QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Curran v yourtown & Anor* [2019] QIRC 059
PARTIES:	**Caitlin Curran** (Complainant) v **yourtown** (First Respondent) & **Michael O'Brien** (Second Respondent)
CASE NO:	AD/2017/45
PROCEEDING:	Complaint
DELIVERED ON:	23 April 2019
HEARING DATES:	7, 8, 9 August 2018 13 September 2018
MEMBER:	O'Connor VP
HEARD AT:	Brisbane
ORDER:	**1. The complaints are dismissed.** **2. I will hear the parties as to costs.**
CATCHWORDS:	ANTI-DISCRIMINATION – DISCRIMINATION IN THE WORKPLACE – where Complainant alleges discrimination on the basis of an 'impairment' – whether 'impairment' was established for the purposes of the Act – whether unfavourable treatment existed – whether a 'term' was imposed

LEGISLATION:	*Anti-Discrimination Act 1991* (Qld) s 6, s 10, 11, s 14, s 108 *Work Health and Safety Act 2011* (Qld)
CASES:	*Bero v Wilmar Sugar Pty Ltd & Ors* [2016] QCAT 371
	Carlton v Blackwood [2017] ICQ 001
	Clarke v Ryan (1916) 103 CLR 486
	Commissioner of Corrective Services v Aldridge
	Cutbush v Team Maree Property Service (No 3) [2010] QCATA 89
	Dasreef Pty Limited v Hawchar (2011) 243 CLR 588
	Edoo v Minister for Health [2010] WASAT 74
	Mahommed v State of Queensland (2006) QADT 21, 37
	The State of New South Wales v Amery and Others (2006) 230 CLR 174
	Woodforth v State of Queensland [2017] QCA 100
	Yousif v Workers' Compensation Regulator [2017] ICQ 004
APPEARANCES:	Mr M Heffernan for the Complainant
	Ms T Jessie, Solicitor of Jessie Lawyers for the First and Second Respondents.

Reasons for Decision

[1] Ms Caitlin Curran filed a complaint with the Anti-Discrimination Commission Queensland on 23 June 2017. The Complainant commenced her employment with yourtown, the First Respondent as a Production Administrator in the fundraising department in or around June 2014.[1]

[2] The First Respondent is a not-for-profit charitable organisation whose mission is to enable young people, especially those who are marginalised and without a voice, to improve their quality of life.[2]

[3] Mr Michael O'Brien was employed by the First Respondent as its senior industrial relations advisor and was named as the Second Respondent to the complaint. The Second Respondent was assigned to work with the fundraising department from September 2016.[3]

[4] The First Respondent is predominantly funded by its charitable art unions with the Christmas prize home draw being the biggest fundraising event for the charity. Accordingly, December is the busiest time of the year for the organisation, particularly for those employees that work in the fundraising department, such as the Complainant.

[5] Due to an illness the Complainant often struggled to meet the demands of her role and her employment with the First Respondent was marked by high levels of absenteeism. In the period from June 2014 to June 2016 the Complainant accessed more than 900 hours of unpaid leave, personal leave and annual leave. The Complainant also failed to successfully complete two return to work programs in September and November 2016.

[6] As an industrial relations advisor the Second Respondent was tasked with managing the Complainant's absenteeism and facilitating a safe return to work. However, this task was made more difficult by the Complainant demonstrating a misunderstanding of her capacity to work and the existence of medical advice from her psychologist which was vague and in conflict with the realities of the Complainant's circumstances.

[7] Ultimately, in December 2016 the Complainant asserted for the first time that she was unable to work full-time and requested to return in a part-time capacity. The Second Respondent advised the Complainant that a part-time arrangement could not be accommodated in the busy December period but the request would be reviewed in January 2017. The Second Respondent advised the Complainant to remain away from the workplace until further details regarding the Complainant's ability to work were received from her psychologist.

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[1] Exhibit 10.
[2] Exhibit 29.
[3] T1-108 Ll35.

[8] The Complainant alleges that during this period she was directly and indirectly discriminated against by the Second Respondent.

Jurisdiction

[9] This matter was referred to the Commission under s 164A of the *Anti-Discrimination Act 1991* ("the Act") subsequent to an unsuccessful conciliation conference at the Anti-Discrimination Commission Queensland. The Queensland Industrial Relations Commission will hereafter be referred to as "the Tribunal".

The Complaints

[10] At the outset, it is necessary to briefly discuss how the Complainant conducted her case. Broadly speaking the Complainant's case was made more difficult by the shifting nature of the contentions; the uncertainty regarding the "term imposed"; the appropriate "comparator"; and an issue regarding whether the Complainant had established an "attribute" for the purposes of the Act.

[11] In this jurisdiction the Complainant is required to file a Statement of Facts and Contentions (SOFC). A SOFC is not attended with the same level of formality as pleadings in the traditional sense but nevertheless the document requires a Complainant to provide an outline of their case.[4] The Complainant's SOFC outlines no fewer than nine allegations of direct discrimination, one allegation of indirect discrimination, one allegation of asking an unnecessary question and one allegation of victimisation. All of the allegations are attributed against the Second Respondent with the First Respondent said to be vicariously liable for the acts of the Second Respondent pursuant to s 133(1) of the Act.

[12] The manner in which the hearing proceeded did not accurately reflect the allegations as particularised in the SOFC. By the conclusion of the hearing it became apparent that some of the allegations made by the Complainant were not supported by the evidence and abandoned. In the Complainant's closing submissions the instances of direct discrimination had been reduced to the following three questions for determination:

1) was the Complainant treated less favourably than a hypothetical comparator by requiring the Complainant to take a period of three months leave, instead of the single month sought by the Complainant;

2) was the Complainant treated less favourably by the Respondents frustrating the Complainant's return to work process from 28 November 2016; and

[4] *Yousif v Workers' Compensation Regulator* [2017] ICQ 004, [13].

3) was the Complainant treated less favourably by unreasonably refusing a request of reasonable adjustments for the Complainant on 28 November 2016.

[13] The changing nature of the Complainant's contentions put the Respondents at a distinct disadvantage. As Martin J observed in *Carlton v Blackwood*:

> An appellant's case has to be known before the hearing starts. The Commission cannot allow a case to "evolve" and *place* the Respondent in the position of having to contend with the shifting sands of an undefined argument. If an appellant wishes to advance a different case, then that should be done by seeking an amendment to the Statement of Stressors or the document identifying the facts and contentions. The Commission can then decide whether or not to allow such an amendment.[5]

[14] Similarly, the complaint of indirect discrimination took a different form in the closing submissions. The SOFC alleges that the Second Respondent imposed a term which required the "Complainant to obtain medical evidence confirming that the Complainant be medically cleared as fit to work full-time duties". The Complainant's closing submissions particularised the term as "the Respondents imposed upon the Complainant a term which required that she be available for full-time work in an ongoing manner".

[15] Later in the Complainant's submissions, it was suggested, in the alternative, that a term was imposed requiring the Complainant to comply with a shortened period of a graduated return to work plan that did not extend beyond two weeks.

[16] The "shifting sands" of the Complainant's case is evidenced by the finessing of the nine allegations of direct discrimination into three questions for determination. Whilst the respondents were required to respond to each of the nine allegations of direct discrimination, the reformulation of the questions for determination do not introduce new allegations and, on balance, does not prejudice the respondents case.

[17] However, in respect to the reformulation of the term alleged to be imposed by the Respondents, I am of the view that the late amendment is patently unfair to the Respondents and ought not to be allowed.

[18] Whilst the "condition, requirement or practice" should be construed broadly, the Tribunal must describe the term with some degree of precision. Describing the "condition, requirement or practice" is a question of fact. In *The State of New South Wales v Amery and Others*, Callinan J observed:

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[5] [2017] ICQ 001, [18].

> The Tribunal and the courts are not bound by an applicant's formulation of a condition or requirement. It is their duty to ascertain the actual position, including whether an (alleged) perpetrator has truly sought to impose, or permit indirectly, the imposition of a requirement or a condition which is discriminatory, and not reasonable within the meaning of the Act.[6]

[19] The Complainant is bound by the term as particularised in the SOFC. It was that term, so the Complainant contended, that she was unable to comply with because her impairment prevented her from returning to full-time work, although she claimed she could return to part-time work.

Legal Framework

[20] One of the overarching purposes for the Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity including the workplace.[7] It is unlawful to discriminate in the workplace, whether directly or indirectly, on the basis of certain attributes, such as a person's "impairment".[8]

[21] Discrimination under the Act can occur on both a direct and indirect basis. Section 8 defines discrimination on the basis of an attribute to include direct and indirect discrimination on the basis of:

> a) a characteristic that a person with any of the attributes generally has; or
> b) a characteristic that is often imputed to a person with any of the attributes; or
> c) an attribute that a person is presumed to have, or to have had at any time, by the person discriminating; or
> d) an attribute that a person had, even if the person did not have it at the time of the discrimination.

[22] Section 10 of the Act defines the meaning of direct discrimination:

> (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.

[23] Section 11 defines the meaning of indirect discrimination:

> (1) Indirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term—
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> (a) with which a person with an attribute does not or is not able to comply; and

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[6] (2006) 230 CLR 174, [208].
[7] *Anti-Discrimination Act 1991* (Qld) s 6.
[8] Ibid s 7 (h).

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

(c) that is not reasonable.

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

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

(b) the cost of alternative terms; and

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

(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.

Did the Complainant suffer from an impairment for the purposes of the Act?

[24] The term impairment is defined in the schedule of the Act to mean: "a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour"[9]. The term "impairment" is used synonymously with "disability".

[25] The Respondents submitted that the Complainant has not produced any evidence to establish that she suffered an impairment.

[26] It is contended by the Complainant in the SOFC that:

2. As a result of an abusive relationship, the Complainant developed anxiety and posttraumatic stress disorder (PTSD), including two major episodes that occurred:

a. in or about April 2015 which continued through to about October or November 2015; and

b. between June and November 2016.

3. The Complainant's PTSD produced effects including without limitation:

a. complete loss of appetite;

b. vomiting after eating;

c. night terrors (sic);

[9] *Anti-Discrimination Act* 1991 (Qld) Schedule, Dictionary.

d. panic and anxiety attacks;

e. loss of the use of the Complainant's arms and legs, producing an inability to walk; and

f. cycles of depression and anxiety.

[27] It was further contended that the Complainant's "anxiety and PTSD" amounted to an impairment because it involved:

a. the total or partial loss of the Complainant's bodily functions, being use of her arms and legs and loss of the ability to walk;

b. a malfunction of the Complainant's brain chemistry; and

c. a condition, illness, or disease that impairs the Complainant's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

[28] The Complainant contends that the Respondents accepted that she suffered from an impairment or that the Respondents case was conducted in such a way that otherwise made proving an impairment unnecessary. However, it is the Complainant who bears the burden of establishing that she suffered from an impairment. Section 204 of the Act provides:

> **204 Burden of proof – general principle**
>
> It is for the Complainant to prove, on the balance of probabilities, that the Respondent contravened the Act, subject to the requirements in sections 205 and 206.[10]

[29] As the Complainant's contention is a contention pertaining to her medical diagnosis it follows that the Complainant was required to produce expert opinion evidence from a person duly qualified to do so. The complication that exists is that in closing submissions the Complainant stated that the evidence of Ms McGuire's, who was described as the Complainant's treating "Clinical Psychologist Registrar", was not that of an expert witness:

> …the Respondents make a critical and fatal error in assessing that the evidence of Ms McGuire was that of an expert witness. It plainly was not. By very definition, expert evidence would require neutrality as to the relevant issues. It was always the case for the Applicant that Ms McGuire, as the Applicant's clinician, was entitled to give evidence on the basis that she was a treating practitioner registered under AHPRA.

[30] The ordinary rule is that witnesses may speak only as to facts and not express their opinions. An exception to the general rule is that persons duly qualified to express some

[10] *Anti-Discrimination Act 1991* s 204.

opinion in a particular area of expertise are permitted to do so on relevant matters within the field of their expertise.

[31] The common law rule does not apply to experts as was explained by Dixon CJ in *Clarke v Ryan*:

> The opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without assistance. … but [expert witnesses] … cannot be permitted to attempt to point out to the jury matters which the jury could determine for themselves or to formulate their empirical knowledge as a universal law.[11]

[32] To add another layer of confusion, the Complainant, notwithstanding the fact that it was submitted that Ms McGuire was not an expert witness went on to submit:

> The fact that Ms McGuire's evidence remains unchallenged in that regard leaves those issues resolved and accordingly, in the Applicant's respectful submission, not in contention for the Commission to determine.
>
> In any event, Ms McGuire could, had it been necessary, have given expert evidence in relation to PTSD. Her knowledge falls within an established field of knowledge which is relevant to her expertise and her testimony goes beyond the ordinary experience of the commission. The decision in *Farrell v The Queen* (1998) 194 CLR 286 is instructive in this regard. It has been well established that a person who purposes to give expert evidence must possess special knowledge or experience, which typically requires having undertaken a previous course of study that sufficiently demonstrates expertise in that area.
>
> ….
>
> In any event, it is not the accepted approach of courts to refuse evidence from psychologists solely on the basis that the witness is a psychologist and not a psychiatrist….

[33] The evidence relied upon by the Complainant to support her case consisted in no small measure on the evidence of Ms Tracy McGuire. Whether a Clinical Psychologist Registrar can provide a diagnosis is a contentious issue between the parties.

[34] The onus is on the party seeking to have the evidence admitted to demonstrate that the person has specialised knowledge based on his or her training, study or experience which enables him or her to opine on a matter that is relevant to an issue in a proceeding. That party must also demonstrate that the opinion is wholly or substantially based on that knowledge.[12] A failure to demonstrate that a witness' opinion is based on his or her specialised knowledge affects its admissibility, not its weight.[13]

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[11] (1916) 103 CLR 486 at 491.
[12] *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588, 603-604; [2011] HCA 21, [35].
[13] *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588, 605; [2011] HCA 21, [42]; *Gunnersen v Henwood* [2011] VSC 440, [64].

[35] Ms McGuire's qualifications were not proven or admitted; her curriculum vitae was not tendered; she did not refer to any clinical notes; none were admitted into evidence; and no expert report was prepared. When Ms McGuire was asked by the Tribunal if she had produced a psychological report for the Complainant she responded: "I wasn't requested to give one, no".[14] A series of letters were prepared by Ms McGuire and sent to the First Respondent regarding the Complainant's ability to work.

[36] There is no evidence before the Tribunal to support the contention that the Complainant suffered from a total or partial loss of the Complainant's bodily functions, being use of her arms and legs and loss of the ability to walk or a malfunction of the Complainant's brain chemistry. The evidence is tenuous that there existed a condition, illness, or disease that impairs the Complainant's thought processes, perception of reality, emotions or judgment or that resulted in disturbed behaviour.

[37] In *Edoo v Minister for Health* it was said that:

> 72 The factual material relied on by Mr Edoo did not establish that he suffered from an 'impairment'. Mr Edoo did not adduce evidence from any witnesses with qualifications in medicine to confirm that his stress was a 'condition' which manifested itself as a defect or disturbance in the normal structure or functioning of his body, or that it was a disease which impaired his thought processes, perception of reality, emotions or judgments or resulted in disturbed behaviour. Although Mr Edoo is a nurse, he did not purport to have qualifications entitling him to provide opinion evidence as to his medical condition. In the absence of any such expert evidence, we are unable to give Mr Edoo's evidence as to his own 'condition' any weight above that of mere assertion. From that perspective, Mr Edoo's 'evidence' of the impairment from which (he) was suffering did not have probative force, and was not capable, of itself, of establishing that he was suffering from an impairment as defined in the EO Act. In addition, there was no expert evidence on which we might base the conclusion that stress was in fact a 'condition' rather than merely a symptom of some other underlying condition or circumstance.[15]

[38] The Complainant submits in the alternative that regardless of the capacity of a psychologist to diagnose a condition, the Complainant's diagnosis of PTSD had also been made by a General Practitioner. The Complainant attempts to rely on a medical certificate issued by Dr Warwick Marks for the purposes of obtaining Centrelink benefits.[16] It was submitted that the condition certified by Dr Marks as existing from 4 June 2015 to 4 March 2017 was consistent with the evidence of Ms McGuire. It plainly is not.

[39] Ms McGuire told the Tribunal that when the Complainant came to her in 2015 she presented with all the primary symptoms of PTSD.[17]

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[14] T1-87 Ll. 19-21.
[15] [2010] WASAT 74; 72 SR (WA) 16, 72.
[16] Exhibit 12.
[17] T1-83 Ll.13-14.

[40] In the letter of 3 June 2016 Ms McGuire wrote:

> Caitlin attended therapy with myself over a period of time in 2015 where she presented with symptoms consistent with a primary diagnosis of posttraumatic stress disorder (PTSD). These symptoms were resolved through the course of therapy.

[41] During the examination-in-chief of Ms McGuire the following exchange took place:

> Mr Heffernan: So on the 28th of November 2016 what was your diagnosis of Ms Curran's condition?
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> Ms McGuire: It was then anxiety with a Secondary presentation of depression. But the anxiety had gotten to a point where we were quite housebound and didn't really like leaving the house. So it was quite extreme anxiety bordering on a panic situation, with some depressive symptoms.[18]

[42] The evidence of Ms McGuire does not support a conclusion existing that from 4 June 2015 to 4 March 2017 the Complainant was suffering from symptoms associated with PTSD. At the highest, the Complainant was diagnosed as suffering from a form of anxiety with some depressive symptoms.

[43] The way in which the evidence has been presented to the Tribunal does not allow it to form a view that the Complainant has an attribute within the meaning of s 7 of the Act. Even if Ms McGuire could have been accepted as an expert witness, her evidence was, in my view, so deficient that it would not have been possible to give it any weight.

[44] The Complainant's evidence was that she had been seeing a General Practitioner who had prescribed medication for her anxiety.[19] The Tribunal was told that after a few more visits to her general practitioner, "…it was discussed that I may have PTSD and to refer to a psychologist to get clarification on that."[20]

[45] What can be gleaned from the evidence of Ms McGuire is that the Complainant had, at the highest, anxiety. I do not accept that the Complainant had PTSD.

[46] As the Complainant has not established this threshold issue, namely that she suffers from an impairment, the complaint must necessarily fail. Should I be wrong in coming to that conclusion, I will proceed on the basis that the Complainant suffered from anxiety as constituting a standalone impairment for the purposes of the Act. Nevertheless, and for the reasons which follow, the Complainant's claim must fail. Further, any reference to the evidence of Ms McGuire is done so to address the submissions of the Complainant and does not suggest that I have relied upon anything she has said before the Tribunal.

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[18] T1-86 Ll.29-32.
[19] T1-7.
[20] T1-7 Ll.46-47, T1-8 Ll.1-2.

Factual Background

[47] On Anzac Day 2014 the Complainant's partner broke into her apartment, assaulted her, and held her captive for two days.[21] As a result, the Complainant is said to have developed anxiety and PTSD which resulted in two major episodes: in or about April 2015 which continued through to about October or November 2015 and between June and November 2016.

[48] A few days after the Anzac Day incident the Complainant contacted the First Respondent and spoke with her then manager, Rose Giorgio, and let her know what had happened and that she would need a few days off work.[22]

[49] The Complainant says that about two or three months after the incident she started presenting with symptoms of severe anxiety, an inability to eat, body tremors and insomnia.[23] She said that the "PTSD was really hitting me quite hard, I was usually only at work around three days a week for an extended period of time". Throughout the balance of 2014 the Complainant says that her employer was "extremely flexible" and "[she] felt very supported" during this period.[24]

[50] The Complainant said that during 2015 she suffered two more episodes and that her employer was still supportive, but realised that she "needed to sort of delve deeper into my mental health care".[25]

[51] On 7 June 2016 the Complainant sent an email to Ms Giorgio in the following terms:

> At the moment I haven't made an improvement & am struggling to function in general on a daily basis… At this point it appears I will need to take some more time off to get myself better.

[52] The email also attached a letter from, Tracy McGuire which relevantly provides:

> I am writing as the treating psychologist of Caitlin in relation to her current mental health state. Caitlin attended therapy with myself over a period of time in 2014 where she presented with symptoms consistent with a primary diagnosis of posttraumatic stress disorder (PTSD). These symptoms were resolved through the course of our therapy.
>
> More recently Caitlin has returned to myself experiencing symptoms of anxiety and some symptoms of burnout. Caitlin is experiencing symptoms such as avoidance of distressing triggers, negative

[21] T1-7 Ll.1-5.
[22] T1-7 Ll. 28-30.
[23] T1-7 Ll.5-10.
[24] T1-8 Ll.14-20.
[25] T1-8 Ll.29-30.

> cognitive distortions mainly in the form of worry, psychological symptoms such as racing heart, dizziness, shaking, sweating, exhaustion and both appetite and sleep disruption…
>
> …I have no hesitation in believing her symptoms will be resolved. Currently, if possible, some flexibility and understanding about her position would be advantageous. Caitlin feels great guilt at not being able to be present at work; this has contributed to her symptoms of burnout as she did not slow down at the First signs of symptoms. If possible some time away from work, or more flexible hours will help her recover immensely.[26]

[53] On 13 June 2016 the Complainant sent an email to Ms Giorgio stating that she had decided to take three weeks off:

> Hi Rose,
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> My psychologist Tracey & I have decided my best course of action from here will be to take the next 3 weeks off work & then re-access (sic) my condition. I have gradually been getting worse, so it's very important that I just focus on my treatment & getting myself better. Please give me a call if you need to discuss, otherwise I will talk to you in 3 weeks.[27]

[54] The same day Ms Giorgio responded to the Complainant's email: "Hi Caitlin I will call you later today."[28] The Respondent submits that Ms Giorgio offered the Complainant the option of either working part-time or to take leave without pay and that she elected to take three months leave without pay. The Complainant contends that she only wanted to take one month off and that the First Respondent forced her to take more time off. Nevertheless, on 15 June 2016 the Complainant sent an email to Ms Giorgio:

> Hi Rose,
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> I spoke with mum & we both agreed that due to the uncertainty of when I will get better it would be best for me to take a 3 month block off to allow you guys to get a temp in. I hope this helps.[29]

[55] On the 15 June 2016 Ms Giorgio emailed the appellant stating:

> We are going ahead and granting leave without pay for 3 months, just checking if you are happy with starting date being from Wed 15 June to Friday 16 September. Please let me know as soon as you can.[30]

[56] The Complainant responded same day "That is fine. Thankyou".[31]

[57] A significant reason why the Complainant needed the time off work was so that she could attend a private mental health facility called Noosa Confidential. Her treatment at Noosa

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[26] Exhibit 31.
[27] Exhibit 1.
[28] Exhibit 2.
[29] Exhibit 2.
[30] Exhibit 3, F5.
[31] Exhibit 3, F4.

Confidential was eight weeks in duration: two weeks as an outpatient, four weeks as an inpatient, and a further two weeks as an outpatient.[32] The outpatient treatment was said to have consisted of phone calls so the Complainant claims she would have been able to work during those periods.

[58] On 5 July 2016 the First Respondent employed Sharon Wood for a fixed term period from 6 July 2016 to 16 September 2016 and it is accepted that Ms Wood performed some of the administrative duties of the Complainant's role, with Ms Giorgio and other employees also assisting to cover for the Complainant's workload.

[59] On 7 September 2016 Ms Giorgio texted the Complainant:

> Hi Caitlin the date you are due to return is the 19 sept. You will need to confirm you are starting back on the date and will need to provide a medical clearance to return to work to full duties.[33]

[60] The Complainant produced a letter from Katrina Steel of Noosa Confidential, that stated:

> I am writing to confirm that Caitlin Curran has received treatment with Noosa confidential over the past 8 weeks. As her treating psychotherapist, I give clearance for her to return to full duties at work as of the 19th September.[34]

[61] The Complainant's representative told the Tribunal that the letter was tendered for the purpose of identifying the date when the Complainant was purportedly ready to return to work.[35]

[62] The Second Respondent facilitated a Return to Work (RTW) with the Complainant on 20 September 2016 with the Complainant asserting that she was ready to carry out normal hours and duties.[36] The Complainant returned to work for four days before requiring further personal leave; she returned to work on 3 October 2016 and worked for two weeks before requiring further personal leave on 19 October 2016.

[63] The Complainant remained off work.[37] On 28 November 2016 the Second Respondent organised a return to work interview form in anticipation for the Complainant's return but she did not return to work on that date.[38] In an email from Andrew Doughty, the Complainant's line manager, to Michael O'Brien dated 2 December 2016 it is recorded that "Caitlin texted in after supplying the letter to say she would not be in this week at all."[39]

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[32] T1-12 Ll7-10.
[33] Exhibit 9, D56.
[34] Exhibit 4.
[35] T1-11 Ll39-41.
[36] Exhibit 22.
[37] Exhibit 8.
[38] Exhibit 39.
[39] Exhibit 40.

[64] It was around this time that the Complainant made a request to work part-time. On 2 December 2016 the Second Respondent was provided with a letter dated 28 November 2016 from the Complainant's psychologist, Ms McGuire. It stated:[40]

> …In my opinion Caitlin is willing and is well enough to return to work; however, I would like to recommend this begins in a part time capacity and builds to a full time capacity. I feel returning fulltime immediately may result in some distress. This week if at all possible, perhaps 1 or 2 half days building into full days next week and aiming for 3 full days awaiting assessment at this time. I understand your workplace is very supportive of Caitlin and her healthy return to work and do hope this goes well over a transitional period.[41]

[65] In response to the psychologist's advice the Second Respondent sent an email to Mr Doughty detailing his concern that given the Complainant had failed in her return to work, that contact should be made with the psychologist to obtain further details.[42]

[66] On 7 December 2016 the Second Respondent sent an email to Ms McGuire:

> On receipt of advice on the 28 November 2016 in relation to Ms Curran's Mental Health and Return to Work there some additions [sic] questions I would like to clarify.
>
> As Ms Curran's Psychologist, the organisation would like to engage your expertise to help support Ms Curran.
>
> Ms Curran has been asked to remain away from the workplace until such time as further details have been obtained.
>
> It would be appreciated if you (sic), please contact me to discuss relevant information about Ms Curran's ability to perform the duties of her role to that we may work together to ensure that a safe return to work plan can be established, including:
>
> 1. Ability to perform the duties of her role (as per the position description and the information provided above)
> 2. Ability to attend 38 hours a week
> 3. Health and well-being and support required by the workplace
> 4. Any other relevant information with regards to her return to work.[43]

[67] On 9 December the Second Respondent wrote to the Complainant to let her know that until she would be off work until he heard from the psychologist.[44]

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[40] Exhibit 40.
[41] Exhibit 6.
[42] Exhibit 41.
[43] Exhibit 43.
[44] Exhibit 44.

[68] The Second Respondent made contact by telephone with Ms McGuire on 9 December 2016.[45] Ms McGuire said that the conversation with the Second Respondent was predominantly about "…safety in terms of physical wellbeing or having her symptoms increasing."[46] The fact that December was a very busy month within the workplace was also discussed as was the safety of the Complainant within "…the prism of an increase in anxiety symptoms"[47]. Ms McGuire told the Tribunal that her advice to the Second Respondent was that the Complainant should be monitored; what her workload was; and how she responded to the workload in terms of pressure and self-doubt. Ms McGuire recalled that the Second Respondent did not press for an immediate return to full-time work but spoke of a graduated return to work[48] albeit quickly, moving to full-time work.[49]

[69] The Second Respondent recorded his conversation with Ms McGuire in a contemporaneous note taken on 9 December. The note records that Ms McGuire was unable to advise of the length of time required for the graduated return to work. The notes state that Ms McGuire advised "She expects it to be a short period but will need to be reviewed each week. She feels that Ms Curran may not be able to handle an immediate return to full-time at this stage."[50]

[70] Ms McGuire said that she told the Second Respondent that she was not prepared to put an exact time frame around it because she did not believe that would be helpful. Ms McGuire gave the following evidence in examination in chief:

> Mr Heffernan: Now, did the employer talk to you about how long your certification for part-time would take?
>
> Ms McGuire: Yes. I told them that I wasn't prepared to put an exact time frame around it because I don't believe that's helpful. In both best interests at that point is getting back to work as quick as possible. But putting a time frame on it can be dangerous.
>
> Mr Heffernan Did you give any range at all when dealing?
>
> Ms McGuire: Not that I can recall. **I believed that Caitlin was able to go back to full-time work**. But, yes, anything I would have said was hypothetical which I would have declared.[51]

[45] Exhibit 16.
[46] T1-103 Ll.32-34.
[47] T1-104 Ll.9-10.
[48] T1-98 L.13.
[49] T1-98 Ll. 9-11.
[50] Exhibit 16.
[51] T1-87 Ll27-37 (emphasis added).

[71] The Second Respondent wrote to the Complainant on 9 December to temporarily decline her request for part-time work for December 2016. The reason for doing so was expressed as follows:

> As discussed on the 28 November 2016 the organisation received a gradual return to work request from your Psychologist. Contact was made with your Psychologist on the 8 December to obtain further Advice.
>
> After considering your request the organisation is unable to accommodate your request for operational reasons. Given the workload over the next month, the organisation is unable to sustain part-time hours in the Production Administrator role.
>
> Another consideration for the organisation is that a specific period for the gradual return to work plan was unable to be advise.
>
> The organisation expects the workload to reduce in January 2017. A review of your request will be undertaken at that point. Consultation will be undertaken with you as part of the review to consider any changes in your circumstances.[52]

[72] On 13 December 2016 the Second Respondent requested that the Complainant provide medical certificates to cover her leave until 6 January 2017.[53] Medical certificates were not provided.

[73] On 9 January 2017 the Complainant wrote to the Second Respondent wanting to know how things were progressing and that she thought it was confusing that she was required to produce medical certificates "for the time I have been not allowed to return".[54] The Second Respondent then attempted to engage in a telephone conversation with the Complainant, however, she said that all communication in relation to medical advice is to be directed to her psychologist. On 11 January the Complainant wrote to the Second Respondent:

> Just a follow up after my session with my psychologist Tracey today. The decision has not changed, full time work is not recommended for me at this time but part time work would be very beneficial.[55]

[74] On 13 January 2017 the Second Respondent emailed Ms McGuire asking for an update on her medical condition "are you now in a position to provide timeframe around a gradual return to work i.e. How long would it take for Caitlin to return to full-time hours?".[56] Ms McGuire did not respond to the email.

[75] On 19 January 2017 the Complainant and the Second Respondent spoke over the phone discussing, amongst other things, her request to work part-time and her return to work.

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[52] Exhibit 13.
[53] Exhibit 45.
[54] Exhibit 45.
[55] Exhibit 47.
[56] Exhibit 48.

The Second Respondent made a case note of the conversation which records that the Complainant said she was seeking legal advice through a lawyer; that it was illegal to not allow her to return to work part-time due to her mental illness; that all the organisation was doing was asking for the same letter from her psychologist over and over again.[57]

[76] On 19 January 2017 the Second Respondent wrote to the Complainant:

> …whilst employees are absence [sic] from the workplace, and are not cleared to return to work (which in this case was full time hours), yourtown requests a medical clearance to process against payroll for leave without pay. A medical certificate can cover a reasonable period of time as required, however should include an end date identifying a review and when the organisation may re-engage with you for an update.[58]

[77] The Second Respondent invited the Complainant to engage in a telephone conference to progress the return to work process. On 20 January 2017 the Complainant responded "As previously stated, you will be hearing from my lawyer…I will not be making contact unless through my lawyer".[59] The Complainant sent an email to the Second Respondent asking him and the First Respondent to have no further communication as it will be classed as harassment.[60]

[78] The Respondents did not receive communication from the Complainant's representatives until March 2017. On 3 May 2017 the Complainant's representatives wrote to the First Respondent stating amongst other things that; the Complainant cannot be engaged to speak with the First Respondent and that the Complainant would be amenable to a redundancy payout.[61] The Complainant's employment ceased on 31 May 2017 by reason of redundancy.

[79] On 23 June 2017 the Complainant filed a complaint with the Anti-Discrimination Commission Queensland.

Direct discrimination

[80] The test to be applied in determining a case of direct discrimination was set out by the full bench in *Commissioner of Corrective Services v Aldridge*:

> [41] The proper test to be applied when determining a case of direct discrimination has been considered on numerous occasions by appellate courts. While there has been some confusion and inconsistency there is clear authority to guide us. In *Waterhouse v Bell (*1991) 25 NSWLR 99 the Court of Appeal considered that part of the Act which deals with direct discrimination on the ground of marital status. Clarke JA stated (at p 105):

[57] Exhibit 49.
[58] Exhibit 51.
[59] Exhibit 52.
[60] Exhibit 57.
[61] Exhibit 14.

> The inquiry for which the section calls is a factual one involving essentially, two separate questions. The First, has A been treated less favourably than a person of different marital status was, or would have been, treated in the same circumstances, or in circumstances which are not materially different? The Second, if so, was the ground of the differential treatment one of those mentioned in (a), (b) or (c)?

[42] In *Waters v Public Transport Corporation* Dawson and Toohey JJ stated:

> Broadly speaking, direct discrimination occurs where one person is treated in a different manner (in a less favourable sense) from the manner in which another is or would be treated in comparable circumstances on the ground of some unacceptable consideration (such as sex or race).

[43] In the leading House of Lords decision, *James v Eastleigh Borough Council* Lord Goff stated:

> The problem in the present case can be reduced to the simple question - did the defendant council, on the ground of sex, treat the plaintiff less favourably than it treated or would treat a woman?

[44] In our opinion these statements clearly express the relevant law and should have led the Tribunal to pose for itself the following question. Did the Commissioner, on the ground of race (or a characteristic of race) treat Mr Aldridge less favourably than it treated or would have treated a non-Aboriginal person in the same circumstances, or in circumstances which were not materially different?

[45] It is useful, for the purposes of analysis, to identify and label the two key components of this question. The First component is *differential treatment* and the Second is *causation*. Logically differential treatment should be considered before causation because if there is no relevant differential treatment it is unnecessary to consider the issue of causation.[62]

[81] The question to answer in this matter is whether the respondents treated the Complainant less favourably than another person without that attribute, or a characteristic of that attribute, because of her impairment or a characteristic of her impairment in circumstances which were the same or not materially different.

The Comparator

[82] The requirement to prove that a person has been treated less favourably than a person without the attribute or a characteristic of the attribute gives rise to a contingent requirement of identifying the proper other person against whom a comparison can be made, or a "comparator". In *Aldridge* it was also said:

> [46] For differential treatment to occur the treatment of the Complainant must be less favourable than the treatment which was or would have been afforded to a person of a different race (in this case the treatment of a non-Aboriginal person) and that treatment must have occurred in

[62] [2000] NSWADTAP 5, [41]-[45] (emphasis in original) (citations omitted).

> circumstances which are the same or not materially different. The treatment which was afforded to the Complainant must be objectively less favourable than the treatment which was actually afforded to a non-Aboriginal person, or which would have been afforded to a non-Aboriginal person, in the same circumstances as the Complainant or in circumstances which were not materially different. As Mahoney JA observed in *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13 at 19 when discussing this component of the element of direct discrimination:
>
> > These words require that there be two situations or sets of circumstances, the actual and the hypothesized, so that it can be determined by a comparison whether treatment in the former is "less favourable" than in the latter.[63]

[83] The comparator must be a person without the Complainant's relevant attribute but who was in the same circumstances as the Complainant. In the present circumstances this is made more difficult given it has been accepted that there is no actual comparator who worked for the Respondent and therefore a hypothetical comparator must be used.

[84] In *Woodforth v State of Queensland*, a comparison was required between the Complainant's treatment as a person with a hearing impairment and an inability to communicate effectively by conventional speech and a person without that impairment and that characteristic. McMurdo JA wrote:

> Section 10 of the ADA requires the comparison to be made on the hypothesis that the treatment of the person without the impairment would be "in circumstances that are the same or not materially different" from those that constituted the context for the treatment of the impaired person. In that respect s 10 of the ADA is no different from s 5(1) of the DDA. But beyond that likeness, there are differences between the two statutes. The DDA contained no equivalent of s 8 of the ADA, the effect of which, in combination with s 10 of the ADA, is to proscribe discrimination on the basis of a "characteristic". In the present case it proscribed discrimination on the basis of the applicant's inability to communicate by speech. That proscription would be ineffective if the characteristic of a disability was also to be treated as a "circumstance" in the comparison for the purposes of s 10. It would mean that there could not be direct discrimination on the basis of a characteristic of an impairment, because the comparator also would be a person with that characteristic. The Appeal Tribunal, whilst adverting to s 8, overlooked its effect upon the operation of s 10.
>
> Further, the Appeal Tribunal incorrectly likened this characteristic of the applicant's impairment with the occurrences of violent behaviour that constituted the relevant circumstances in *Purvis*. They were occurrences which formed part of the factual context in which the student was treated. He was treated, by suspension and expulsion, in response to those occurrences. The required comparison was between the treatment of this student and the hypothetical treatment of another student. That hypothesis required the consideration of what would have been the treatment of another in response to occurrences of the same kind. The complication in *Purvis*, caused by the student's behaviour also being an incident of his disability, did not exist in the present case. In the present case the relevant "treatment" was the response of police to a complaint of criminal conduct.
>
> …

[63] [2000] NSWADTAP 5, [46].

> The Appeal Tribunal misunderstood the relevance of the reasoning in *Purvis* and thereby erred in law in identifying the relevant comparator. **The applicant's case required a comparison between her treatment as a person with a hearing impairment and an inability to communicate effectively by conventional speech and a person without that impairment and that characteristic.** This error affected the Appeal Tribunal's conclusions on relevant factual issues….[64]

[85] In the present case no submissions were made regarding the 'characteristics' of the Complainant's impairment. Indeed, as noted above the lack of specificity as to the exact nature of the Complainant's impairment makes the determination of an appropriate comparator problematic.

[86] The Complainant submits that the appropriate comparator, with respect to the events between May and September 2016, is that of an individual who has taken an extended period of personal leave.

[87] The Respondent submits that the appropriate comparator is a person without mental health issues, having long term, extended and unpredictable absenteeism, having the September 2016 Failed RTW, having no Medical Certification of Fitness for Duty in November 2016, having no Medical Certification of absenteeism, and having no engagement in the 2017 RTW.

[88] In my view, the appropriate comparator is another employee of yourtown, working in the position of a Production Administrator, who does not have anxiety or any characteristics of it. The circumstances that are "the same or not materially different", are that the person has taken extended periods of personal leave and wishes to return to work.

Direct discrimination - the Complainant's case as identified in the submissions

[89] I now turn to the Complainant's case in respect of direct discrimination. As noted elsewhere, having considered the evidence, the representative of the Complainant refined the grounds upon which they wished to rely.

Was the Complainant treated less favourably than a hypothetical comparator by requiring the Complainant to take a period of three months leave, instead of the single month sought by the Complainant

[90] The Complainant's SOFC attributes this allegation to the Second Respondent. The evidence before the Tribunal indicates that the Second Respondent had no dealings with the Complainant until September 2016. Consequently, as this allegation relates to a period of time in June 2016 the allegation is unable to be sustained against the Second Respondent and no finding can be made against him for a contravention of the Act.

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[64] [2017] QCA 100; [2018] 1 Qd R 289, [53],[54],[57] (emphasis added).

[91] The Complainant contends that she asked Ms Giorgio if she could have a month off work (to attend Noosa Confidential) however her manager said that she would need to check with HR.[65] The Complainant said she was told that due to contractual issues around hiring temporary employees the employer would be unable to hire a temporary employee for a single month to fill in her position, but rather, the employer would be able to hire a temporary employee for a three-month period but she would need to take three months off.[66]

[92] The Complainant submits that she was required to take a full three months leave, as opposed to one month, for reason of her impairment and that it was not based on the minimum engagement period for a temporary replacement. In support of this contention the appellant cites the evidence of Ms Rose Giorgio where she said she was not aware of any rules at yourtown regarding minimum periods for employing temporary employees, and accordingly "the only basis for concluding that a three month suspension was required was on the basis of the Complainant's impairment."[67] The Complainant also refers to the evidence of Ms Mirie, the Employment Relations Manager of the First Respondent, who said that it would have been perfectly reasonable that temporary replacement staff may be engaged on tranches of either one, two, three or four months.[68]

[93] The Complainant submits that in the circumstances where the hypothetical comparator sought a period of leave, that being one, two or three months, the comparator would have had that period granted as provided for by the systems in place by the employer to engage temporary staff on such a periodical basis. The Complainant further submits that the comparator would not have been told that they should take a longer period of time away as was said to her by Ms Giorgio.

[94] The Complainant submits that it was because of her impairment that her employer felt that she needed a longer period of time away from the workplace and contrived a reason, despite the options available to the employer, to force the Complainant to take a longer period of three months rather than the one month she had sought.

[95] The Respondents have accepted that it could appoint temporary employees for any period of time and that it did not require the Complainant to take three months leave in order to appoint a temporary employee. It is not exactly clear when the "three month" discussion first arose. Ms Giorgio had no recollection of having a discussion with the Complainant about three months.[69]

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[65] T1-8 Ll.38.
[66] T1-8 Ll.38-42.
[67] T2-86 Ll.31-35.
[68] T2-60 Ll12.
[69] T2-86 Ll21–29.

[96] In my view, the evidence does not demonstrate that the Complainant was required or directed to take three months off. On the contrary, there are emails which state the Complainant thought it was a good idea for her to have three months off due to the uncertainty surrounding her recovery.[70] The Complainant was asked in examination-in-chief to explain why she would send an email which appears to be requesting three months off work.

> Mr Heffernan: So how do you explain that it looks like you have requested it?
>
> Complainant: Basically, I was still quite happy with the employer and I'd felt extremely supported by the past, and I just truly believed that it was a contractual reason that they needed to get a temp in. I wanted to do the right thing by the employer as well. I didn't want to inconvenience them any further than I already had, so, if they required me to take a three month block, then that was what I was willing to do.[71]

[97] In my view, the Complainant agreed to an arrangement with her employer whereby she would have three months off work so that she could attend Noosa Confidential. She went on leave in June, started the treatment at Noosa Confidential in July and planned to return to work in late September. Under cross-examination the Complainant was asked how she could have attended the clinic starting on 23 July 2016 when she claimed to only require a month's leave commencing on 13 June 2016:

> Complainant: I had simply been in discussions with Rose, because I knew I wanted to go into this in-clinic. I didn't know when they could book me into. So that was the day I could book in, was from the 23rd, and Rose and I discussed, well, we might as well just start the three-month block, I'd do my inpatient in the middle, and then I'd have a little bit of time after that, anyway, and then I return to work.

[98] The Complainant's evidence was contradictory. She said that if given the option she would have worked the month of June before attending the clinic in July.[72] This is notwithstanding the email from the Complainant to Ms Giorgio on 13 June 2016 that states that she and her psychologist had had decided that the best course of action would be to take three weeks off because "I have been gradually getting worse".[73] The evidence before the Commission was that the Complainant agreed to take three months due to the fact that she was uncertain when she would get better and she thought it would "be best"[74] to have more time off work. It was open for the Complainant to have objected to the arrangement at any time. She did not. It appears that it only became an issue sometime after her employment with the First Respondent ceased and she lodged her complaint of discrimination.

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[70] Exhibit 2, F3.
[71] T1-10 Ll.26-31.
[72] T1-30 Ll.39-41.
[73] Exhibit 1.
[74] Exhibit 2.

[99] I am not convinced, on the balance of probabilities, that the Respondents required the Complainant to have three months off work. In the absence of sufficient evidence supporting the allegation of the requirement it is not necessary to consider whether such a requirement would constitute less favourable treatment.

Was the Complainant treated less favourably by the Respondents by frustrating the Complainant's return to work process from 28 November 2016?

[100] The Complainant submits that in a letter from her clinical psychologist dated 28 November 2016, the Complainant sought to return to the workplace but that that request was refused and that refusal was followed by a less favourable course of conduct. It is contended that both the refusal and the course of conduct is direct discrimination within the meaning of s 10 of the Act.

[101] To support this contention the Complainant cites the internal email of 5 December 2016 from the Second Respondent to Michael Doughty where he says:

> Give (sic) Caitlin's last attempt to return to work was unsuccessful and the disclosure of her mental conditions from her Psychologist (see attached) I suggest we make contact with the Psychologist to obtain further details.[75]

[102] The Complainant submits that the email demonstrates that, based on the Complainant's impairment and presumptions as to her mental health condition, the Respondents engaged in conduct that they would not otherwise have engaged in against a comparator. It was also contended that the Respondents subsequently engaged in a request for information that they would not ordinarily have otherwise requested.

[103] The Complainant contends that the Respondents, having received the letter from her clinical psychologist dated 28 November 2016, decided that she not be permitted to return to work until further information was received from the psychologist.

[104] The Complainant submits that this was unfavourable treatment and a deliberate act to delay and frustrate the Complainant's return to work. It is also alleged that the Complainant's failure to return to work was due to a "higher standard of requirement" imposed upon the Complainant. In addition, the Complainant submits that the conduct of the Respondent unfavourably prevented her from returning to the workplace and was predicated on presumptions and inferences based upon her impairment that were not available for the Respondent to draw.

[105] The way the Complainant has described this allegation is misleading as it suggests that the Complainant was ready and willing to return to her substantive duties. In reality the

[75] Exhibit 41.

Complainant, through her psychologist, had made a request to work part-time to which the Respondents were considering. The Respondents remained open to discussing the option of part-time work with the Complainant but with the understanding that part-time work would not be offered during the busy December Christmas period.

[106] Further, the Complainant has led no evidence which would demonstrate to the Tribunal that the comparator would have been treated differently. Here, the facts are that the Complainant had been absent from work for three months before returning in September 2016, managing only to work a few days before requiring further leave. The Complainant then aimed to return to work in November 2016 but this proved unsuccessful notwithstanding the clinical psychologist's opinion that "Caitlin is willing and is well enough to return to work". Understandably this created doubt in the mind of the Second Respondent as to the veracity of the views expressed by the psychologist therefore the Second Respondent required further clarification as to the Complainant's fitness for duty. Similarly, the Complainant did not explain how the Respondents in requesting clarification from the psychologist engaged in a request for information that they would not have ordinarily requested. The psychologist was the only person who was providing the Respondents with information regarding the Complainant's condition and fitness for work. Moreover, the evidence was that when the Second Respondent attempted to engage with the Complainant the Complainant said that all communication in relation to medical advice is to be directed to her psychologist.

[107] I am unable to accept that the Respondents conduct, in seeking to obtain further information from the psychologist regarding the Complainant's fitness for work, amounted to a deliberate act to delay and frustrate the Complainant's return to work. There is nothing to suggest that the Respondents would not have engaged in similar conduct with the comparator and thus there is nothing to suggest that the Complainant's failure to return to work was due to less favourable treatment and a "higher standard of requirement" being imposed.

Was the Complainant directly discriminated against on the basis of a refusal to provide reasonable adjustments?

[108] The "reasonable adjustments" that the allegation refers to is the Complainant's request to commence part-time work in December 2016 as described in the email from Ms McGuire of 28 November 2018.[76]

[109] The Complainant submits that the Respondents refusal of the request to work on a graduated basis was unfavourable treatment and falls within the meaning of direct discrimination.

[76] Exhibit 6.

[110] The Respondent submits that the decision not to offer a return to work in December 2016 was made for the following reasons:

- the Complainant's extended period of 900 hours of unpaid leave;
- the seriousness of the information put forward by the psychologist in the description of the Complainant's well-being;
- the lack of information from the psychologist;
- the failed return to work attempt in September 2016
- the Second failed return to work attempt in December 2016;
- the risk that the return to work could exacerbate the Complainant's condition;
- accommodations that could be made in terms of the Complainant's well-being; and
- the levels of supervision and support, and the potentially negative consequences the limitations of those accommodations may have on the Complainant.

[111] In an effort to clarify the nature of the Complainant's condition and her fitness to return to work the Second Respondent contacted Ms McGuire on 8 December 2016. However, Ms McGuire was not able to clarify the number of hours of work that the Complainant could work; unable to provide an anticipated length of a return work programme; and, unable to provide an account of the "triggers" which might result in the Complainant feeling overwhelmed. In the email of 13 January 2017 to Ms McGuire, the Second Respondent sought from her some clarification concerning a timeframe around "a gradual return to work".[77]

[112] Moreover, December was the busiest period for the organisation, particularly for those employees that work in the fundraising department, such as the Complainant. The Complainant's evidence was that she recognised that the lead up to Christmas was a very busy time. The Complainant was asked by her representative:

Mr Heffernan: Is Christmas busy for yourtown?

Complainant: Very.

Mr Heffernan: What goes on at Christmas that makes yourtown busy?

[77] Exhibit 48.

Complainant:	We have the Christmas house lottery, so it's the biggest one of the year. It's the most important. It's the one that we do the most marketing for. So, yeah, overall it's just a very busy time for everyone.
Mr Heffernan	And what is it about your job that would've meant that it needed to be fulltime prior to Christmas?
Complainant:	**The job was just a very large job, so we were – I was constantly busy, constantly working very hard. Yeah, it was just a big position overall.** [78]

[113] It was not unexpected in an employment context for the Respondents to have declined the Complainant's request to work part-time for the balance of the month of December particularly given the uncertainty regarding the Complainant's ability to return to the workplace, her capacity to work, and the heightened workload around December. It must be borne in mind that notwithstanding that Ms McGuire had said that the complainant was fit to return to work on 28 November, being the date of the request for a graduated return to work, the complainant clearly was not. Indeed, she did not return to work on 28 November or the balance of that week.

[114] It can be seen that the Respondents adopted a 'realistic' approach in dealing with an employee who had been on extended period of personal leave, unable to meet the demands of her role and an organisation that was approaching the busiest and most demanding period of the year. As Kirby J said in *The State of New South Wales v Amery and Others*:

> *The meaning of "requirement or condition"*: It is settled law that, in construing anti-discrimination laws, courts are to adopt a "realistic" approach. This has proved necessary because "the forms of such disadvantage [are] infinitely various", requiring the court or Tribunal to consider whether, in the particular case, "there [has been] insistence upon a particular requirement". The insistence on the adoption of a practical and not a theoretical approach to such cases is well accepted by authority.[79]

[115] I do not accept that the Respondents have refused to provide reasonable adjustments, namely, the request to commence part-time work in December 2016. It was not a refusal but a question of timing. It was a request without notice and with an expectation that it would be immediately acted upon. I accept that the Second Respondent had in his contemplation the return of the Complainant to the workforce on a graduated basis. It was an issue for the Second Respondent to determine the appropriate time for the Complainant to return to her employment. It was acknowledged by the Complainant that this time was the busiest and most demanding time for the First Respondent. The Second Respondent sought advice from Ms McGuire so that a "safe return to work plan can be

[78] T1-17 Ll.14-16 (emphasis added).
[79] 230 CLR 174, [130] (emphasis in original) (citations omitted).

established."[80] The Second Respondent had already facilitated a return to work on 20 September 2016. Ms McGuire said in her evidence that the Second Respondent had spoken of graduated return to work for the Complainant.

[116] Further, it ought to be noted that the Second Respondent, in declining the Complainant's December request to work part-time, advised the Complainant that the organisation expected the workload to reduce in January 2017 and a review of the request would be taken at that point.[81] In that regard the Second Respondent sought an update from Ms McGuire on 13 January 2017 in relation to a timeframe for a graduated return to work.[82]

[117] The Complainant submits that where "less favourable" treatment exists any attempt by the Respondents to have this "less favourable" treatment exempted from being deemed unlawful direct discrimination, must be in line with the exemptions under the Act and appropriately discharge the Respondents positive obligations.

[118] As discussed elsewhere, the information received from Ms McGuire was inadequate to make an appropriate determination as to whether or not it was safe for the Complainant to return to the workplace. As is discussed more fully in respect of direct discrimination, the Respondents have a special duty to ensure that reasonable care is taken for the safety of those to whom it is owed. The Respondents have such an obligation. I accept that the welfare of the Complainant was a paramount consideration for the Respondents and as such the approach adopted by the Second Respondent was reasonably necessary to protect the health and safety of the Complainant.[83]

Indirect Discrimination

[119] As stated above the SOFC particularises the "term" said to have been imposed on the Complainant in the following way:

> The term, condition, requirement or practice that the Second Respondent imposed on the Complainant (whether written or oral) **was the requirement of the Complainant to obtain medical evidence confirming that the Complainant be medically cleared as fit to work full-time duties** (**Term**).
>
> (emphasis added)

[120] The Complainant contends that the term was unreasonable because:

> (a) The consequences of not complying with the Term were that the Complainant was prevented from being able to comply with the Term;

[80] Exhibit 13.
[81] Exhibit 13.
[82] Exhibit 48.
[83] See: *Anti-Discrimination Act* 1991 (Qld) s 108.

(b) The cost of alternative terms was not prohibitive given that the request had been to work part-time hours;

(c) The financial circumstances of the First Respondent, acting vicariously through the Second Respondent were those of a large and nationally-significant not-for-profit with resources sufficient to accommodate the Complainant's request for part-time hours;

(d) The Term was imposed after the Complainant had made repeated attempts and requests to return to work, including providing medical reports supporting her request, and had alerted Mr O'Brien to the fact she was seeking legal advice;

(e) The Term was all-or-nothing and did not contemplate reasonable adjustments or alternative suitable duties for the Complainant.

Was the Complainant required to obtain medical evidence confirming that the Complainant be medically cleared as fit to work full-time duties?

[121] As is the case with an allegation of indirect discrimination, the Respondents bear the onus of establishing, on the balance of probabilities, that the requirement was reasonable.[84] The question must be must be determined in accordance with s 11(2) of the Act.

[122] The evidence before this Tribunal does not support a conclusion that the Second Respondent imposed a term that the Complainant had to provide medical evidence confirming that she was cleared for full-time work.

[123] The Second Respondent wrote to the Complainant on several occasions requesting that she provide medical certificates to cover her absences from work. The Second Respondent explained to the Complainant that whilst employees are absent from the workplace a medical clearance is requested so that it can be processed against payroll for leave without pay.[85]

[124] The Complainant failed to return to work in September 2016, after having 3 months leave, and then subsequently failed to return to work in late November 2016. On 2 December 2016 the Complainant texted her line manager to say "she would not be in this week at all".[86] The Complainant then asserted that she could in fact work part-time and this assertion was accompanied by a letter from her psychologist, Ms McGuire.[87] In response to this letter the Second Respondent emailed Ms McGuire advising that the Complainant had been asked to remain away from the workplace until such time as further details regarding the Complainant's condition had been obtained. This was done

[84] *Anti-Discrimination Act* 1991 (Qld) s 205.
[85] Exhibit 51.
[86] Exhibit 40.
[87] Exhibit 6.

to "ensure that a safe return to work plan can be established".[88] The Second Respondent sought guidance regarding the Complainant's ability to perform the duties of her role, as per the position description; the ability to attend 38 hours a week; health and well-being and support required to be provided by the workplace; and any other relevant information with regards to the Complainant's return to work.

[125] It is the Complainant's contention that she had no ability to return to full time employment at yourtown however she could undertake part time work. However, the medical certificate of Dr Marks certified the Complainant as unfit to work between 4 December 2016 and 4 March 2017 in her usual work. The certificate stated that she had the ability to undertake "other work" for eight hours or more per week but the nature of the "other work" was not specified on the certificate.

[126] At all times the opportunity to return to the work place either in on a part time or full-time basis was an issue to be considered after a medical clearance had been obtained. I am not persuaded that the term, as described by the Complainant, was imposed.

[127] Even if I accept that a term as described by the Complainant, which I do not, the Complainant has not convinced me that the term was not reasonable.[89]

[128] In *Mahommed v State of Queensland* President Dalton SC, as her Honour then was, in dealing with the approach to be taken by the Tribunal in dealing with the question of reasonableness wrote:

> The test of reasonableness (of the term) is an objective one, less demanding than a test of necessity, but more demanding than a test of convenience. I am required to weigh "the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the term on the other and all other circumstances, including those specified in section 11(2)".[90]

[129] On the question of reasonableness, the Respondents submitted that yourtown required clarification of the Complainant's fitness for duty having regard to the Complainant's extensive absence from work and her failed return to work. The Respondents submitted that there was insufficient information available on the nature of the Complainant's medical condition, the extent of her incapacity; her prognosis, her ability to perform the inherent requirements of her position, or modified or suitable duties, without exacerbating risks to herself or to others.

[130] The evidence of Ms Mirie, Employment Relations Manager, was:

> Ms Jessie: And are there are work health and safety considerations in that process?

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[88] Exhibit 43.
[89] *Anti-Discrimination Act* 1991 (Qld) s 11(1)(a)-(c).
[90] (2006) QADT 21, 37, referring to *HM v QFG & KG* (1998) QCA 228.

Ms Mirie: Absolutely. I think in – in context with Caitlin in December, there were a range of considerations that Michael and I would reflect on together, and that would be the significant time away from the workplace; it would be the seriousness of – of what was put forward by the psychologist in the description of Caitlin's well-being. It was also looking at the lack of information we had from a general practitioner or from a – a medical support team to support that particular disclosure. It was looking at the failed return to work in September, which was quite significant, where Caitlin did return to the workplace, and – and there was risks that could have then exacerbated her condition. We then looked at what accommodations we could make in terms of her well-being, the level of supervision and support. She had been away for some time. And we looked at all those considerations before providing advice to the manager.

Ms Jessie: Okay. And what was that advice; do you know?

Ms Mirie: The manager felt at that time they couldn't support Caitlin's return to work based on what was being presented in terms of the support she might need, and what was happening in the business at that particular time, and they requested they could re-engage in January where they could look at part-time engagement. And we supported the manager's request after going through our considerations.

[131] The Respondents further argued that the request was reasonable as the information about the Complainant's medical condition and her fitness to return to work was necessary to meet the duty to comply with the *Work Health and Safety Act 2011* (Qld).

[132] Section 108 of the *Anti-Discrimination Act* 1991 provides:

> a person may do an act that is reasonably necessary to protect the health and safety of people at a place of work.[91]

[133] Under the WHS Act, a "person conducting a business or undertaking" will owe a primary duty of care to ensure, so far as is reasonably practicable, the health and safety of all workers. This broad duty of care cannot be delegated. The non-delegable duty of care is a special duty to ensure that reasonable care is taken for the safety of those to whom it is owed. In the present case, the First Respondent owes a duty of care to the Complainant to ensure, as far as is reasonably practicable, her welfare including her psychiatric or psychological well-being is protected.

[134] Whilst the Respondents deny that that they have discriminated against the Complainant they contend in the alternative that if they are found to have discriminated against her, such discrimination was lawful pursuant to s 108 of the Act. I agree.

[135] It was, in my view, reasonable therefore that the First Respondent sought a clearance from the Complainant prior to her returning to work whether it be on a full-time or part-

[91] *Anti-Discrimination Act* 1991 s 108.

time basis. Even if the term as described was imposed it was reasonable in the circumstances.

Conclusions

[136] The Complainant has failed to establish that she has an impairment within the meaning of the Act. Such a conclusion is fatal to the Complainant's claim.

[137] With respect to the allegations of direct discrimination the Complainant has failed to establish that the Respondent(s) have treated her or proposed to treat her on the basis of the attribute, less favourably than another person without the attribute is, or would be treated in circumstances that are the same or not materially different.[92]

[138] With respect to the allegation of indirect discrimination the Complainant has failed to establish that the term as described in the SOFC was imposed.[93] Moreover, even if I accept that a term was imposed the Complainant has failed to demonstrate that it was not reasonable.[94]

[139] For the reasons set out in this decision, I find that the Complainant has not established that she suffered either direct or indirect discrimination. Accordingly, the complaints must be dismissed.

Vicarious Liability

[140] Because the Tribunal has found that there has been no contravention of the Act, the question of vicarious liability as contended by the Complainant does not arise.

Non-Publication Order

[141] The Complainant has sought an order pursuant to s 191 of the Act prohibiting disclosure of Complainant's identity. The basis of the application is said to be the frank nature of the events leading up to the Complainant's claim of PTSD and anxiety conditions.

[142] Section 191 of the Act relevantly provides:

> **191 Anonymity**
>
> (1) If the Tribunal is of the reasonable opinion that the preservation of anonymity of a person who has been involved in a proceeding under the Act is necessary to protect the work security, privacy or any human right of the person, the Tribunal may make an order prohibiting the disclosure of the person's identity.

[92] *Anti-Discrimination Act* 1991 s 10.
[93] *Anti-Discrimination Act* 1991 s 11.
[94] *Anti-Discrimination Act* 1991 s 11(c).

…

(3) In this section, a reference to involvement in a proceeding under the Act includes—

(a) making a complaint under the Act and continuing with the complaint, whether by investigation, conciliation, hearing or otherwise; and

(b) being a Respondent to such a complaint; and

(c) involvement in a prosecution for an offence against the Act; and

(d) giving information or documents to a person who is performing a function under the Act; and

(e) appearing as a witness in a proceeding under the Act.

[143] In *Cutbush v Team Maree Property Service (No 3)* Wilson J in dealing with an application for non-disclosure under s 66(2) of the QCAT Act wrote:

> [8] Although QCAT's discretion to grant a non-publication order is created by statute, the discretion is underpinned by the principle of open justice which aims to ensure not only that court proceedings are fully exposed to public scrutiny, but also to maintain the integrity and independence of the courts. This principle applies in cases where the information has already been published, or not.
>
> [9] Open justice requires that nothing should be done to discourage the fair and accurate reporting of what takes place in the courtroom, unless there is some material before the court to show that it is reasonably necessary to prohibit the publication. The onus is on the applicant to show special circumstances justifying the making of the order.[95]

[144] In *Bero v Wilmar Sugar Pty Ltd & Ors* Pennell M was called on to deal with an application by Wilmar Sugar Pty Ltd for a non-disclosure order under s 191 of the Act in anti-discrimination proceedings before QCAT. Member Pennell wrote:

> Before making a decision to make a non-publication order, the Tribunal should First form a reasonable opinion that the preservation of the anonymity of the people involved is necessary. In arriving at that position, the Tribunal must also have regard to the objects of the Anti-Discrimination Act which are to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation.
>
> However, in arriving at a "reasonable opinion" as required by the Anti-Discrimination Act, the Tribunal is required to take into account the fundamental principle that these types of proceedings in the Tribunal are open to the public. It is a fundamental principle of justice that court proceedings are open and an order for anonymity is only made where there is some clear reason to depart from that general rule.[96]

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[95] [2010] QCATA 89, [7], [8].
[96] [2016] QCAT 371, [190].

[145] The onus is on the party making the applicant to show circumstances exist which would justify making of such an order. I am not convinced that this is a matter, especially having regard to the limited nature of the evidence given by the Complainant, which would justify the granting of the order sought.

Order

[146] I make the following order:

1. **The complaints are dismissed.**

2. **I will hear the parties as to costs.**