later date.

[119] It was the respondents' submission that it was open to the applicant to accept his failure in the course and rather than seeking a supplementary examination he may have attempted to undertake the course again. Professor Shaw described the supplementary assessment procedure requirements and indicated that it was important that academic standards of the program were maintained. It was his view that this included ensuring that procedures were set in place and applied to all students. Further, the procedural requirements around supplementary examinations formed part of a wider accreditation standard and therefore could not be varied. It was submitted

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35 Closing addresses, Day 3 of transcript, page 61, lines 31 to 34.

that it was not reasonable to expect a student should be given endless attempts until they either passed or desisted.

[120] It was the evidence of Professor Shaw that he considered the request made, including the supporting material attached to his email to Professor Hawkins on 10 November 2017 and determined not to permit a supplementary assessment. He made this decision on 13 November 2017 and stated that he made that decision not to vary the supplementary procedure because:

(a) the OSCE undertaken on 14 October 2017 was already a supplementary assessment that had been granted as a direct result of the Student Senate Appeals Committee;

(b) the applicant had failed that examination and it was important that the academic standards of the program were maintained and not lowered;

(c) the faculty had provided the applicant with support and exam adjustments in each of his OSCE attempts;

(d) he was provided with three attempts at the OSCE all of which were unsuccessful and the faculty needed to ensure the students met standards and expectations of phase one of the program before progressing to phase two of the program;

(e) the faculty could not reasonably provide the applicant with further adjustments or further attempts at the OSCE and ensure the academic standards of the program was satisfied;[36]

(f) further, it was the view of Professor Shaw that it would be inequitable to other students to provide the applicant with a fourth attempt at the OSCE as it would mean that he had been afforded the opportunity to attempt the OSCE more than any other student in the MBBS program.

[121] The respondents submitted that the suggested term was not applied because it was obvious from the applicant's own circumstances that even if one excludes 25 January 2017 from the calculation of the applicant's number of attempts, the applicant in fact had four opportunities to undertake an OSCE. This was submitted on the basis that there were three attempts but four opportunities to undertake the examination i.e. the first was 14 October in 2016 and the applicant had this exam deferred until 11 November and he did not attend on this date, the next attempt was on 15 December 2016 and the final attempt was in October 2017.

[122] It was the applicant's submission that the 11 November 2016 attempt was not a valid attempt and should not be counted in the application of the University rules guiding the number of attempts at an OSCE. The only evidence provided by the applicant that addressed his non-attendance at this exam was Mr Patel's own statement that he had been suffering a panic attack and secondly, a medical certificate from his then treating psychiatrist Dr Garg. Despite submissions from the applicant's legal representative that the document spoke for itself and that it was wide enough to cover the date of the examination in question this is not the finding of the Tribunal. The certificate nominated one date only that the patient was unfit for studies or work and therefore one would assume an examination, and this did not include the date of the exam

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36 Statement of Professor Shaw, Exhibit 14.

attempt at the OSCE on 11 November 2016. Doctor Garg was not called to give evidence at the hearing.

[123] The first respondent concluded that the applicant was absent from 11 November 2016 examination without a reasonable excuse. Without any further evidence to assist the Tribunal to come to the conclusion urged upon it by the applicant, the Tribunal finds that the applicant, without reasonable excuse or valid proof of the reason, failed to attend the examination on 11 November 2016. The consequence of this is that the examination on this date was included in the calculation of how many attempts the applicant had made at passing the OSCE and the Tribunal finds that such inclusion was reasonable in the circumstances.

[124] The next date of relevance was the date of the deferred examination which was 15 December 2016. The applicant undertook this piece of assessment and failed. The next attempt was on 25 January 2017 and for reasons already discussed this does not form part of the calculation. Finally, the last attempt was on 14 October 2017 and the applicant failed this examination.

[125] Based on the number of attempts the Tribunal has found that at the very least the applicant was given the opportunity to undertake the exam on four occasions i.e. 14 October 2016, 11 November 2016, the deferred exam on 10 December 2016 and the final attempt 14 October 2017 so this does indicate that there was no such term in place as alleged; the applicant had more than two prior exam attempts when he was given the final opportunity.

[126] The Tribunal finds that without a reasonable excuse for the absence of a student, non-attendance will count as an attempt at examination. The Tribunal made the finding that there was a lack of evidence of a medical excuse or persuasive evidence of why the applicant did not attend the 11 November 2016 exam. The absence of such evidence leaves the Tribunal in the position that in coming to a decision about whether or not this attempt should be counted, this student was in no different position to any other student who had not attempted an examination and not provided a reasonable excuse or medical certificate to the University.

[127] Possibly the applicant may have been able to make submissions relating to the number of attempts at the examination he had undertaken at the time he received his exclusion notice on 14 November 2017, however it is noted that despite there being opportunity for the applicant to make a submission in response to that exclusion notice he chose not to do so.

[128] The Tribunal thus finds that the term alleged was not applied to the applicant. Evidence in support of this finding includes that the applicant had four attempts in total at the examination. Therefore, it is the finding of the Tribunal that the applicant has not discharged his onus in relation to this allegation of indirect discrimination.

[129] Even if the applicant had proven such a term was applied, the Tribunal is of the view that the term would be reasonable in all of the circumstances however, as this is not the term being applied the Tribunal has no need to finally determine this issue.

[130] The Tribunal finds that the allegation that the first respondent did not consider the application for a supplementary assessment was unfounded and in fact there was evidence to the contrary, as outlined above.

[131] In summary, the term that the applicant alleges as an incident of indirect discrimination allegations is that the first respondent imposed a term, namely that to pass the OSCE exam they must be able to attend the exam in person and pass it on at least one of three occasions. The respondents submitted that no such term applied because the applicant's own circumstances showed that to be incorrect. The evidence supports the conclusion that even if even the January 25 2017 attempt is excluded the applicant had been given four opportunities in respect of the OSCE. There were three attempts but there were four opportunities:

(a) 14 October 2016 which was deferred to 11 November 2016;

(b) 11 November 2016 is the date that the applicant failed to attend;

(c) 15 December 2016 when he failed the examination;

(d) 14 October 2017 when he again failed the examination.

[132] It was thus submitted by the respondents that the term pleaded was not the term applied and that the applicant's own circumstances bore that out. The respondents' counsel, Mr Murdoch, referred in his address to the evidence given by Professor Shaw and Professor Carney about the program rules, in particular rule 5.7, that were applied.

[133] The applicant was issued with the disenrollment notification on 14 November 2017. The respondents submitted that while there was a decision taken to disenroll the student he was given the opportunity to make submissions as to why he should not have his enrolment cancelled and that opportunity was never taken up by the applicant. The respondents' submitted that even if the Tribunal found that the term alleged was imposed, it was reasonable to do so because it was part of a process that involved an opportunity to come back and make submissions.

[134] It is the finding of the Tribunal that such a term was not made in respect of the applicant and there is no finding of indirect discrimination in the circumstances relating to 10 and 14 November 2017 and the applicant's subsequent disenrollment.

Other Issues

(a) Absence 11 November 2016

[135] The Tribunal considered the evidence surrounding the decision made in relation to the 11 November 2016 examination being counted as a valid attempt at a deferred exam despite non-attendance by the applicant, his undertaking of the examination on 10 December 2016 and his undertaking of the examination on 14 October 2017, and accepts that these decisions were applications of the University's rules and procedures as they applied at that time to medical students. There was nothing to indicate that these decisions were specific to the applicant and nor was there evidence to indicate that they were decisions that would not be made about any medical student in the same circumstances of repeated failures.

[136] There was no tangible, cogent and compelling evidence that the applicant offered any reasonable excuse for his absence on 11 November 2016. The University was entitled, in the absence of medical evidence supporting his claim that he could not leave the house due to a panic attack on the date of the examination, to treat his failure to attend as a valid attempt at an examination. As previously discussed the Tribunal accepts the

method of calculating the number of examination opportunities and this includes 14 October 2016, 11 November 2016, 10 December 2016 and ultimately 14 October 2017.

(b) 25 January 2017

[137] It is common ground from all parties' submissions that the examination attempt on 25 January 2017 should now not count towards the tally of three opportunities to undertake an examination, in this case an OSCE, allowed according to the rules of the University of Queensland.

[138] Despite the parties not counting 25 January 2017 as a valid attempt, due to varying reasons, this of itself does not prevent the behaviour by the University on this date from being held to be indirect discrimination.

[139] The evidence before the Tribunal leaves open the view that the first and second respondents did not act in a compassionate or indeed even an efficient manner when making decisions about the applicant. However, maladministration, a seemingly insensitive attitude and general time delays do not of themselves found an anti-discrimination claim. It is worth noting on review of other anti-discrimination cases within similar jurisdictions that other universities have been advised that while their practices leave a great deal to be desired with regard to the management of students, their behaviour while administering assessment and the applying policy appears to fall somewhat short of the legislative requirements of the relevant Acts in each state. With the exception of the indirect discrimination alleged regarding the 25 January 2017 examination attempt, it would appear that this is situation that the applicant and respondents find themselves in this case.

[140] In terms of the treatment of this student, generally, I find that he was not always approached in a professional, efficient way, however, this does not support the allegation that the enrolment of Mr Patel was terminated because of his bipolar disorder, social anxiety disorder and panic disorder and that he was therefore discriminated against and victimised.

[141] From the available evidence it would appear that his enrolment was terminated due to his multiple failures of the last piece of assessment in phase one of his program. This outcome came at the end of a long and at times difficult attempt to progress though the first phase of the program. As evidenced by material before the Tribunal, the applicant had been five years in the attempt to complete this first phase. On evidence before it the Tribunal accepts that this portion of the program called phase one was usually completed by students in a two year time frame.

(c) Reliance on BKY v The University of Newcastle

[142] It was the submission of the applicant in material filed on 21 November 2018[37] that the applicant's case was factually analogous to *BKY v The University of Newcastle*.[38] The Tribunal was not further assisted on submissions relating to this case. In that case a New South Wales Tribunal found the university had discriminated against a medical student by refusing her an extension to complete the 5 year medical course beyond the usual maximum of 8 years. The Tribunal identified a probable connection between

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37 Paragraph 55.

38 [2014] NSWCATAD 39.

the decision not to grant BKY an extension and her psychiatric condition. The Tribunal in that case also found that the Dean's decision had depended on the alleged effect on BKY's health of her continuing to study and his opinions about her suitability to practice safely, which should have been irrelevant to his decision.

[143] There is no evidence before the Tribunal to indicate that the applicant in this case was disenrolled on the basis of his unsuitability to practice medicine. The applicant tendered an article written by Jennifer Schafer, an academic in the Medical Faculty of the University, however despite a number of the respondent's witnesses being cross-examined about the views expressed in the article the evidence never rose to a standard that would enable the Tribunal to conclude that the views of the author were the official views of the University and its staff members who were involved in making decisions about the applicant. Further there was no evidence that the decisions made about the applicant were in any way influenced by this article It is clear that this student was disenrolled on the basis of the multiple attempts that he had been given and subsequent multiple failures of the one piece of assessment namely the OSCE. There was no information with regard to fitness to practice.

[144] While this case and BKY share the common ground of involving a medical student and a university faculty, the cases diverged in many important aspects and therefore BKY was of limited utility to the Tribunal.

Conclusion

[145] Reference is made to the sentiments expressed by the respondents' legal representative when he stated this in his closing submissions:

> Mr Murdoch: Could I say, at the outset, that one can understand that Mr Patel is disappointed with the ultimate outcome of his time as a student at the University of Queensland. It would be an understatement to say anything else. However, of course, to succeed in this proceeding, the applicant needs to demonstrate to the Tribunal, by reference to the contentions that he has relied upon, and the evidence, that there's been a contravention of the Anti-Discrimination Act.

[146] In the case of *King v University of Notre Dame Australia*,[39] a matter concerning leave required for a complaint[40] to proceed under s 96(1) of the *Anti-Discrimination Act 1977* (*New South Wales*), the principal member made the following comments:

> I have considerable sympathy for Ms King in her disappointment. She is an intelligent person who has made a substantial personal investment studying medicine. She feels aggrieved about the decision by the University to refuse to permit her to continue as a student at the University School of Medicine.

[147] In that case the Tribunal concluded that on application of the relevant law the evidence did not meet the requisite standard to allow the matter to progress. Similarly in these circumstances the words applied to Ms King in the case referred to above could equally apply to Mr Patel and the Tribunal is not without sympathy for his position. However it would be wrong of the Tribunal to translate such sympathy into a positive finding of discrimination. QCAT is a creature of statute and all times must apply the

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39 [2017] NSWCATAD 58.

40 *King v University of Notre Dame Australia* [2017] NSWCATAD 58, 58 at [56].

law from the enabling Act. To take matters into consideration other than those set out in the legislation and by the governing authorities is to act in a manner that is highly inappropriate and without a jurisdictional foundation.

[148] The remedies sought by the applicant in this case were multifactorial. Principally the applicant wished the first respondent to re-enrol the applicant in the Bachelor of Medicine/Bachelor of Surgery program or an equivalent program. It is noted, based on the evidence of Professor Carney, that the program the applicant originally enrolled in is no longer in existence. The applicant sought orders that he be allowed to re-sit the OSCE at the Ochsner School in the United States. Further it was submitted that the Tribunal should make an order requiring the University to amend its records to reflect that the applicant did not sit the OSCE on 11 November 2016, 25 January 2017 or 14 October 2017 and to make any other orders that are necessary to ensure the applicant could complete the program (subject to passing the course's requirements) without discrimination, including (without limitation) orders in relation to reasonable timeframes and facilities. Additionally it was submitted that the Tribunal should order the applicant pass on to phase two of the program upon completion of the OSCE. Another order sought was that a written apology should be issued to the applicant for the discriminatory and/or victimising conduct and the applicant should be financially compensated with such compensation including general damages. It was submitted that the second respondent should be ordered to issue a written apology to the applicant for her discriminatory and/or victimising conduct.

[149] As previously discussed, of all of the allegations the only area of discrimination that was found was the allegation of indirect discrimination relating to the requirement that the applicant undertake the examination on 25 January 2017. This allegation was made out only against the first respondent and not the second respondent and no liability attaches to the second respondent with regard to this finding.

[150] The Tribunal accepts the applicant's counsel's submission that the fact that the University had tried to "right the wrong" did not mean that the allegation of indirect discrimination could not be found. It is the finding of the Tribunal, however, that this act of indirect discrimination alone did not lead to the applicant's final expulsion from the course. In fact, as it was not counted in the number of attempts that the applicant under took, it did not appear to play a part in his disenrollment.

[151] Rather, the disenrollment was caused by a legitimate application of the University's rules, which led the University to the inevitable conclusion that the applicant had exhausted all avenues of supplementary examination and therefore was in the same position as any other student who had been given a number of attempts at a practical examination such as the OSCE and failed all attempts. It is noted that there had been a process for the applicant to make submissions to show cause as to why he should not be excluded however he chose not to take up that opportunity. Following the expiration of the period for such submissions the student became disenrolled from the course. The Tribunal finds that this act was not an act of direct discrimination victimisation and/or indirect discrimination by the first and second respondents against the applicant.

Orders

[152] Having found only one complaint of indirect discrimination proven to the requisite standard the Tribunal is left with the difficulty of what order to make. It is recognised

that the successful appeal process did give the applicant another opportunity to undertake an OSCE. It is noted that the applicant made a number of allegations regarding his lack of access and disadvantage due to the long appeal process and while it is acknowledged that the appeal process did take a considerable amount of time the Tribunal found there was insufficient evidence to support his allegations that he was disadvantaged by his inability to access course materials. As previously found the applicant had either access during semester 2 of 2017 to the University's Blackboard site or had previously had access and opportunities relating to the subject when he undertook it in the second semester of 2016.

[153] What, then, is an appropriate order in light of:

(a) the dismissal of the other complaints; and

(b) the finding of the Tribunal that the applicant in fact was excluded from University due to the valid application of University rules relating to the number of attempts at examinations?

[154] Ultimately, it is the finding of the Tribunal that the applicant was not disenrolled due to his impairment. However having found indirect discrimination relating to the examination of 25 January 2017 it is incumbent upon the Tribunal to make a decision regarding what would be appropriate in terms of an order in these circumstances given a lack of submissions on the amount of compensation being sought by the applicant.

[155] The expenses of the applicant and his father with regard to airfares and accommodation during January 2017 were placed before the Tribunal. However these appear to be inappropriate measures of a quantum of damages as the applicant became acutely unwell post his arrival in Australia and therefore in any circumstances other than the unpredicted illness occurring he would have been in Australia to undertake the exam and these would have been costs that he would have borne. His father's expenses were not because of the University's actions but because of Rohan Patel's illness.

[156] For the reasons outlined above, the Tribunal considers it not appropriate to order the applicant be re-enrolled. However it is important to some way acknowledge that the Tribunal accepts that an allegation of indirect discrimination has been proven to the requisite standard, and compensate the applicant therefore, thus:

1. All complaints against the second respondent are dismissed.

2. The complaint of direct discrimination against the first respondent is dismissed.

3. The complaint of victimisation against the first respondent is dismissed.

4. The complaints of indirect discrimination, except for complaint number two (examination 25 January 2017) are dismissed.

5. The complaint of indirect discrimination relating to the applicant being required to sit the examination on 25 January 2017 is proven to the requisite standard.

6. It is the order of the Tribunal that the first respondent pay the applicant the sum of $2,000 within one month of the date of publication of these reasons.

7. The parties have one month from the date of publication of these reasons to file in the Tribunal and exchange with each other any submissions on costs.

8. The decision on costs will be made on the papers on a date to be advised after filing of the submissions.