QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*TT and Ors v Lutheran Church of Australia Queensland District and Ors* [2013] QCAT 48
PARTIES:	TT (First Complainant) AT (Second Complainant) JT (Third Complainant) v Lutheran Church of Australia Queensland District (First Respondent) Gordon Rackley (Second Respondent) Fred Stoltz (Third Respondent)
APPLICATION NUMBER:	ADL004-11 / ADL005-11 / ADL006-11 / ADL122-11
MATTER TYPE:	Anti-discrimination matters
HEARING DATE:	10-14 December 2012
HEARD AT:	Brisbane
DECISION OF:	**P Roney SC, Member**
DELIVERED ON:	29 January 2013
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. That the complaints be dismissed.** **2. Publication of the actual names of the complainants is prohibited.**
CATCHWORDS:	ANTI-DISCRIMINATION – Impairment discrimination in education – Victimisation – Treatment of school assessment – sporting abstention – school camp attendance as a condition of enrolment *Anti-Discrimination Act 1991*, ss 7, 11, 39, 130, 205 *Australian Iron and Steel Pty Ltd v Banovic* (1989-1990) 168 CLR 165

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
I on behalf of BI v State of Queensland [2005] QADT 37
JM v QFG and GK [1998] QCA 228
Morrison-Liddy v The Director of the Department of Technical and Further Education (1999) EOC 92-246
Narda Tapia v Lagoon Seafood Restaurant [2003] NSWIR COMM 341
Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2) [2010] QCAT 412
Secretary Department of Foreign Affairs and Trade v Styles (1989) 23 FCR 251
Wadsoworth v Akers and Woolworths Ltd trading as Big W Discounts Stores [2007] QADT 17

APPEARANCES and REPRESENTATION (if any):

APPLICANT:	The First and Second Complainants were, pursuant to leave granted by the Tribunal, represented by the Third Complainant. The Third Complainant was self-represented.
RESPONDENT:	Mr C Chowdhury of Counsel instructed by Corney and Lind Lawyers

REASONS FOR DECISION

Introduction

[1] At the time of the events which are the subject matter of the current complaints, the First and Second Complainants were both students of a school conducted by the First Respondent, the Lutheran Church of Australia Queensland District. The school was at Anzac Avenue, Rothwell, north of Brisbane, and was known as Grace Lutheran College ('the College'). At the relevant times both the First and Second Complainants were below the age of 18, however by the time these matters came to a hearing they had achieved their majority, the First Complainant being 19 years of age and the Second Complainant 18. In 2009 they were aged 16 and 15 years respectively, and each was in grade 10 at the College. One of their younger siblings was also at the College.

[2] The Third Complainant is the mother of the First and Second Complainants. Apart from having been given leave to represent them at

the hearing, she also appeared on her own behalf, having brought a separate complaint in her own right.

[3] The First Respondent is responsible for administering the College at which the Complainant students attended. The Second and Third Respondents were staff at the College. The First and Second Complainants were enrolled at the College and attended it from early in 2008. The Complainants' relationship with the College ended with notification to them at the end of the school year in December 2010 that the College had terminated the enrolment of all 3 student members of this family at the College. This was said to be based on the College's contractual right to do so, but was said to be done on various grounds particularly because of what was described as '*inappropriate conduct*' by the Third Complainant towards various members of the College community.

[4] Before that decision to terminate the enrolment had occurred, there were numerous incidents involving separately and collectively each of the Complainants which brought them into conflict with the College administration, their teachers, and possibly in some cases their fellow students or parents of fellow students and other persons associated with the College. This led to 4 separate Complaints having been lodged with the Anti-Discrimination Commission Queensland ('ADCQ'), initially on behalf of the First and Second Complainants and later by the Third Complainant. Parts of those complaints were accepted and were referred to this Tribunal for determination. They were lodged with ADCQ on 15 April 2010, 24 June 2010, and 17 May 2011 respectively. It is to be noted that the last of those post dates the termination of the enrolment of the Complainant students at the College and alleges the victimisation of the Third Complainant. Before the termination of the students' enrolment had occurred, the parties had attended a voluntary mediation, and a conciliation conference in the ADCQ. Neither managed to resolve any of the issues between them.

[5] Although only some of those complaints were referred by the ADCQ to this Tribunal for determination, and a number of those complaints were rejected or not referred, nevertheless, unfortunately, some of the material which was filed on behalf of the parties dealt with the factual circumstances relating to those unreferred complaints. That unnecessarily led to the filing of responsive evidentiary material which also dealt with those topics. Orders were made in October of this year striking out material which was concerned with those areas of the complaints which had not been accepted, were dismissed, or had not been referred. Those orders did not, unfortunately, identify specifically what parts of the statements of the various witnesses which had been filed, fell within the description of excluded material.

Background, the conduct of the case and issues of credit generally

[6] The First and Second Complainants each formally complain that they have been subjected to unlawful discrimination, both direct and indirect, as a result of various things that occurred to them whilst they were students

at the College. The Third Complainant brings her own claim, but jointly with the other Complainants, claiming that she or they were the subject of victimisation pursuant to s 130 of the *Anti-Discrimination Act 1991* ('the Act'). That allegation depends primarily upon the circumstances which led to the termination of the enrolment of the First and Second Complainants. There is also an earlier claim of victimisation. The first victimisation complaint was made in June 2010. That complaint was based upon the decision of the College Principal, Mrs Butler, to instruct teachers not to have direct communications with the Third Complainant from early 2010.

[7] The trial in this matter took place over 5 days. In excess of 20 witnesses were called, all but a few of whom were cross-examined. Most of those witnesses were called in the Respondents' case and were cross-examined in each case by the Third Complainant. As is common experience in cases where parties are self represented, there was often an intermingling of evidence from the Bar table, statements made in the course of cross-examination of others, and the making of submissions as well. Each of the Complainants and for a considerable time the Second and Third Respondents were in court for the hearing, including final submissions. I gained considerable assistance in reaching my conclusions upon issues of credit both from their demeanour primarily whilst giving their evidence, but also from observation of them in the course of the trial, including observations as to their reactions to evidence given by others. Primarily, I have regard however to the testimony they gave and have given careful consideration to the extent to which it is supported by contemporaneous documentation or is corroborated by other evidence.

[8] The First and Second Complainants each gave me the impression of being persons of generally good character. Each was complimented by more than one of their teachers, some of whom were called to give evidence for the Respondents. It is obvious that wherever conflict arose between, principally the Third Complainant, and the College authorities and its staff (and in some cases members of the public associated with the College), it arose because the Third Complainant was a veracious defender of what she saw as her childrens' interests. A reading of the many items of correspondence that passed between her and the College, and in some cases that which came from her solicitor, suggests that there was often a combative and somewhat negative attitude directed to the College authorities, and that often this was misplaced, or based upon a simple misunderstanding as to the facts. Something of a warring attitude appeared to have been adopted by her to any perceived wrongdoing by persons associated with the College, to the point where the College Principal herself decided that it was no longer in the interests of the College, inter alia having regard to workplace health issues, and the welfare of her staff, to allow her staff to be able to have encounters with the Third Complainant. She therefore directed the staff from at least as early as January 2010, and also later, that they were not to have dealings with the Third Complainant. This did not extend to staff dealing with the First and Second Complainants. A person at the College was a nominated contact point for any dealings with the Third Complainant apart

from those engaged in by the Principal herself. The Third Complainant was given written notice of that decision and a direction given that she not contact staff except to the limited extent identified, in a letter of 19 January 2009.

[9] What then followed was a year of seeming continual conflict between the Third Complainant and personnel at or associated with the College, to the point where in large part the decision to terminate the enrolment of the children in December 2010 was made on the basis that there had been so much conflict brought about by the Third Complainant that it justified the drastic step of forcing the children to leave the College. The Principal, Mrs Butler, gave evidence which I accept, that notwithstanding some decades of experience as a Principal, including at some major private schools in and around Brisbane, she had never had cause in her career to terminate the enrolment of students other than on the basis of the students' own behaviour. In this case, that termination was based on the conduct of the parent of the 3 students she had at the College.

[10] It was apparent that to a significant degree, the First Complainant, and to a much lesser degree the Second Complainant, had joined with their mother in supporting her in her ongoing battle with the College throughout 2010. This taking of sides continued to some degree during the trial, and in my view, clearly affected the reliability of their evidence. From a reading of the correspondence which passed from the Third Complainant to the College in 2009 and 2010, and from the Third Complainant's evidence, it is evident that she had seen herself and her children as being victimised by the College in a large number of decisions that were made that affected them, and this seemed to bring her into continual conflict with the College. They saw themselves as a family siding together against the rest of the world's attacks upon them. I do not suggest that the relationship between the College and this family was continuously one of conflict. But insofar as the incidents raised in this case themselves were concerned, that undoubtedly saw the respective parties taking up adverse positions and maintaining them.

[11] My impression generally of each of the Complainants was that they were acting on honestly held views as to the way they had been treated. Sadly, those views were often based upon assumption or were ill-informed or misconceived. I suspect that to a substantial degree the First and Second Complainants were not particularly concerned about some of the things that happened to them, but since they had significantly upset their mother, they found themselves needing to side with her in her subsequent battles with the College over these and other matters. This means that it is necessary to treat the evidence of the Complainants with some caution.

[12] On a number of topics it is almost impossible to reconcile the First Complainant's evidence with that of others. An example concerns what kind of country he was hiking through on the 3 day hike that was held by the College. On his version, he would have had this novice group of hikers, including himself with a known heart condition, directed to hike through steep wilderness country away from any walking tracks. On the

other hand, the hike leader Mr Wilson, described the hike as one which was over '*undulating*' ex farming or grazing land and at all times on roads which were vehicle accessible.

[13] Although the Third Complainant did not attend the camp site, she would have undoubtedly known what kind of country they were hiking through because she communicated with a number of College associated persons concerning it, both before and after the camp was held. She nevertheless chose to describe the camp, which for the most part involved sleeping in huts and being fed by food cooked from a proper kitchen by staff, as a '*wilderness camp*', or a '*survival camp*'. By no stretch of the imagination was it either of those things. Another blatant example of exaggeration, if not actual invention, were the First and Third Complainants' suggestions that even though the College staff were well aware of his heart condition, and its seriousness, he was forced to play sport against their expressly stated wishes to the contrary. No specific examples were able to be identified.

[14] Having heard from those who managed the College, including his Sports Master, his former class teacher and the 2 Principals, I do not accept for one moment that this College would have permitted, and least of all directed, that to occur. In the overall scheme of things, these were not critical issues in terms of what I am to decide, but they neatly demonstrate the kind of exaggeration which crept into the evidence as it was presented by the Complainants.

[15] The Second Complainant was least affected by this kind of exaggeration, but the case that she brought on her own behalf was considerably narrower in scope, and involved the least serious of the allegations, comprising a complaint about being kept in a so called '*detention room*' during physical education activities, an event that occurred at the same school camp, concerning the weight placed in her backpack, and the taking of medication in mistaken doses.

[16] The Third Complainant demonstrated a heightened sensitivity to what she perceived to have been perpetrated upon her and her family members. She insisted on apologies or acknowledgements of wrongdoing, not only from the Respondents themselves in terms of the relief sought in the case, but also from the witnesses themselves whilst in the witness box. She managed to elicit concessions of a sympathetic, or at least an empathetic nature from at least 3 of those, namely the current Principal Mrs Butler, the Sports Master Mr Rackley, and the English teacher Ms Kissick. Empathy for their position was also expressed by the former Principal Mr Stoltz, who is the Third Respondent. He was a man of considerable experience as an educator in this State and was highly respected by those associated with him at the College and elsewhere. On his last day at the College before he retired, after 30 years of service to it, the Third Complainant insisted on having a meeting with him. What resulted was a confrontation with him over what, on any view of the matter, was a relatively trivial issue, namely whether there had some other day been an attempt by a teacher to remove banned jewellery or check whether it could be removed from

the arm of the Second Complainant. The Second Complainant had been told she was not permitted to wear it, and had been directed to remove it. On the evidence before me, there is insufficient evidence to decide whether this confrontation with Mr Stoltz was intended to cause distress to Mr Stoltz on his last day at the College, or whether it simply showed poor judgement by the Third Complainant. He clearly was very emotional about the fact that that had occurred to him on his last day of service, and it clearly also affected the attitude of his successor, Mrs Butler, toward the Third Complainant. It is difficult to conclude other than that it demonstrated a lack of judgement or understanding of what might be a reasonable behaviour on that day.

[17] Mr Stoltz presented as a softly spoken and professional man who had since retired from public life. He was generous in his evidence in describing his encounters with the Third Complainant. He clearly had trouble in the witness box remembering the detail of specific discussions that he had with the Third Complainant, particular concerning what may or may not have been said to him by her in the course of the very first meeting he ever conducted with her. The purpose of that meeting was to see whether the children would be able to attend the College. The facts he had trouble with essentially concern whether he was told by her at that time what had happened to her children at another school. It was of little, if any, ultimate significance in this case whether that issue had been raised or not in that meeting. One might not be surprised to learn that in a school of this size, he had probably conducted thousands of interviews with parents of existing or proposed students. It would be unsurprising in the extreme to learn that he might not remember every detail or every significant detail of one of those interviews. The interview in question had occurred almost 5 years ago. That did not however discourage the Third Complainant from suggesting to him in cross-examination, on numerous occasions, that he was in fact lying about his stated lack of recollection of aspects of that conversation. Indeed it was put to him on a number of occasions that he had a '*selective memory*', and that he was remembering only those things which assisted his case, and was pretending to not remember those which did not. In my view to have put those propositions was entirely without factual justification. It demonstrated to me a level of ongoing animosity and lack of objectionality which the Third Complainant held towards him, the Third Respondent, and others at the College.

[18] A somewhat similar approach was adopted in the cross-examination of the current Principal, Mrs Butler. There could be little doubt that from the time that Mrs Butler took over as Principal at the beginning of 2010, she was firm in her dealings with the Third Complainant. But there was little if anything to suggest that this flowed on in any way to any dealings she had with the Third Complainant's children at the College. From having observed Mrs Butler, I could understand how some might perceive her manner to be at times abrupt or direct, however she clearly conceded that she was often direct and forthright in her manner in dealing with the Third Complainant and spoke firmly to her. The Third Complainant insisted that she was just spoken to in a '*rude*' fashion.

[19] The Third Complainant was affronted by the suggestion that it had been the Principal's original idea to engage a mediator to seek to resolve their dispute in the early part of 2010. The Third Complainant was insistent that she had been the person who had put this proposal forward. But there is contemporary correspondence in evidence which shows that indeed the College Principal was, if not the initiator, certainly a prime mover in bringing that mediation about. Yet, the Third Complainant was adamant that Mrs Butler was being intentionally untruthful about this.

[20] The Third Complainant cross-examined Mrs Butler with a view to obtaining a concession from her that she had, in effect, bullied her or treated the Third Complainant harshly, had been unfair in failing to properly investigate complaints which had been made against the Third Complainant by others, and had intentionally sought out persons who would make complaints generally to boost the chances of being able to terminate the students' enrolment. There is no evidence at all to suggest that Mrs Butler in fact did so. Certainly she went about collecting and considering evidence so as to be able to substantiate any decision she made. But such conduct falls well short of establishing some kind of vendetta or improper fabrication or encouragement of complaints by others. But in that context, as Mrs Butler made clear, the fact that this dispute had escalated to the point where 3 pupils' enrolments were to be terminated, and the fact that this case was on foot, demonstrated the failure of her own attempts to resolve disputes amicably, professionally and for the benefit for the pupils themselves. There could be no doubt that Mrs Butler was irritated, and frustrated like other staff who reported to her, as well as distressed by some of her dealings with the Third Complainant. But as she conceded, she knew the Third Complainant to be a strong advocate for her children, and that even by the time the decision was made to terminate the enrolments, although she regarded the Third Complainant as a woman who made vexatious complaints, she also knew that she could be a person who was very pleasant towards others. Notwithstanding these kinds of concessions, which might be seen as being generally favourable toward the Third Complainant, the Third Complainant cross-examined Mrs Butler with a view to suggesting that she was giving knowingly false evidence, indeed trying to give tailored answers to questions to give a misleading impression.

[21] A final example of the way the case was conducted and to which I wish to make reference is concerned with the case against the College based upon the decision of the English teacher, Ms Kissick, not to allow the First Complainant to sit a particular English exam when he was in 11th grade. Whether or not the precise circumstances of that decision were fully understood by the First and Third Complainants before Ms Kissick gave her evidence, it had become abundantly clear from her evidence in chief that her decision was based upon a heightened level of empathy for her pupil and made in a way that she clearly regarded as in his best interests, both from health and academic perspectives. Ms Kissick also spoke affectionately and generously of the good characters of the First and Second Complainants. Notwithstanding that, the case put to her and

maintained against the College was that Ms Kissick's conduct amounted to obvious or intentional discrimination against the First Complainant on the basis of his impairment. This viewpoint was maintained to the very end, against overwhelming evidence to contrary.

The impairments suffered by the First and Second Complainants

[22] The First Complainant suffered an impairment in the sense referenced in s 7(h) of the Act and the Dictionary Schedule to it. Section 7 prohibits discrimination on the basis of the attribute of an impairment. The First Complainant's impairment in this case was that he suffered from hypertrophic cardiomyopathy. That condition is one which involves the potentiality for, or actuality of enlargement of the muscular wall to the heart. The condition may lead to life threatening arrhythmias or heartbeat irregularities, which can be brought on in some circumstances, including when engaging in some kinds of exercise.

[23] The Second Complainant also suffered from an impairment in the sense referenced in s 7 of the Act. In her case she suffered from scoliosis, which for a period until 2009 had required her to wear a back brace. She ceased wearing it prior to her attendance at a school camp in 2009 and gave evidence that she has not worn it since. There was some suggestion in the evidence from the Third Complainant that she had also been involved in a car accident which had in some way affected her condition. She also suffered from what were described as symptoms associated with Tourette's syndrome. Apart from the necessity to take some medication to deal with that condition, that does not appear to have caused her any particular problem on a regular basis, and there is no reference to it made in her statement, except to identify the fact that she suffered it.

[24] It is common ground that the First and Second Complainants had a relevant impairment within the meaning of that term in the Act, and that at all relevant times the College and each of the Second and Third Respondents was aware of the nature and significance of that impairment. It is also common ground that the First Respondent was responsible for not only the operation of the College, but was also vicariously liable for any of the conduct of the Second and Third Respondents, or indeed other conduct on the part of the staff at the College which is the subject matter of complaint here.

[25] 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**
>
> An educational authority must not discriminate—
>
> (a) in any variation of the terms of a student's enrolment; or
>
> (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.

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

The detention room complaints

[27] The first complaint of discriminatory conduct is alleged to have been directed to both the First and Second Complainants in 2008. This was the first year that they were at the College. Their complaint in that regard is that from time to time when the rest of their class was engaged in physical education lessons, or physical activity associated with that subject or sport, because they were not able to, or had been advised against participating in those activities because of their impairments, they were sent to a '*detention room*' for the duration of that lesson. I shall refer to this as the detention room complaint. It is alleged that the room to which they were sent was one which otherwise held students who had been sent there because they were being punished for misbehaviour or otherwise because they had failed to comply with College rules. It is said that this was discriminatory because, in effect, they were being sent to that room because their health conditions prevented them from participating in physical education or sport activity. And that because what they were being sent to was called the '*detention room*', and held others, unlike themselves, who were physically unable to be involved in the physical education class, they felt themselves to be in effect being punished for being unable to engage in sport. Whilst the room was used to hold those on detention for misconduct, I accept that others who were not participating in sport for non-punitive reasons were also placed in that room under supervision during sport.

[28] After the Third Complainant took issue that the fact that her children were being in the '*detention room*' a decision was made to permit them to work in the library of the College whilst others were engaged in sport. This, it was argued, demonstrated that alternative arrangements could have earlier been put into place for them.

[29] Mr Stoltz, the Principal at the time gave evidence which I accept, that as part of the College's policy, and to ensure that all students at the College were able to be accounted for, all students were required to be marked off the roll every sports afternoon. As was explained in the evidence of the Sports Master, there is a difference between the College sports afternoon and the subject physical education. So that students who were not participating in sports would be appropriately supervised, students who were not participating would be kept together in a supervised room. Some of the students who were kept there were being kept there as a form of punishment, but others were not. There were a number of reasons why

students might be in that room and not participating in sport on a given day. He swore, and I accept that, the room was not a room specifically for the punishment of students, nor was its use a form of '*detention*', ie as a form of punishment. Students who were there were required to complete school work in a supervised environment. The requirement that the First and Second Complainants go to that room was not as a form of punishment or detention because they could not or would not play sport, but because it was required that they be in a supervised place, and it was decided that all students who were not doing sport would be kept in one supervised location. After requests were made for alternative arrangements concerning the First and Second Complainants, that was accommodated.

[30] It seems that the argument which is at the root of this complaint is that the First and Second Complainants were kept in detention because they would or could not participate in sport. Insofar as it is suggested that such a state of mind existed in the College authorities, I reject that contention. There is no evidence whatsoever to support it. The fact that some students or perhaps even some teachers referred to the room in question as a detention room, does not alter the fact that no part of the reasoning behind the Complainant students being required to attend there was because of any impairment they had. They were merely administrative arrangements to ensure that students who were not participating in sport for any reason were in a place where they could perform supervised work.

[31] The test for present purposes, is concerned in the context whether there has been direct discrimination, with whether particular conduct was '*on the basis of an attribute*' within the meaning of ss 8 and 10 of the Act.

[32] Careful consideration of the approach to whether something occurred '*on the basis of an attribute*' was undertaken by the Court of Appeal in *JM v QFG and GK* [1998] QCA 228. That case involved an appeal from a decision of the Anti-Discrimination Tribunal concerning whether a refusal of treatment at an infertility clinic on the claimed basis that her lawful sexual choice of lesbianism amounted to direct discrimination. The approach of the Court was to carefully identify precisely what was the reason for the refusal of the treatment. If it could not have been said to have been her exclusive lesbianism, but rather the fact that she failed to comply with the Respondent's definition of what constituted infertility, that she was refused the relevant treatment.

[33] A similar approach may be found in the analysis of the High Court in *Australian Iron and Steel Pty Ltd v Banovic* (1989-1990) 168 CLR 165 at 176-7. That case concerned allegations of direct discrimination on the basis of gender. It was alleged that workers were retrenched because they had not been employed before a particular date. It was said that this amounted to discrimination on the basis of gender because the waiting period for employment with that employer was for a longer period for women than it was for men. Hence female workers were being retrenched because the male workers had in effect been employed longer, and before the relevant cut off date. In the joint judgment of Justices Deane and

Gaudron JJ it was held that

> [11] ... in the ascertainment of the true basis of an Act or decision it may well be significant that there is some factor, other than the ground assigned, which is common to all who are adversely affected by that Act or decision. In certain situations that common factor may well be seen to be the true basis of the Act or the decision. And that may also be the case were some factors identified as common to a specific proportion of those adversely affected.
>
> [12] Even if it could be said that a factor common to all or a significant proportion of those who are adversely affected by the decision of AIS to retrench by the "last on, first off" method was that they were women, a further finding that that was the true basis of the decision would be necessary to render [the equivalent to section 10] applicable ... There is no finding to that effect made by the Tribunal.

[34] Hence the Court in *Banovic* concluded since the reason for retrenchment was the time at which employees were employed, and even though women were more affected by those retrenchments because they were more likely to have been employed later, there was no direct discrimination. The Court went on to consider the alternative case of whether it was a case of indirect discrimination.

[35] In the present case the factor which founded the requirement that they be held in a room which they shared with others, some of whom were on detention or being punished and not being permitted to enjoy a sport was that they had in fact disqualified themselves through their own choice or out of necessity from participating in sport. And the College required that all of those, who for any reason were either unable to or not permitted to participate in sport, including those being punished, would be held together for administrative purposes in a supervised area. In those circumstances, I find that the requirement that they attend that room did not constitute discrimination on the basis of an attribute within the meaning of ss 8 and 10 of the Act.

Legal studies assignment complaint

[36] On the 4th day of the hearing it was conceded that the stated basis for this claim, involving a legal studies assignment done by the First Complainant in November 2010 was not accurately represented in the supplementary contentions which set out that claim. In particular, to the extent that those contentions asserted that there was a '*refusal*' to provide reasonable accommodation to the First Complainant in order to assist him to complete a legal studies assignment, this was not correct. Instead it was argued that although such accommodation was in due course provided, it was only after the Third Complainant was called upon to write to the College complaining about the treatment of her son. In other words, the case was not that he had <u>not</u> been accommodated, but rather that initially he had not, and there was a short delay before he was accommodated. The delay in question was in truth a little more than a week.

[37] Mr Curran's evidence on this issue, which I accept, was that there was a College policy which had two elements. The first was in effect that assigned work meeting minimum standards needed to be submitted by the final due date. Secondly, if an extension was sought by a student to put an assignment in late, or beyond the due date, there were procedures that had to be undertaken to allow it to occur. These included the provision of a written application signed by a parent in that regard. Mr Curran was the Deputy Head of the Business Education Department, and that put him in a position where he was responsible for when assignments were due in the subject of legal studies. Notwithstanding that, he was not the person to whom applications for extensions would be sent, and he had no authority to grant them. In this case there was no such application ever signed. He accepts that initially because a final copy of a legal assignment he had given out was not handed in by the First Complainant on time, his draft assignment was marked as if it were the assignment. But in due course, the First Complainant was allowed to hand in a final version and this was marked instead. His mark in that regard reflected the quality of the work in the paper and he was in no way penalised by reason of it having been put in beyond the due date. Nor was any part of the circumstances of its marking to do with whether the paper did or did not exceed the word limit for that assignment, and I so find.

[38] Indeed Mr Curran explained, and I accept, that he had actually accommodated the First Complainant in a way that perhaps he need not have, in allowing him to include for the purposes of assessment research notes, which strictly he was not required to do for the purposes of marking the assignment itself. The end result was that for that semester the First Complainant received a C grade for that subject. There is not the slightest evidence that the College in any way treated the First Complainant less favourably in relation to that assignment on the basis of any impairment, or even any health related issue which might explain the failure by him to have his assignment in on time. Once the College was aware that it was suggested that his inability to get the assignment in on time was in consequence of his having been ill, it remedied the situation by giving him further time.

[39] Independently of that matter, there is no objective evidence that the First Complainant's impairment due to his heart condition was the reason that he was ill at that time that he missed the first due date. It seems to be inappropriate to speculate that that illness was because of his impairment. Even had I concluded that there had been discriminatory conduct in this case, the evidence does not suggest that there was any consequence which ought result in a monetary compensation order, or any other order.

The English exam complaint

[40] This complaint concerns the acknowledged failure of the College to have the First Complainant sit a particular English examination which he should or might have sat during the final term of 11th grade in 2010. I have dealt with some of the evidence briefly already. The English teacher, Ms Kissick, was a teacher of considerable experience, having taught in that

subject since 1976. The allegation is that the '*failure to reasonably accommodate the First Complainant*' by allowing him to sit the English exam on an occasion after he had been away ill based on what were described as '*impairment-related health issues*', amounted to discrimination. Indirect discrimination was also alleged, relaying upon the same conduct.

[41] It is contended that the First Complainant did not pass English in that semester, and that this was the first time he had ever failed English. In fact his marks show he was awarded a D+ which is very slightly below a pass mark. Ms Kissick explained that this reflected his performance, and that placing students in that position in 11th grade is in some ways a form of encouragement that they can push themselves over the line the next year to achieve a sound result, ie a C or better. The facts surrounding this issue seem to be largely not in dispute. Particularly, what is not in dispute, and there was no challenge to the evidence of Ms Kissick in this regard, was that her unilateral decision not to ask or require him to sit the particular English exam was motivated by genuine belief that it was in his best interests that he not sit that particular exam. Her own perception, and which I find corresponds with the objective facts was that he had been away for a considerable period prior to when he was due to sit the exam. He returned looking poorly and unwell even after given further time to prepare for the examination. She believed he was significantly unprepared for the exam and would have done poorly in it. In this event she could have given him the opportunity to have sat the exam, but as she explained, it was in her professional judgment and in his best interests that he not do so and that he move on to the next part of the course with the other students and do well in that course and thereby achieve a good mark for English. As she expressed it, she preferred that he do well at one thing, rather than poorly at two. She considered that he would miss English class he was about to go into were he to sit the exam and was demonstrably unprepared for the exam he would have sat anyway. She saw it as in his interests that he work with and form part of the drama groups which were then going to be put together for the next part of the subject course. I accept that she had these genuinely held beliefs.

[42] The First Complainant might have himself asked to be allowed to sit the exam no matter what, or sit it at a different time for example in the lunch hour or another day, but he did not do so. Of course Ms Kissick could have facilitated this herself, but she exercised a judgment as a person whom I accept was sympathetic to her pupil's needs. The evidence does not suggest that his mark for that semester was any worse than it would have been had he sat the exam. On Ms Kissick's evidence, which I accept, it was possible that his overall mark would have been worse than it was had he sat the exam. In the end the First Complainant completed 12th grade and achieved a sound result for English.

[43] The indirect discrimination case under this head alleges that the College imposed terms, or proposed to impose terms:

a) with which the First Complainant 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.

[44] The term which it is said was imposed with which he was not able to comply was that he sit the examination on the due date, failing which his mark for English might be adversely affected.

[45] Section 11 of the Act provides as follows

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

(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.

[46] 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.

[47] 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.

[48] The '*term*' relied upon here is that he was required to sit the exam on the due date allocated for other students to sit it (or perhaps on the adjourned date when he was otherwise likely to be required to sit it). In my view even if that had occurred, which I find that it did not, it does not constitute discrimination against him 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). That is, in my view, because the decision made to dissuade him, or even prevent him from sitting that examination, occurred in the absence of any objection on his part to his not sitting that exam. As Ms Kissick explained, he could have but did not request an opportunity to sit that exam the next day, during the lunch break or any other time outside of class hours. Moreover, the decision made by her, albeit one which prima facie may have deprived him of whatever marks he might otherwise have achieved for the work, was designed to improve his mark in other areas of assessed work. Hence the decision not to have him sit the examination was not because of any impairment, in consequence of it. Rather it was because of a perception that, having regard to the existence of his health impairment he would benefit from not sitting that exam, but being enabled to participate in the ongoing learning activity of the rest of the English class.

[49] Even were I to have concluded that there was a relevant term within the meaning of s 11 of the Act, I would have accepted that the imposition of that term in this case was reasonable within the meaning of that term in s 11(1)(c). Although the First Respondent bore the onus of establishing that it was so reasonable pursuant to s 205 of the Act, in my view it satisfies the accepted test enunciated by the Court of Appeal in the early referenced decision of *JM v QFG and GK*. There 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 and all the circumstances, including those specified in section 11(2) must be taken into account*'. To similar effect are comments in *Secretary Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 at 263 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'.

[50] In the circumstances I have described, the claim that he was discriminated against by reason of any of Mr Kissick's conduct fails. Her decision was in no way motivated by or was a consequence of any impairment on his part. The fact that he had earlier missed the exam may well have been caused by his impairment, although the evidence is not clear on this subject. The fact that he was '*denied*' the opportunity to sit the exam on the later date when it was proposed that he would was a decision motivated by good faith considerations and professional judgment which were seen to be in his best interests.

[51] Even had I been able to find this was discriminatory conduct, I would not have regarded the incident as being worthy of a significant compensatory award. There was no suggestion whatsoever that the First Complainant had any kind of adverse reaction to the decision, or any negative consequence flowed to him. Had I upheld this complaint I would have considered an appropriate compensation award to be $1,000.00 inclusive of interest.

The sick room incident

[52] A further ground of complaint by the First Complainant concerned an incident which occurred on 6 September 2010. It is alleged that on that date there was discriminatory conduct on behalf of the College, through the actions of the First Respondent's home class teacher, Mr Johnson. The basis for this complaint is that Mr Johnson is said to have walked with the First Complainant to the sick room that day in circumstances where he was on notice that he should not do so because of the First Complainant's health problems or heart concerns. It is common ground that Mr Johnson did walk him to the sick room that day. As explained from the Bar table by the Third Complainant, the real complaint here is not that in fact anything flowed from what was done that day, nor were there any adverse consequences for her son, but rather that there could have been.

[53] Mr Johnson presented as an interested and sympathetic supporter of the First Complainant and showed some considerable empathy toward the First Complainant and his health concerns. In particular Mr Johnson was fully aware of the nature and seriousness of his heart condition, and knew that it was potentially life threatening. He was aware that an instruction had been issued that in circumstances where there was recognised dizziness and the like, that his pupil was not to be walked to the sick room. There were alternative means by which he could have been taken to the sick room, for example a wheel chair. But on that day, it came to Mr Johnson's attention that the First Complainant was sitting at the foot of some stairs, in a relatively public place at the College, and was crying. Other students were passing him by and looking at him. As his home class teacher he went down to seek to comfort him and asked him a series of questions to find out what was the problem. I accept that it was explained by the First Complainant that he was anxious about climbing the stairs because he had had a heart related episode on the previous

weekend. Mr Johnson then expressed sympathy for the First Complainant and asked him what was happening to him. He asked him if he was having problems. The First Complainant said that he was, but that he was just anxious about the climbing the stairs; he was worried about whether what had happened the weekend before was going to happen again. Mr Johnson's evidence, which I accept, is that then he said to the First Complainant that if he was having a problem with the stairs, that he could walk with him up to the sick bay. And to that they mutually agreed. It was suggested in cross-examination of Mr Johnson that he did not in fact know what the problem was. His evidence, which I accept, was that whilst that was true initially, after asking a series of questions of the First Complainant, he had satisfied himself that there was not a problem as such. He was diligent to ensure that he understood what the First Complainant's condition was. He accepted what he had been told by the First Complainant, namely that he was not having any cardiac problem at that time.

[54] There is no suggestion that there were any other symptoms present which were of a kind which would have led him to a different view, or to bring into play the prohibition upon the First Complainant being walked to the sick room. They did both walk to the sick room. It was not apparent that what was occurring that day was anything apart from anxiety itself associated with the First Complainant's concerns at walking up stairs after the previous weekend's incident.

[55] I am not satisfied that the conduct in question was in any way discriminatory, or that Mr Johnson could or ought to have done anything different to avoid the situation with which he was presented. The distress in what the First Complainant found was in no way brought about or exacerbated by anything that Mr Johnson did subsequently. I therefore find this complaint is not made out, but had it been, I would not have regarded it as worthy of other than a nominal compensatory award.

The disability comparison issue

[56] The next issue raised by the First Complainant concerns a statement alleged to have been made to him by the Second Respondent, who was the Sports Master at the College. It is alleged that it arose in the context of a discussion about whether he might be required to, or would attend the year 10 camp which was generally regarded as compulsory for students at the College. The camp was typically held for a period of 4 weeks and was held at a place known as the Googa Camp near Blackbutt, a place approximately 2 hours northwest of Brisbane. The camp took place in May 2009, and involved the 10th grade students being involved in various kinds of physical activity at the camp, no doubt designed to encourage non-academic skills, bushcraft and other skills, the detail of which I shall return to.

[57] The issue of complaint concerns the fact that, in April 2009, it had been decided by the First and Third Complainants that he would not be attending the Googa Camp. The allegation made is that Mr Rackley, the

Second Respondent is alleged to have made a statement to the First Complainant the substance of which was that '*blind students, deaf students, midgets and a mentally impaired student*' had attended the camp previously; and if those students could attend it, so could the First Complainant.

[58] I have been able to observe in the course of the hearing, that the person who took greatest and possibly the only offence at whatever statement was apparently made by Mr Rackley, was a person who was not there when it was made, namely the Third Complainant. She became quite emotional in the course of the hearing whilst Mr Rackley was giving his evidence concerning this statement. And it became clear that she was extremely sensitive to the idea of her children being compared with other persons who might have had disabilities, of the kind that might have included blindness, and those who had suffered from '*dwarfism*'. It was not immediately obvious why such offence would be taken by a parent of a child who himself was impaired and against whom it was alleged there had been discrimination on the basis of his impairment. But be that as it may, and as best I can gather it, the complaint appears not to have been so much that he was compared with other persons with disabilities, but rather that it was not appreciated that the First Complainant's disabilities were more serious than any of those whom those others mentioned. Views may readily differ about whether that was a legitimate basis for any complaint. Obviously each impairment was a significant one, but in the context of a discussion about attendance at a school camp in such a location, impairment might have serious implications for what a student might do.

[59] But the real issue here is that whether one accepts the version given in the First Complainant's statement as to what was said, or the version given by Mr Rackley. Mr Rackley said, and I accept, that the intent of what was said was to encourage the First Complainant to actually attend and enjoy the camp. It was thought to be part of the responsibility of the Sports Master to encourage participation in outdoor activities, such as those that would be provided at the camp.

[60] In his statement, the First Complainant said that in the course of a discussion about an explanation about his heart condition, Mr Rackley had said to him in front of other students that other students with various kinds of disabilities ('*deaf students, midgets and mentally impaired students*') had attended the Googa Camp conducted by the College and that if those students could attend it, so could he. In his statement the First Complainant contends that this amounted to direct discrimination because it involved treating him '*less favourably than other students present without the attribute, by making derogatory and/or critical comparisons between (the First Complainant) and other people with impairments*'.

[61] Even on the First Complainant's version of those events, there is no reasonable basis to contend that such a statement was derogatory of him, compared with persons who had no such impairments. At worst it might be regarded as showing, perhaps a lack of sensitivity, and probably

evidence of a rather robust approach to the encouragement of students to participate with their fellow students in outdoor and sporting activity. My impression from having observed Mr Rackley in the witness box, is that although enthusiastic, and certainly robust in the way that he expressed himself, it was easy to see that he might have expressed his genuinely felt views for the benefit of his charges rather strongly, and had shown that on other occasions in his dealings with even with First Complainant during periods when students were meant to be at sport. He was a strong advocate for the idea that everyone ought to participate in sport. This was not intended to be something that showed any disregard for any of the health concerns of the First Complainant. It was just a general attitude that was evident from not only the manner, but the content of his evidence.

[62] Mr Rackley presented as a witness who was frank in his dealing with the issues insofar as they had involved him, to the point where he made an open apology in the course of his evidence to the First Complainant and his mother for any offence they might have taken to his statements. This led to a statement of appreciation to Mr Rackley whilst in the witness box, and also whilst leaving the court.

[63] Be that as it may, I accept Mr Rackley's evidence that he did not make any adverse comparison whatsoever of the First Complainant with other persons who had impairments. I accept his evidence that he used some of the words attributed to him, but they have been reconstructed into a sentence he did not use. I would not have been surprised if there had been evidence that Mr Rackley had said similar things to persons without disabilities who were nervous about the idea of attending the camp or about their ability to do anything useful at the camp. There was evidence which I accept, that many parents of children, and some children become distressed at the point where their children leave for the 4 week camp. And there is natural concern by students about whether they can do some of the outdoor activities they would be asked to do. As explained in Mr Rackley's testimony, which I accept, the topic came up because he had overheard the First Complainant talking with other students in the Sport's office and discussing the Googa Camp. The First Complainant mentioned that he was going to the camp the following week, and then made a statement to the effect that '*not that I'd be able to do much anyhow*'. Mr Rackley's response, by way of encouragement to him, was that he would be able to get some benefit out of the programs that Googa conducted, and that lots of students achieved benefit from the program, and gave an example of a student who had dwarfism and arthritis who attended even though he could not do the walk and had made a point of participating despite his physical difficulties. In Mr Rackley's statement he mentioned that he was trying to encourage the First Complainant to adopt a positive attitude to the activities he would try and to accept that they would tailor the activities to his abilities as they had for other students with impairments. He accepted that he may have said this in a somewhat abrupt, or abbreviated way.

[64] Apart from the obvious reactions of the Third Complainant herself to what she understood Mr Rackley to have said, there was no evidence that the First Complainant himself suffered any adverse consequences from the making of those statements to him. On the 4th day of the hearing, the Third Complainant withdrew the claim against Mr Rackley. I have referenced the evidence on his subject because of the seriousness of this issue, insofar as it might affect Mr Rackley. And because, although he had apologised publicly for offence he may have caused, he was not given the benefit of knowing that his conduct was not in fact properly open to the claims made in respect of it. Also because the resolution of the issue was of assistance in making findings going to credit. This complaint would have been dismissed on the basis that it had no substance had it not been abandoned.

The Googa Camp issues

[65] The third issue concerns complaints about the way in which the First Complainant was actually treated when he attended the school camp in early May 2009. His sister, the Second Respondent was also at the camp that year. She also lodged a complaint to the ADCQ over her treatment there.

[66] There is a considerable body of evidence which deals with the circumstances by which the First Complainant came to attend that camp, and whether he attended by his own free will, or was in effect threatened into submission that he should attend.

[67] It had been the practice prior to 2009 for the College to have 10th grade students attend the Googa Camp, held on College property which was former forestry land.

[68] The stated goals in having students attend Googa Camp in year 10 were described as:

a. To develop in participants an understanding of human being's relationship to the physical and biological aspects of God's creation as expressed in the Australian countryside;

b. To promote initiative and self-reliance to students by presenting a challenge beyond that presented in the usual academic and sporting areas of the school;

c. To increase the opportunity for participants to develop a sense of cooperation, interdependence and community spirit and to encourage self expression;

d. To deepen the participants' spiritual life and encourage interest in the work of the schools and the church.

[69] All parents sign an agreement when they enrol children at the College acknowledging that attendance is compulsory unless there is an exemption granted. The Third Complainant signed that agreement at the

time of enrolment of her children in 2008.

[70] In circumstances which I will describe shortly, whilst on the camp the First Complainant essentially decided to stop eating, or to substantially reduce his food intake. This may have been intended to register his protest at being required to attend the camp when he or his mother did not wish that he do so. In the course of undertaking a 3 day hike, he collapsed or fainted on the 2nd day, was assisted by the ambulance to return to the camp huts, but was then required to return to the hike the next day. There is some factual dispute, about whether the hike was in rugged terrain, or whether it was an easy grade walk. I accept that clearly some was on tracks but some may not have been. Some was through bush, some was not. As I have said, this area was previously forestry land. It was not virgin forest. Some of it involved hills and embankments. It is unnecessary to describe what might have been encountered in such bushland. Putting aside the First Complainant's health issues, he appeared to me to be a young man with a good physique, and apart from the effect of external influences upon him, someone who would have enjoyed 4 weeks in the relative '*wilderness*', with his fellow students. There is evidence which I accept that he had in fact been enjoying the camp.

[71] In the end the College authorities decided that he should be returned home from the camp, and no longer participate in the last 2 weeks' activities. Because his mother could not collect him, he was placed on a public bus, along with other members of the public, and sent back to a north Brisbane train station close to where he lived, so that his mother could collect him.

[72] It is submitted that this treatment in either not making arrangements for reasonably alternative activities other than hiking, and leaving him to return on the bus '*unsupervised*', amounted to discriminatory conduct on the part of the College, and also on the part of the Third Respondent Mr Stoltz, the School Principal at the time.

[73] In the First Complainant's '*Statement of Evidence*', most of which is a narrative in the third person, he provides little detail of his own knowledge of how he came to be required to attend that camp. I have no doubt from reading it out that most if not all was written by his mother. It lacks any version of events that involves his own experiences. What is asserted is that on multiple occasions his mother requested the College to excuse him from attending the camp, having regard to his impairment. It was suggested that this was reflective of her belief that there would be an activity of a '*strenuous physical nature*' at the camp.

[74] There can be no doubt in light of the evidence of Dr Statis, his treating psychiatrist, that his mother expressed concern about his ability to deal with what might be presented at the camp and as to whether he would be presented with any risks in relation to his participation in the events at the camp. It is asserted that the College refused those requests and insisted that he attend. This is disputed by the Respondents.

[75] There were then various meetings on 1 and 3 May 2009 at which a College staff member, Ms Gregory, met with the Third Complainant to discuss her concerns about her son's impairment and its influence on his attendance at the camp. By then, the Third Complainant swears Mr Stoltz had already made the suggestion to her that her son's enrolment would be under threat if he did not attend the camp. The Third Complainant said that she decided not to object to his being allowed to go on the camp, she says to avoid having the withdrawal of his enrolment from the College. I reject this evidence as implausible.

[76] As I have said, there is almost nothing in what purports to be the First Complainant's statement which deals with his own perspective about attending that camp, or his own concerns or otherwise about attending. Fortunately he did give some oral evidence about this. That he had concerns about attending can to some degree be ascertained from reports prepared then and later by his treating psychiatrist Dr Statis. A number of Dr Statis' reports were placed into evidence. The first of those on 1 May 2009 written prior to his patient's attendance at the Googa Camp, was addressed to and in fact sent to the College. The report states '*I understand that TT is to participate in a school based 4 week wilderness experience. TT suffers from a potentially life-threatening cardiac problem and sees me in relation to mental health issues associated with condition* (sic)*. Whilst there are no acute mental health reason* (sic) *why he should not attend the camp, given the medical problems, I believe it would be in ... his and his mother's best interests if they were allowed limited contact over this period. I understand that (his mother) is requesting at least a weekly phone call, and I would endorse this request*'. He then invited any questions to be directed to him. Nothing in the report advised against his attendance at the camp.

[77] Dr Statis had clinical notes of an interview he had with the First and Third Complainants in April 2009 in which he recorded the First Complainant as stating he was not wanting to go to the camp, as having been told he would be unable to do a number of the activities that would be proposed there, that he would rather stay home, and that he did not want to be involved in a '*wilderness experience*'. In that meeting the Third Complainant had indicated that she was concerned about what might happen if he went. It records that Dr Statis and his patient then engaged in a number of '*problem solving*' scenarios to do with what might happen when he was at the camp. As I read it, nothing in that 1 May report or the April clinical notes suggests that the doctor was adverse at all to the proposal that the First Complainant attend the camp. That was, despite his having been the First Complainant's doctor since about August 2007, and having a detailed understanding of his health problems. In his oral testimony Dr Statis said that he had not been asked to give permission for his patient to attend. He accepted that based on what he knew to be the anxiety of his patient in the knowledge that he would be going to the camp, he knew that his patient's anxieties were reasonably based. He accepted that it was clear that the anxieties of his patient were separate from those which his mother had.

[78] Dr Statis was not contacted at any stage by the First or Third Complainants about the events that did occur at the camp until much later, however, there may be reasons for that which are to do with access. Dr Statis had the events which had occurred during the hike subsequently recounted to him by the First Complainant. Initially Dr Statis described what he eventually referred to as a '*fainting*' incident whilst at the camp, as being an arrhythmic incident. He was shown an ambulance report which referenced the fact that on the day in question the First Complainant had complained of dizziness and shortness of breath, in a short or brief episode, with no chest pain and no attendant sensory loss present. The ambulance officers concluded that the cause of the fainting was low blood sugar probably caused by the First Complainant stopping eating for a few days. These comments were contained in a detailed ambulance officer's report which was not apparently provided to Dr Statis at any time before he gave evidence. Notwithstanding that, he did not consider that his views would differ as to what the consequences were for the First Complainant as a result of the events at the camp. Dr Statis was of course a psychiatrist, not a cardiac specialist as he freely accepted and noted in qualifying his views.

[79] One of the things that is of concern is the direct conflict between the evidence of Dr Statis as to what had led to the First Complainant diminishing his food intake whilst on camp, and that of the First Complainant himself. Dr Statis had not ever been told that the First Complainant had been starving himself or attempting to starve himself on the camp. Rather, the report to him had been that the First Complainant had stopped eating, except for taking a few snacks and that he had fainted. As I have said, he explained this as a probable consequence of the First Complainant's own anxiety reaction. Dr Statis said that the First Complainant '*going off*' food was to do with the anxiety, and that he wasn't protesting, or manipulating staff. This was in direct conflict with the evidence of the First Complainant himself, who in his evidence in chief said that he had starved himself of food for a week to try to get out of the camp. The First Complainant said that his friends had reported his conduct to the kitchen staff. He said he had done this because he did not want to be at the camp.

[80] It is difficult to reconcile this conflicting evidence, however I think it probably likely, having regard to the fact that the First Complainant was adamant that he did not want to attend the camp for various reasons, that he did intentionally bring about a situation in which he became undernourished, and this may have had some influence on whether he fainted or '*collapsed*', as he put it. Whether this was the cause of his collapse or not cannot be known for certain. What is known, and is mentioned in the two reports from Dr Statis dated 16 February 2010, the substance of which I accept, is that as a result of the First Complainant's understanding of his life threatening arrhythmias and which may be precipitated by certain types of exercise, he also suffered a level of associated anxiety. This was explained as his having an acute sense that he might die as a result of some kind of relatively un-strenuous activity,

like climbing a set of stairs. As Dr Statis explained, since one can't say what the risks of death are, there can be a level of anxiety in the patient which itself can mirror the cardio system problems. In Dr Statis' view, which I accept, the First Complainant could differentiate between the anxiety associated with having this condition, and cardiac events. On the other hand, there was evidence that the anxiety itself might bring on such an event. So it would seem each fed upon the other. Equally of likely concern to the First Complainant, the doctor said and I accept, was that his presence there might have the effect of diminishing the experience of others, particularly where he was going to go on a 3 day hike with them. In those circumstances, Dr Statis concluded, it is not difficult to imagine a young student who was in distress because he could not complete many of the activities which other students were doing, or because he could see the other students doing things he couldn't.

[81] After the First Complainant returned from the camp, Dr Statis had a lengthy phone call with the Third Complainant where the events at Googa were in part apparently recounted to him. The impression given to him, particularly by the Third Complainant, was that the College had failed to take into account his individual needs when determining his suitability to attend the camp and had not provided appropriate alternative activities for him while on the camp. On the other hand, the First Complainant's own view was that he was relieved that the camp was over. The doctor diagnosed an acute stress reaction as a result of having been sent to the camp. This reaction settled, and in his opinion there was no long standing significant or pervasive mental health complications arising from it.

[82] Whatever may have been the Third Complainant's perception about whether she felt under pressure in allowing him to go to the camp, or whether she believed she had in fact been threatened with his being asked to leave the College if he did not attend the camp, it is clear that the College went some way toward recognising her concerns and recognising his impairment and its consequences. College staff perhaps underestimated the extent to which he did not want to attend the camp, and the ways in which it would bring about a state of anxiety as his reaction to it. In an alternate version of his 16 February 2010 report, Dr Statis specifically mentions the fact that the Third Complainant had mentioned that she had made a number of requests to the College asking that he be exempt because of her concern about its remote location and the level of physical activity. But in his main report which dealt with the issue, the doctor recounted that assurances had been given to the First and Third Complainants that it was recognised that although he would be unable to fully participate in all camp requirements, he would be kept busy with other activities.

[83] Indeed for that purpose the College, in consultation with the First Complainant's GP, had identified the specific range of activities which he could safely and healthily be involved at this camp. One of those was to go on a 3 day hike. There was nothing to suggest in any of the material that this hike was particularly strenuous and I accept that it was not. The

group he was in had an adult leader, who gave evidence, which I accept, of the First Complainant's apparent enjoyment of the hike up until the moment he fainted. The First Complainant himself agreed that he had been out in front of the group enthusiastically leading them at some point. The ambulance report concerning the collapse incident referred to it as an easy grade hike. It was described in the First Complainant's statement as a hike in '*rugged terrain*'. The expression used in Dr Statis' reports is that it was '*a wilderness camp*'. As I have said before, the Third Complainant at one point referred to it as a '*survival camp*'. The objective evidence does not suggest that this hike was particularly strenuous, nor for that matter that at the time of his collapse, the First Complainant was exhausted or under excessive stress as a result of the walk itself. It was on the 2nd day of the hike, about 2 hours into it. He was carrying a pack, just as each boy was.

[84] The conditions on the hike were described by the Hike Leader, Mr Mark Wilson. He was there for 2 of the 3 days when the First Complainant was on the 3 day hike. He gave evidence, which I accept, that as Hike Leader he was in supervision of the group at all relevant times, and they hiked some 8 to 10 kilometres per day. He rejected the suggestion put to him that it was a 20 kilometre per day hike and explained that there were a range of hikes available, and students were given a choice as to which they would go on. A 20 kilometre per day hike was a difficult hike and to be able to do it students would have been assessed. According to him, the First Complainant would never have been permitted to undertake such a difficult hike. He described the area in which they hiked as generally roads, whether gazetted gravel roads or farm accessible tracks. This is to some degree inconsistent with other objective evidence about the terrain, but I accept that the area where the First Complainant collapsed, although not actually flat, was an easy incline and that it was in undulating open country. The First Complainant was wearing a pack supplied to all hikers. Generally the packs were 40 litre packs, but they were not necessarily fully packed. Mr Wilson gave evidence, which I accept, that the First Complainant's pack was not fully packed whilst they hiked. The College had provided logistics support for the hike, so that the heavier items of camping equipment were transported by vehicles to the camping sites for each night's camp. Therefore the students needed only carry light items and they were distributed amongst the students to carry.

[85] As I have said, he gave evidence of enthusiastic participation by the First Complainant in the hike, principally on the day after he returned following his fainting incident on the 1st day. He had a conversation with the Third Complainant by telephone in which she confirmed that she was satisfied with the treatment her son had received, confirmed that she was happy that he was eating again, and either made no mention of having any objection to her son continuing on the camp, or actually said words which gave the impression to Mr Wilson that she felt that way. She did not give evidence of having said otherwise, although she insisted that she had certainly raised that objection, and insisted on her son being brought home in other conversations she had with other staff.

[86] No doubt a combination of factors, including his serious anxiety about even being there, the influence his presence might have on his peers, and the fact that he had not eaten any significant amount of food for some days before the hike would have contributed to the events which unfolded.

[87] After the fainting and then ambulance treatment had been administered, and he had rested, the First Complainant went back out on the hike the next day before he was finally sent back to the quarters, then home on a bus. The contention made is that there was discrimination against the First Complainant in failing to arrange '*reasonable alternative activities that is, alternatives to the "strenuous" physical activities he could not do for him to undertake*' whilst on the camp. Alternatively it is alleged that he was subjected to indirect discrimination because terms were imposed upon him which by reason of his attribute with which he was not able to comply and with which a high proportion of students who did not have that attribute were able to comply. The suggested conditions were that enrolment would be terminated if he did not attend the camp and undertake '*certain physically strenuous activities*'. So at the heart of this part of the case is the assertion that such a threat to terminate his enrolment was made, expressly or by implication.

[88] It is difficult to tease out from the report from Dr Statis first made 2009 any clear statement of concern that the First Complainant would be attending the camp at all and participating in any of its activities. On the contrary, his emphasis was upon ensuring that his patient was able to communicate with his mother both in writing and once per week by telephone whilst there. This would not suggest to me, absent some other evidence, that the limited range of activities in which his GP thought he could he participate was thought unsuitable either by Dr Statis, or his other specialist, Dr Slaughter. Dr Slaughter was a paediatrician who also wrote a report in April 2009 just prior to the First Complainant's attendance at the camp. That report mentioned that the First Complainant '*should not be exposed to more than moderate levels of activity. He should certainly be restricted from running and other vigorous activities*'. It mentions the risk of his fainting due to his hypertrophic cardiomyopathy and that this risk was present '*while he is exercising in water, climbing or riding bikes. TT should be restricted from such activities or very closely supervised to ensure that he comes to no harm*'. Another report from his GP, Dr Briggs, dated 2 April 2009, referred to his need for '*strict supervision for all activities*' and the avoidance of '*any activity which could place him at risk or endanger, e.g. working at heights, more than moderate levels of exertion*'.

[89] It should be noted that none of those treating practitioners made specific mention of any concern that anxiety associated with attending the camp itself was a matter of serious concern, independently of the question of whether he was subjected to strenuous activity or any activity which might bring on an arrhythmic episode. Dr Slaughter accepted that a moderate level of activity for the First Complainant was acceptable, and that would include, for example in the case of walking, walking for perhaps 5km per

day, although certainly not as far as 20km per day. Walking on the level would have been acceptable, but climbing, for example, a 15 degree slope might be too much, in his view.

[90] The First Complainant himself accepted that he had agreed that he could go to and remain at the camp with supervision and agreed to ensure food intake after he had been treated by ambulance officers. He accepted that he was aware that he had an agreement with the College that he would not have to do specific sports except agreed swimming. And that he had never been forced to do sports he was uncomfortable with. After having given that evidence during cross-examination on the 1st day of the hearing, on the 2nd day of the hearing he suggested that perhaps he had in fact been asked to participate in sport that he shouldn't have, but couldn't remember whether he had or not. I find that there is no evidence to support any conclusion that he had been.

[91] The issue here is whether there has been direct or indirect discrimination in either insisting that he attend the camp and/or for asking him to be engaged in the hike and not arranging alternative activities. The College authorities might have benefited from a timely explanation such as that given by Dr Statis in his evidence before me as to the effects of the First Complainant's condition in bringing about anxiety and the effects of anxiety itself on his heart condition. But there was no suggestion that in fact any information of that kind was given to the College prior to the camp occurring.

[92] The extent to which they were aware that there was significant resistance or anxiety on the First Complainant's part about the idea of going is controversial. The Third Complainant had insisted during her cross-examination of various witnesses, and in a report that she had given to Dr Statis that it had been implied to her that if she insisted that her son be kept out of the camp all together, that consideration would be given to whether he would be continued to be enrolled. By the time she came to be cross-examining the Third Respondent, it was being suggested to him not only that this was implied, but that he had actually said that he would reconsider the First Complainant's enrolment if he did not go to the camp. Indeed later it was put to him that the Third Complainant had only agreed with him that her son could go on the program because she was being forced to do so, and that she had asked for her son to be exempt from attendance. Then it was put that in fact that she had even said to him that if her son was made to go, he would '*end up in an ambulance*'. None of this was mentioned in the Third Complainant's own statement nor in any of her evidence up to that point. It seemed to me to have emerged suddenly and out of the blue in the course of cross-examining Mr Stoltz.

[93] Mr Stoltz denied that any person would have been forced to do anything at the College whilst he was Principal and that there was no forcing going on in this case. On his evidence, which I accept, if there had been any objection expressed to him about a pupil going to camp at all, he would have had little hesitation in agreeing to that result. Exemption applications were meant to be made to him and not to other staff. He was the only

person who could grant an exemption. But as he explained, there was a long process which preceded attendance at the camp itself, and parents were heavily involved in that process. There were information sessions and seminars and information booklets provided. The fact that an application to exempt a child, howsoever described might need to have been made, would have been obvious to any parent, and I find it would have been obvious also to the Complainants. He denied that he had said or implied that he would look at the children's enrolment if they did not attend the camp, and I accept that evidence. He gave evidence of having previously exempted other students from attendance, primarily for health related reasons, but also on some occasions simply because a particular parent felt strongly about their child not attending. He treated each case on its merits. As he put it, if any medical practitioner had said that it was inappropriate for either the First or Second Complainants to attend the camp, they would not have gone.

[94] The fact that he was willing to allow a variation to that practice may be readily inferred from the fact that whilst the First Complainant was actually at the camp, Mr Stoltz had written on 13 May 2009 to the Third Complainant indicating that she would be allowed to make greater contract with her son than had been previously allowed or agreed, but that if she was not happy with the contact arrangements, or that proposal, she was welcome to arrange for her son to leave the camp and return home. The record shows that she did not write at that time insisting that that occur, although shortly thereafter events overtook that matter, and the College itself decided to return him home '*for the benefit of all concerned*', as Mr Stoltz put it.

[95] Mr Stoltz had been Principal of this College for 30 years by the time these incidents were occurring. He was the foundation Principal. He had practised for 54 years as a teacher. He was not only a credible witness, but despite clear memory lapses over the events that which had occurred 4 years ago, he did his best to recall the relevant events, and agreed to allow for the possibility that events suggested to him had in fact occurred without his specifically remembering them. An example was his concession that the Third Complainant may have mentioned in their initial parent interview that there had been the use of the word '*discrimination*' against the Third Complainant's children at other schools.

[96] In relation to the decision to send the First Complainant home on a bus, I accept that there was some kind of communication to the Third Complainant of the fact that the decision had been made to return him by bus prior to his having in fact being placed on it. She insists that she was only told about it after he had been put on the bus. But it is common ground that she was unavailable to collect her son and had notified College staff to that effect. Her evidence was that she was too ill to do so. Such a conversation is only likely to have occurred if in fact she was given an opportunity to make arrangements to collect her son herself, and having regard to what seemed to be the meticulous practices that staff at this College adopted, it is scarcely imaginable that they would have not

communicated to her that it would be necessary to put him on a bus. He was not alone on that bus. There were other members of the public on it. His mother knew to collect him from a particular train station at the journey end. The policy of this College was that staff were not in a position where they were travelling in a vehicle alone with a student. The requirement is that there always be 2 staff available if there is an outside of class room encounter. On that day, there were not 2 staff members available to drive the First Complainant home from the camp, so he was put on a bus.

[97] I find that the suggestion that the First Complainant was forced to attend the camp, expressly or impliedly, or otherwise face potential consequences for his enrolment is without substance. Whilst the Third Complainant may genuinely feel that this was the choice she was given, nothing that was said in fact by Mr Stoltz, or other staff at the College amounted to such a statement, express or implied. Moreover the decision to return her son home from the camp on a bus, rather than drive him by use of the College staff could not, and did not in this case, constitute discriminatory conduct of any form. The First Complainant's complaints in relation to the Googa camp have no substance, and are dismissed.

The Second Complainant's claims associated with the Googa Camp

[98] As with her brother, the Second Complainant was also sent to the 10th grade Googa Camp in May 2009. A few months prior to her attendance at that camp, she ceased wearing a back brace, which she been required to wear because of her impairment, namely scoliosis. Additionally, she was required to take medication which was associated to some degree with that, and also with the fact that she suffered a form of Tourette's syndrome. There is no dispute that she suffered these impairments and that they met the definition of that term in the Dictionary Schedule to the Act.

[99] Prior to her attending the camp, there had been medical opinion obtained which specified that she was not to carry a backpack which carried a weight greater than 7.5 kilograms and the College agreed she would not be made to do otherwise. The allegation is that through a course of events that happened whilst she was on a hike with other girls, her pack which had been initially weighed when packed and ensured was below 7.5 kilograms, may well have come to carry weight in excess of 7.5 kilograms. Although the case as particularised referenced the claim that a teacher or adult supervisor had over packed her backpack, the Second Complainant's own evidence is that no teacher or adult had in fact done so. What had happened was that one of the other students in her hiking group had insisted she would not carry some of the gear in her own pack. The other students knew that the Second Complainant's backpack was '*underweight*' in the sense that she was carrying less than the rest of them. The Second Complainant gave evidence that her pack had been weighed at 6 kilograms before she departed on the hike. She said she felt herself under pressure from the other students to take up some of the weight which was being dispensed out of the protesting student's bag. She therefore loaded into her own backpack, possibly in front of one of the

adult supervisors, a first aid kit which weighted approximately 3 quarters of a kilogram, and a bag of muesli which may have weighed 1 to 2 kilograms. There is no reliable evidence about what weight the muesli bag had, nor what the total weight of the additional items was.

[100] It is alleged that she was subjected to direct discrimination because she had been treated less favourably than students without an attribute because she was required to carry a weight which was greater than she could safely carry. It was suggested that she was subjected to indirect discrimination because terms were imposed with which she was not able to comply, namely that her enrolment would be terminated if she did not attend the camp, and which she could not meet without being required to take a risk to her health. I have already held that no such term was imposed by the College.

[101] All of this proceeds on the fundamental fallacy that she was in fact required by the College to carry that weight. I find that she was not in fact so required, but even if she was, there is no evidence that her own decision to carry perhaps a kilogram greater than her doctor had recommended was unsafe, or indeed led to any adverse consequences whatsoever for her. In fact her evidence, which I accept, is that she enjoyed the camp and stayed there for the duration of it after her brother was sent home.

[102] The second aspect of the complaint in relation to the Second Complainant's involvement at Googa is that it is said that she was the subject of direct discrimination because she was '*required to be responsible for the dispensation of medication*' that she was required to take and that in some way or another it was known, or ought to be known that she was incapable of dispensing her own medication. Indirect discrimination is alleged, on the basis that again it was said to be a threat that her enrolment would be terminated if she did not attend the camp, and if she could not meet '*without being required to dispense her medication, and risking her health by doing so*'. The evidence from those who administered the camp, and oversaw the activities of the students is that whilst there were controls in place to ensure that students who were to take medication actually did so, and to accurately identify who it was that was to take medication, that all students were required to administer their own. I accept this evidence.

[103] In this particular case, either through the inadvertence of the Second Complainant herself, or because of ignorance on the part of the supervisors as to precisely what dose of which of the types of medication she was to take was the correct dose, for a number of days during the camp the Second Complainant took 4 times the required dose of one type of medication, and a quarter of the required dose of another because of a mix up.

[104] The success of the complaint on this issue essentially depends upon accepting the proposition that it is discriminatory to require a 10th grade student of at least average intelligence to administer her own medication

whilst on a school camp. The Third Complainant gave evidence that she did not allow her child to administer her own medication whilst in their home. But there is no reliable evidence that she made that requirement clear to any person at the College, or insisted that her daughter not be responsible for administering her own medication for any particular reason. It would have been a simple matter for the Third Complainant herself to have sorted the medication into the required doses, and indeed it was her evidence that she had to a certain degree done so. There was a substantial number of students at this camp. It does not seem to me that there was anything about the personality or demeanour of the Second Complainant which would have suggested to a reasonable person that, whilst on that camp, she was incapable of administering medication with which she was well accustomed. Even if views might differ about this, conceptually the claim is difficult, because no aspect of the requirement that she attend the camp depended upon discrimination on the basis of an impairment, nor was the requirement that she take her medication discriminatory on the basis of an impairment. All students with impairments, or indeed any that required to take medication, were required to dispense their own. In those circumstances it seems to me that the complaint is without substance.

The victimisation cases

[105] The first complaint made to the ADCQ by any of the Complainants was filed on 15 April 2010. It raised complaints concerning the attendance at Googa of the First Complainant, and the detention room issue.

[106] Subsequently there were further complaints filed in the Commission in 2010.

[107] Amongst a number of complaints which were made on 24 June 2010 there was included and there was referred to this Tribunal an allegation that the Third Complainant was victimised because teachers at the College had been directed not to talk to her, allegedly because of her having made the first complaint of 15 April 2010. No mention of this allegation of victimisation was mentioned in the statements of contentions which were filed on behalf of the Third Complainant. It was explained to me in final addresses that this was an oversight and that indeed the Third Complainant continued to advance a case that she was victimised as the consequence of her having filed the first complaint by the making of that direction to teaching staff.

[108] Section 129 of the Act makes it an offence to victimise another person. Victimisation is defined in s 130 of the Act as follows:

> **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

(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).

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

(c) supplying information and producing documents to a person who is performing a function under the Act; and

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

[109] 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.

[110] 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.[1]

[111] I turn then to the facts put forward by the Third Complainant in support of her first victimisation claim. The first apparent reference to the relevant conduct appears in the complaint to the ADCQ of 24 June 2010 where, after referring to correspondence from Mrs Butler the Principal to her complaining that she had intimidated teachers and others, she asserts that she believed herself victimised due to her complaint. She based this on what she said was a conversation she had had with Mrs Butler's secretary, Mrs Farr, a few weeks earlier where Mrs Farr had supposedly said to her that the teachers were not allowed to talk to her '*due to your discrimination complaint*'. Mrs Farr did not give evidence.

[112] Fundamentally, the difficulty with the complaint is that the objective facts show that the decision to restrict the Third Complainant's access to the teaching and other staff was not one made by Mrs Farr, but was made by the Principal. Moreover it was a decision made on or before 19 January 2009, approximately 3 months before the first complaint was filed in the Commission. The material shows that the first mention of any threat or any possible complaint to the Commission to raise issues of discrimination was on 1 February 2010, that is after the 19 January decision had been made and communicated.

[113] The statement of the Principal, Mrs Butler sets out in careful detail how that decision came to be made. She only took on the role as Principal in January 2010, and in a conversation before the school year started she had met with the Third Complainant, whom she said '*continually interrupted, would not let me speak and so I eventually hung up*'. Also in the first weeks of January she had received expressions of concern from a number of staff about the behaviour of the Third Complainant, including what was described as '*frequent, often abusive or critical communications*'. I accept her evidence on this issue.

[114] In her letter of 19 January 2010, Mrs Butler made reference to a conversation she and the Third Complainant had on the telephone the previous Monday. It dealt with some other issues not relevant for present purposes but then contained the following:

> I also made the request that you meet with me at the College to discuss protocols relating to your interactions with College staff. It is important for us to establish these protocols to ensure that relationships are harmonious and that communication with staff and volunteers is cordial and clear. Effective partnerships with parents are the highest priority at Grace College and also I have a duty of care for our staff in their workplace. I would request that, until this conversation has been held, that you do not communicate with staff of

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[1] 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.

> the College personally or by phone. If you have any requests, please contact the office by email or in writing. I trust that you would be able to contact Louise very quickly to arrange the face to face meeting with me so that we can restore normal working relationships.

[115] There is evidence that in or about January 2012 one of the teachers to whom the Third Complainant had sought to discuss matters had told her that teachers had been instructed not to meet or discuss matters with her. After a further meeting on 25 January 2010 the Principal wrote another letter to the Third Complainant on 29 January 2010 notifying her that she should only contact staff at the College in writing via post or email to the College email address, and that she could contact the Principal's assistant to arrange any communication with the Principal herself.

[116] The next development or communication on this subject was on 10 June 2010, that is after the initial complaint to the ADCQ. In a letter to her of that date the Third Complainant was notified that she could only contact the College by written postal communication with correspondence sent to the College's solicitors. This was said to be based on the alleged repeated harassment by the Third Complainant of College staff within and outside of the College grounds, and harassment of parent volunteers at the College. There has been no hearing of all the facts surrounding these allegations and I do not make specific findings in relation to them. It suffices for present purposes to say that I accept that the Principal was bona fide in her belief that it was necessary to restrict communication for the reasons that she expressed in her correspondence and explained in her evidence, and that no part of her decisions in that regard was materially because of any complaint, or threat to make a complaint of discriminatory conduct. I therefore find that that complaint is without substance, and it is dismissed.

The second victimisation complaint

[117] A conciliation conference was held at the ADCQ on 5 August 2010, but failed to resolve the numerous matters in dispute between the Complainants and the Respondents. There was a considerable body of correspondence which passed between the College, and the Third Complainant on a wide range of issues in the period from when the first complaint was filed in April 2010 until 13 December 2010 when the College wrote to the Third Complainant indicating that it was giving notice terminating the enrolment of the three children of the Third Respondent who were at that College. That included the enrolment of both the First and Second Complainants. At that stage the First and Second Complainants had just finished 11th grade. Between the time when the first complaint was filed in the ADCQ until the termination of their enrolment, there was no reference in any of the correspondence which passed between the parties as to whether the College took objection to the bringing of those complaints or invited or insisted upon them being withdrawn. There was nothing which referenced or suggested any particular sensitivity on the part of the College to the fact those complaints existed.

[118] In the notice notifying of the decision to terminate the enrolment there are grounds set out for the relevant decision. Those grounds referred in each case to the evidence of conduct by the Third Complainant and which it was suggested showed she had bullied, harassed and made false or vexatious complaints about various staff members of the College. It also referenced similar conduct alleged to have occurred or been directed to members of the College community, including other students and parents. The Third Complainant swore that there was absolutely no basis for any of these accusations. She denied having engaged in any such conduct and in some cases denied even having met the individual to whom the relevant conduct was directed. In one case it involved a particular student at the College who was a student leader, and with respect, to whom it was suggested she had been harassed and insulted by the Third Complainant at a shopping centre. A considerable body of the evidence of the Third Complainant was concerned with the accuracy or otherwise of these allegations, or more particularly what the precise circumstances were that had actually prevailed. That evidence does not persuade me that relevantly, the Principal of the College who made the decision and who wrote the relevant letter, did not genuinely believe that the relevant incidents had occurred in the way that the termination letter describes them. I accept that she did genuinely consider herself entitled to terminate the enrolment and did so on the bases set out in the letter.

[119] There is no contemporaneous document which in any way suggests that the College had, as a material consideration in making the decision to terminate the enrolment, the fact of the existence of the complaint to the ADCQ, or any threat being any other complaint. The Third Complainant was unable to point to any specific evidence which demonstrated that any part of the thinking of the College or its staff in deciding to terminate the enrolment was other than that stated by Mrs Butler. Essentially her case was that the Principal at the time conspired, together with others to have false allegations made against the Third Complainant with a view to creating an environment in which that termination letter could be sent. It was suggested that the case was based upon what '*must have happened*' for such a letter to have been able to be written. Whilst I have no reason to doubt that the Third Complainant genuinely believed and indeed continues to believe that such a conspiracy has occurred, there is not the slightest evidence to support such a claim. On the contrary, I accept that the determination was made by the College on the grounds set out in the termination letter.

[120] Mrs Butler, who made the relevant decision was accused in cross-examination of failing to conduct a proper investigation into the various complaints against the Third Complainant, and as I have said earlier, was looking for other people to make complaints in order to build the case against the Third Complainant. Mrs Butler rejected these contentions. Indeed, her evidence, which I accept, is that she fully anticipated, because of the fact there was already a complaint which had been referred to this Tribunal by the ADCQ that it was likely that the basis for her actions would be investigated in the context of whether it amounted to victimisation. She

went to the trouble to obtain legal advice about what the consequences might be of making any decision based on what might amount to victimisation. She therefore undertook what she described as an '*extremely full investigation of the matter*' in which there were several conferences at which the Third Complainant had the opportunity to fully discuss her contentions. In those meetings the Third Complainant had always denied the acts of alleged harassment towards staff and other persons associated with the College. It had reached a point where by 10 December 2010, the Principal had decided that there was no point in having any further conferences to discuss what the Third Complainant's response to the allegations against her were. She swore that it was no part of her concerns leading to the decision to terminate the enrolment, that the complaints had been made to the ADCQ. She had by then spent hundreds of hours investigating and considering the matters which had been raised against the Third Complainant, and indeed she had been subjected to some criticism by others at the College for failing to act earlier. I accept her evidence on this subject.

[121] The precursor to the making of the Principal's decision is set out in considerable detail in the statement of Mrs Butler. I do not propose to repeat what is said there, suffice it to say that it details a litany of complaints by various members of the College community of confrontations of various kinds with the Third Complainant, including with Mrs Butler herself, and with her secretary. Many, but not all of these instances, were set out in the letter notifying of the termination of the enrolment. Although some of the incidents described in the termination letter involved some staff members whose conduct had been the subject matter of complaints to the ADCQ (for example Mr Curran the legal teacher), the circumstances which had founded the complaint against him, or the fact of the making of any complaint to the ADCQ was not a material consideration in the relevant determination.

[122] It follows that I do not accept that the elements necessary to make out a case of victimisation have been met.

Assessment of compensation

[123] Had I upheld either of or both complaints of victimisation, and having regard to the significant consequences particularly of the decision to terminate the students' enrolment, I consider an award of general compensation of $25,000.00 to be an appropriate figure to reflect the level of distress and inconvenience caused to the Complainants generally in consequence of that decision. In that regard an award in that amount, together with interest of $2,000.00 was awarded in consequence of the cancellation of an enrolment of a high school student in the decision the President in the earlier mentioned decision of *I on behalf of BI v State of Queensland* [2005] QADT 37. Such an award would properly reflect the level of interruption to the childrens' education, particularly that at the end of year 11, and the loss of friendships with those they had established at the College. Precise details of how these incidents affected the Third Complainant and her children are set out in her statement, Exhibit 3 at

paragraphs 122 to 133. There was no significant, or any, challenge to those matters in cross-examination. It was conceded that it would have been appropriate to make an allowance for the costs of new school uniforms and the like resulting from having to change schools at that time. There is no specific evidence of the costs associated with the replacement of school uniforms for the 3 children. I would have been prepared to have allowed a global sum of an amount of $5,000.00 for the cost to the Third Complainant for replacing those uniforms.

[124] I would allow interest on that general compensation and uniform costs at the rate of 10% per annum for the period from 1 January 2011 to date. As I have said both the assessment of general compensation and the interest upon it were contingent upon having upheld those complaints. However each has failed.

[125] Since I have not upheld any of the complainants, it is strictly unnecessary to consider whether apologies might have been considered had they had been upheld. Having regarding to the passage of time since these events and other relevant considerations, I would not have regarded apologies as an appropriate form of relief in this case.

[126] The formal orders therefore shall be that each of the complaints be dismissed.

[127] I have not heard any submissions in relation to what should occur with respect to the costs of the proceeding, however having regard to the provisions of ss 101 and 102 of the QCAT Act and the numerous decisions of this Tribunal which have dealt with the proper interpretation of these provisions, particularly that in *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)* [2010] QCAT 412, I would not have regarded this as a case which justified a departure from the principle set out in s 100, that each party to a proceeding must bear their own costs for the proceeding. Liberty is granted to the parties to apply in respect to any application for costs or ancillary aspects of the orders to be made in this proceeding.