REPUBLIC OF TRINIDAD AND TOBAGO

IN THE EQUAL OPPORTUNITY TRIBUNAL

E.O.T. No. 0005 OF 2018

BETWEEN

DR. PETER HANOOMANSINGH

Complainant

AND

THE UNIVERSITY OF THE WEST INDIES

Respondent

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DECISION

Before H.H. Donna Prowell-Raphael

Appearances: Mr. Ronnie Bissessar instructed by Mr. Varin Gopaul-Gosine for the Complainant.
Mr. Ravi Nanga instructed by Ms. Elena Araujo for the Respondent.

Delivered: September 25, 2019

Contents

THE EQUAL OPPORTUNITY TRIBUNAL

1. The Equal Opportunity Tribunal[1] ('the Tribunal") is an anti-discrimination court established by the Equal Opportunity Act[2] ("the Act"). The Act permits a person who claims that he has been discriminated against to submit[3] *"a written complaint .. setting out the details of the alleged act of discrimination" to* the Equal Opportunity Commission ("the Commission"). If the complaint, after investigation cannot be or is not resolved through conciliation by the Commission, the Commission is mandated, with the consent and on behalf of the Complainant, to institute proceedings before Tribunal for judicial determination of the complaint.

THE COMPLAINT

2. These proceedings were initiated by referral dated July 18 2018 from the Equal Opportunity Commission ('the Commission'). In these proceedings the Complainant is seeking declarations for discrimination and damages pursuant to sections 6 and 8 of the Act, consequential relief and damages.

3. By Notice dated 27 August, 2018 time was fixed for the Complainant to file his Complaint and Particulars thereof on or before the 17 October, 2018 and the Respondent to file its Defence on or before 19 November, 2018. A Case Management Hearing was fixed for 6 December, 2018. By Notice of Application filed 17th October, 2018 the Complainant, applied for an extension of time to file his Complaint with the consent of the Respondent. By order dated 17 October, 2018, the Complainant was granted an extension of time to 30 October 2018 to file his Complaint and the time for the filing of the Respondent's Defence was extended to 30 November, 2018. The Complainant filed the Complaint on 30 October, 2018. The Respondent

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[1] *Equal Opportunity Act.* 41. (1) *For the purposes of this Act, there is hereby established an Equal Opportunity Tribunal (hereinafter referred to as "the Tribunal") which shall be a superior Court of record and shall have in addition to the jurisdiction and powers conferred on it by this Act all the powers inherent in such a Court.*

[2] Ch. 22:03. Laws of the Republic of Trinidad and Tobago.

[3] *Equal Opportunity Act.* s30: 30. *(1) A person who alleges that some other person has discriminated against him or has contravened section 6 or 7 in relation to him may lodge a written complaint with the Commission setting out the details of the alleged act of discrimination.*

entered an Appearance on 9 November, 2018. By Notice of Application filed on 23 November, 2018 the Respondent, with the consent of the Complainant, applied for an extension of time to file its Defence. By order dated 29 November, 2018 the time for filing the Defence was extended to 2 January, 2019 and the Case Management hearing fixed for 6 December, 2018 was adjourned to 3 June, 2019. The Respondent did not seek an extension of time to file an application to challenge the jurisdiction of the Tribunal. The Respondent filed its Defence on 2 January 2019, in which it raised issues challenging the jurisdiction of the Tribunal to hear and determine the complaint.

4. By application dated 21 January 2019, the Respondent seeks the following orders pursuant to Parts 7.13 and 24.1 of the Equal Opportunity Tribunal Rules and Procedure 2016 ('the ETR') and or Parts 26.1 (1)(d) and 27(9)(1) of the Civil Proceedings Rules 1998 ('the CPR'):

   (i) That the time be extended for the Respondent to dispute jurisdiction;

   (ii) A declaration that the Tribunal has no jurisdiction in this matter ('jurisdictional application'); and

   (iii) That the Complainant pays the Respondent's costs.

   This application is supported by the affidavit of Camille Ramcharan ('the Respondent's affidavit') sworn to on 21 January 2019 and filed herein the same day. It is opposed by the affidavit of Varin Gopaul-Gosein ('the Complainant's affidavit') sworn to on 28 January 2019 behalf and filed on 29 January 2019.

THE ISSUES

5. The issues raised for determination are -

   (i) Whether the Tribunal can extend the time for filing an application to challenge its jurisdiction after the Respondent filed its Defence; and

   (ii) Whether the University Visitor (of the Respondent) has exclusive jurisdiction to determine the Complainant's complaint that the Respondent violated the Equal Opportunity Act by allegedly discriminating against him.

THE SUBMISSIONS

The Respondent

6. The Respondent is seeking by limb (i) of its application to have the time for making the jurisdictional application extended. It submits that by the conjoint application of Part 26.1(1)(d)[4] of the CPR and Rule 24.1 of the ETR the Respondent has the power, which it ought to exercise to extend the time for the jurisdictional application to be made. It relies in part on the decision in *Williams v. Trinidad and Tobago Gymnastics Federation & others*[5], where the court in interpreting section 7 of the Arbitration Act[6], accepted that a reservation in the Defence to take a preliminary point on jurisdiction after the Defence was filed, was sufficient to protect the defendant from the stringency of the requirement in that section 7 to take the point before the Defence was filed.

7. By limb (ii), ('the jurisdictional application'), the Respondent contends that the Tribunal ought to decline jurisdiction over hearing this matter on the basis that this matter involves the temporary appointment to an academic office within the Respondent and the exclusive jurisdiction on such matters resides with the University Visitor pursuant to Charter of the University of the West Indies and or its successive amendments ('the Charter').

The Complainant

8. The Complainant does not refute that the Tribunal has the power to extend time, but contends that the Respondent's must also make an application for relief from sanctions. However, even if the Tribunal is minded to treat the application for an extension of time as an application for relief from sanctions, the Respondent has failed to put any evidence before the court upon which it could consider and or grant such relief. The Complainant relies on *West Indies Players Association v. West Indies Cricket Board*[7] .

9. The Complainant disputes that the matter involves a function that falls within the exclusive jurisdiction of the University Visitor and contends instead that the matter involves a complaint

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[4] "26.1 (1) The court (including where appropriate the court of Appeal) may — (a)... (d) extend or shorten the time for compliance with any rule, practice direction or order or direction of the court..."
[5] CV 2016 – 02508.
[6] Chap 5:01.
[7] CV 2011-03130.

of discrimination by victimisation under the Act that is within the exclusive jurisdiction of the Tribunal. He therefore contends that the jurisdictional application ought to be dismissed.

10. The Complainant further submits that no issue as to jurisdiction was taken when the matter was being conciliated at the Commission, and therefore it cannot be taken at the Tribunal stage.

The Respondent's Rebuttal

11. The Respondent in his Reply rebuts the submission of Complainant that *West Indies Players Association v. West Indies Cricket Board* is applicable and seeks to distinguish it on the basis that the tailpiece to Rule 7.17of the ETR "... *is precluded from making any such application during the proceedings.*" ('tailpiece') removes the strictness of the interpretation of Part 9.7 of the CPR by Jones J[8]. The Respondent suggests that the term "*during the proceedings*" should not be interpreted to mean from the initiation of the Complaint at the Tribunal and should be applied only to action taken after the close of pleadings and or the first hearing. It contends therefore that pleadings are not closed and there has been no hearing of the Complaint to date. Therefore it is not precluded from filing the jurisdictional application. It therefore concludes that *West Indies Players Association v. West Indies Cricket Board* is not applicable.

12. The Respondent further rebutted that *Equal Opportunity Commission v. The Attorney General*[9] was not applicable, as it is not authority for the submission that where an objection is not raised at the Commission it cannot be taken at the Tribunal.

LAW AND ANALYSIS

Issue (i) Whether the Tribunal can extend the time for filing an application to challenge its jurisdiction after the Respondent filed its Defence?

Rules 7.13 – 7.17 of the ETR

Rules 7.13 – 7.17 of the ETR treat with the procedure for disputing the Tribunal's jurisdiction.

They provide –

> "*7.13 A Respondent who wishes* –

[8] Now Justice of Appeal.
[9] CV2014-00477

(a) to dispute the Tribunal's jurisdiction to try the complaint; or

(b) to argue that the Tribunal should not exercise its jurisdiction, may apply to the Tribunal by notice for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

7.14 A Respondent who wishes to make such an application must first enter an appearance.

7.15 An application under this subrule must be made within the period for filing a defence.

7.16 An application under subrule 7.15 must be supported by evidence.

7.17 If the Respondent –

(a) enters an appearance; and

(b) does not make such an application within the period for filing a defence,

he is treated as having accepted that the Tribunal has jurisdiction to try the complaint and is precluded from making any such application during the proceedings.

13. Part 9.7 Rules (1) – (5) of the CPR set out the procedure for disputing the court's jurisdiction as follows -

"Procedure for disputing court's jurisdiction

9.7 (1) A defendant who wishes—

(a) to dispute the court's jurisdiction to try the claim; or

(b) to argue that the court should not exercise its jurisdiction,

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first enter an appearance.

(3) An application under this rule must be made within the period for filing a defence. (Rule 10.3 sets out the period for filing a defence).

(4) An application under this rule must be supported by evidence

(5) If the defendant—

(a) enters an appearance; and

(b) does not make such an application within the period for filing a defence,

he is treated as having accepted that the court has jurisdiction to try the claim."

14 Part 9.7 Rules (1) – (5) of the CPR are materially identical to Rules 7.13-7.15 of the ETR save that the CPR does not include the tailpiece in Rule 7.17of the ETR - "*is precluded from making any such application during the proceedings*". As Part 9.7 Rules (1) – (5) of the CPR are materially identical to Rules 7.13 -7.15 of the ETR, in interpreting their meaning, principles, rules and guidance ought to be extracted from decided cases (particularly in this jurisdiction) that considered and applied them. This principle of legal precedent or *stare decisis* is the fabric that underpins the common law system to which our legal system ascribes.

15. In the leading case of *West Indies Players Association v. West Indies Cricket Board* , Jones J. devoted considerable time to interpreting Part 9.7 Rules (1) – (5) of the CPR. The following principles, material to the instant case, can be extracted from the judgment of Jones -

(i) The time for filing the application to challenge jurisdiction must be made within the period after the appearance is filed and before the filing of the Defence, (unless the court fixes a specific time for filing it);

(ii) In the absence of such an application the CPR imposes an automatic sanction that the defendant is deemed to have accepted the jurisdiction of the court;

(iii) Therefore where an application to extend the time to challenge the jurisdiction of the court is made after the Defence has been filed, the application ought to include (or may be treated as) an application for relief from sanctions; and

(iv) Like any application for relief from sanctions, the application to extend the time to challenge the court's jurisdiction must be supported by evidence that it is made promptly, and that the delay was not intentional

16 These principles will therefore apply with due substitution of applicable terms to the corresponding rules in the ETR.

The Tailpiece

17. The issue must then be confronted, if or how are these principles affected by the tailpiece to Rule 7.17 to wit – *"is precluded from making any such application during the proceedings"*.

18. In his Reply the Respondent sought to re-engineer its initial submissions to further the argument that its jurisdictional application was not out of time. As I understand the argument, the Respondent contends that the term "*during the proceedings*" in the tailpiece to Rule 7.17 in the ETR should be interpreted to mean after the close of pleadings or the first hearing. The tailpiece must therefore be interpreted to mean, '*the jurisdictional application is precluded after the close of pleadings...*' The corollary is that it could be made at any time before pleadings are closed. Interpreted in this way, the tailpiece extends the time for filing the jurisdictional application. By this argument, the jurisdictional application was filed before the close of pleadings and therefore it was within the time prescribed by the ETR for filing it. The Respondent therefore contends that *West Indies Players Association v. West Indies Cricket Board* does not apply.

19. A successful outcome of the respondent's arguments in support of limb (i) vitiates the need for that application, as the time for making the jurisdictional application is effectively preserved or made within the stipulated time. This notwithstanding it argues that the Tribunal has the jurisdiction under the CPR 26.1 (1) (6) and or Rule 11.6 of the ETR to extend the time to make the said application.

20. Using a literal approach, *Black's Law Dictionary*[10] defines "*proceedings*" as "*the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the time of entry of judgment* [emphasis mine]". This definition provided by *Black's Law Dictionary* is consistent with good common sense and the common practice of our courts. Proceedings usually commence when the action is initiated and pleadings are part of the proceedings Applying the definition in *Black's,* the term '*during the proceedings*' must therefore mean from the time the complaint is initiated until it is determined by the Tribunal.

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[10] Bryan A. Garner – Editor in Chief. 1990. *Black's Law Dictionary.* 9th edn. London: Thomson Reuters.

21 Notwithstanding that the tailpiece may invite some arguments of imprecision or duplicity, taken in context of the scope of the Rule, the inclusion of the tailpiece can be regarded as introducing a further sanction for tardiness and to repel the notion of 'wiggle' room of the consequences of late filing. Not only is the Respondent treated as having accepted jurisdiction, but unless it complies with the requirement to file his application within the period specified for filing its defence it is prohibited from making an application to challenge jurisdiction at any other time during the proceedings.

22 I do not accept the contention of the Respondent that 'during the proceedings. .' must be interpreted to mean 'after pleadings are closed, thereby giving some leeway to the time for filing the jurisdiction application. Contrary to enlarging the time for filing the jurisdictional application, the sanctions for filing have been strengthened by adding a new sanction that [the Respondent] *"is precluded from making any such application during the proceedings"*.

23. I therefore hold that the tailpiece expressly precludes the making of an application to challenge the jurisdiction of the Tribunal at any time *between the time of initiation of the Complaint and the time of entry of judgment* save within the period when the Appearance is filed and the time fixed for filing the Defence and adds another layer to the sanctions on the Respondent who has failed to file a timely application to resist jurisdiction.

Reservation of the jurisdictional issue in the Defence

24. The argument has been raised by the Respondent that where the issue of jurisdiction is raised in the Defence, then it can be raised later in the proceeding. It contends that the issue falls within the ratio of the decision in *Williams v. Gymnastics*[11] where the court held that the reservation of the preliminary point in the Defence was sufficient to make the filing of the Defence subject to the success of the preliminary point on jurisdiction being taken later in the proceedings.

[11] CV 2016 – 02508.

25 The provision under consideration in *Williams* was section 7[12] of the *Arbitration Act*[13]. This section is materially different from Rules 7.13 – 7.17 of the ETR and or its counterpart in Part 9 of the CPR under consideration. Not only does section 7 of the *Arbitration Act* confer a discretion on the judge that is not reflected in the ETR or the CPR, but it is contained in primary legislation, which would override the relevant Parts of the CPR or the ETR (which are subsidiary legislation) in any event. The rationale in *Williams* is therefore distinguishable and does not apply to the instant application. Indeed the tailpiece becomes even more relevant, in considering the argument that where the issue of jurisprudence is raised in the Defence, then it can be raised later in the proceedings. The tailpiece solidifies the intent that no application to challenge jurisdiction can made after the time specified for doing so by ETR 7.15 and 7.17 has elapsed.

Relief from Sanctions

26. Rule 24.1 of the ETR provides –

> *"24.1 In any case where the foregoing rules do not expressly provide, the existing rules of the Supreme Court of Trinidad and Tobago shall apply mutatis mutandis."*

27. The ETR do not expressly provide for the imposition of and or relief from sanctions for non-compliance with its provisions. The imposition of and or relief from sanctions for non-compliance with its provisions are dealt with in Parts 26.6[14] and 26.7[15] of the CPR. In that

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[12] 7. If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

[13] Chap. 5:01

[14] Court's powers in cases of failure to comply with rules, orders or directions

26.6 (1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply. (2) Where a party has failed to comply with any of these Rules, a direction or any court order, any sanction for non-compliance imposed by the rule or the court order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.8 shall not apply.

[15] Relief from sanctions

26.7 (1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly. (2) An application for relief must be supported by evidence. (3) The court may grant relief only if it is satisfied that— (a) the failure to comply was not intentional; (b) there is a good explanation for the breach; and (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions. (4) In considering whether to grant relief, the court must have regard to— (a) the interests of

event, pursuant to Rule 24.1 of the ETR, Parts 26.6 and Parts 26.7 of the CPR will apply *mutatis mutandis* to proceedings under the ETR and hence to the instant proceedings. The Respondent in seeking to bring an application to extend time to file his jurisdictional application after the time for filing his Defence has elapsed, must make a prompt application that is supported by evidence that the delay is not intentional and that there is a good reason for the failure[16].

Applicable Principles

28 Assimilating the applicable rules of the ETR and the CPR with relevant applicable case law, the applicable principles to the instant case can be summarised as follows -

(i) The time for filing an application to challenge the jurisdiction of the Tribunal or to ask the Tribunal not to exercise its jurisdiction, must be made within the period after the Appearance is filed and before the filing of the Defence (unless the court fixes a another time for filing it);

(ii) If no application to challenge the jurisdiction of the Tribunal is made within the time limited by (i), the ETR imposes the automatic sanctions that the Respondent is deemed to have accepted the jurisdiction of the Tribunal and is precluded from filing an application to challenge its jurisdiction;

(iii) Therefore where an application to extend the time to challenge the jurisdiction of the Tribunal's jurisdiction is made after the Defence has been filed, that application ought to include (or may be treated as) an application for relief from sanctions; and

(iv) The application to extend the time to challenge the Tribunal's jurisdiction must be made promptly, and supported by evidence that the delay was not intentional, and there is a good explanation for the failure to file the application within the prescribed time.

29 Applying the above principles to this instant application, there can be no dispute that under the ETR the jurisdictional application ought to have been filed before the Defence was filed. The Respondent's Defence was due and filed on 2 January 2019. I do not accept the Respondent's

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the administration of justice: (b) whether the failure to comply was due to the party or his attorney: (c) whether the failure to comply has been or can be remedied within a reasonable time; and (d) whether the trial date or any likely trial date can still be met if relief is granted. (5) The court may not order the Respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

[16] *West Indies Players Association v. West Indies Cricket Board* CV 2011 – 03130, 6

submission that the time for making the application was reserved in the Defence or extended by the tailpiece. Taking the Respondent's case as its most liberal, the last day to file the jurisdictional application would have been 2 January 2019, when the Defence was due and in fact filed.

30. The jurisdictional application was not filed until 21 January 2019, some 19 days later. That application is therefore out of time. As a consequence under the ETR, the Respondent is deemed to have accepted the jurisdiction of the Tribunal and is precluded from making the jurisdictional application. To cure this potentially fatal defect, the Respondent must obtain successful applications to extend time to file the jurisdictional application and for relief from sanctions for not doing so in time.

31. There is no dispute that the application for an extension of time prayed in limb (i) is no more than a bare application. This notwithstanding, I am prepared to exercise the discretion to treat the Respondent's application to extend time as an application for relief from sanctions as was done in *West Indies Players Association v. West Indies Cricket Board*. To be successful however, the Respondent's application, must have been made promptly and include evidence that the failure was not intentional and there is a good reason for the delay. The promptitude of the application ought to be considered in the light of the reason for the delay.

32. The evidence in support of the application is contained in the Respondent's affidavit. Paragraphs 1-3 are the customary procedural paragraphs. Paragraphs 4-9 outline the chronology of the Complaint. Paragraphs 10-11 set out the nature of the jurisdictional application. Paragraphs 12-15 summarise the grounds of the jurisdictional application. Paragraphs 16 makes a plea for the grant of the subject application. This is followed by the jurat. The Respondent has provided no evidence whatsoever of its reason for the delay for making the application out of time or to satisfy me that lateness was not intentional. Indeed it has provided no evidence whatsoever as to why the application was not made on or before 2 January 2019, when the Defence was due and filed.

33. This evidential approach is consonant with the Respondent's submissions that the time for making the application was enlarged either by raising the issues of jurisdiction in the Defence or by the "tailpiece'. Had these arguments been accepted then the application to extend time would have been of no moment. These arguments however have not been accepted, and the

precursors to the progress of the jurisdictional application are applications for extension of time and relief from sanctions, with the appropriate evidential support

34. There may have been good reason and explanation for the delay, but the Respondent has not condescended to put it into evidence. Even a bare application to extend time, requires evidential support of the reason for the delay. I am therefore stymied in any consideration as to whether the application was promptly made and or whether the delay was intentional or there is good reason for it. In the premises, an application for relief for sanctions cannot stand, the application to extend time fails, and consequently the jurisdictional application cannot be advanced.

Waiver

35. The Complainant has submitted that the Respondent failed to take the jurisdictional point at the Commission and should not be allowed to take it in these proceedings. In *Hosein v. Caroni*[17], Gregory JA opined that the issue of waiver may have applied where a matter was actively investigated by the Commission outside of the limitation period. The factual matrix in *Hosein* was peculiar, and are not replicated in this matter. The view of Gregory JA looked at in the context of that factual matrix may not necessarily be of general application.

36. The litigation process commences when the matter is initiated at the Tribunal. The Tribunal is prevented by section 40 of the Act[18] from admitting into evidence anything said or done in conciliation. The Tribunal is thereby precluded from prying into the events as they transpired during the conciliation process before the Commission. I cannot on the evidence before me and or without offending section 40, make the inference, that the Respondent's failure to take the jurisdictional point (if that occurred) at the Commission was intended to be a waiver of the jurisdictional point at the Tribunal.

Issue (ii) Whether the University Visitor (of the Respondent) has exclusive jurisdiction to determine the Complainant's complaint that the Respondent violated the Equal Opportunity Act by allegedly discriminating against him?

37. It is in these circumstances unnecessary to address the issue of lack of jurisdiction and or to accept the invitation to decline jurisdiction. Briefly stated, however, and in the event that I am

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[17] CAP 204 of 2016.

[18] 40. Evidence of anything said or done in the course of conciliation proceedings under this Part is not admissible in proceedings before the Tribunal.

wrong on my refusal to extend the time to file the jurisdictional application. I have considered the authorities provided by the Respondent in support of his submissions on the jurisdiction of the University Visitor. The Respondent claims that the University Visitor and or its delegate has the exclusive jurisdiction to determine the dispute that has arisen between the parties. The Complainant submits that this is the jurisdiction of the Tribunal

38 In this complaint the Complainant is seeking declarations for discrimination and damages pursuant to the Act. The issue before this Tribunal, is not a review of the decision of the Respondent not to hire the Complainant. The issue is whether the Respondent has discriminated against the Complainant in the process of deciding not to hire the Complainant, and thereby attracted the censure of sections 6 and or 8 of the Act. The Tribunal is not being asked to review and to quash the internal or domestic decision of the Respondent not to hire the Complainant. The Tribunal is being asked to declare that certain actions of the Respondent violated the provisions of the Act.

39. *Jones v. Council of Legal Education & Others*[19] is distinguishable. In that case the Caribbean Court of Justice ('CCJ') considered inter alia the issue whether it has jurisdiction to entertain a case of discrimination involving the Council of Legal Education. The CCJ found that the treaty of Chaguaramas that delineated the original jurisdiction of the Caribbean Court of Justice did not give jurisdiction over the Hugh Wooding Law School. Therefore it declines jurisdiction. This rationale of the CCJ in determining *Jones*, does not assist the issues of the jurisdiction of the Visitor raided in this application.

40. The Jamaican case of Myrie *v. The University of the West Indies*[20] placed reliance on the case of *Wadinambiaratchi v. Hakeem Ahmad*[21], a decision of the Court of Appeal of this country'. In *Wadinambiaratchi v. Hakeem Ahmad*[22], (a decision of the Court of Appeal of this country), Bernard JA[23] held that matters falling within the internal management of the university[24] *are*

[19] Application No TTOF2018/003.
[20] Claim No. 2007 HCV 04736.
[21] 1985 35 WIR 325.
[22] 1985 35 WIR 325.
[23] As he then was.
[24] Ibid. p 346 at letter e.

classified as purely domestic matters, and are within the exclusive province of the visitor or his delegate, whose decision on such matters are regarded as final and conclusive.

41. Bernard JA recognized in *Herring v. Templeman*[25] that a distinction was made between the wrongful exercise of a discretion by the University and a breach of a contractual right in the dismissal of a teacher. Nonetheless he appeared to favour the dictum of Brightman J, in *Herring v. Templeman* in affirming that the dismissal of the officer of the university fell within the purview of the Visitor. He hesitated however to go beyond the facts of the respective cases and left open the issue that the jurisdiction of the Visitor would always trump the courts' jurisdiction to determine contractual rights and obligations of University members.

42. Undoubtedly there appears to be considerable legal support for the proposition that the decision not to hire a prospective lecturer is a domestic matter of discretion that appears from the Charter to be within the internal management of and the purview of the Respondent, its Council and or its Visitor. The learning however does admit that there are finite limitations to the Visitor's jurisdiction, for example natural justice, judicial review and matters falling outside of the ordinances and statutes of the University.

43. I have not been able to find any decisions on point in this jurisdiction, in considering whether breaches of the law were within the exclusive remit of the Visitor. Nonetheless there is relevance and assistance in dictum in *Wadinambiaratchi v. Hakeem Ahmad*, of Bernard JA observed[26]-

> ***"... recourse to the visitorial jurisdiction is not obligatory where the conduct complained of is contrary to the fundamental principles of the law of the land."***

This dictum fortifies and gives weight to the argument that the jurisdiction of the Visitor will not always override contractual rights or State laws.

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[25] [1973] 2 All ER 581. See also Ibid. 385 at letter c

[26] Quoting from *Halsbury's Laws of England* (4th edn) page 131, para 119, under the Rubric "Inns of Court, Colleges and Universities" at n 5. *Wadinambiaratchi v. Hakeem Ahmad, 342 at letter g.*

44 The Charter though of some vintage is legislative in nature, and through the savings provisions in the Independence Constitution continued as part of our body of law thereafter. In *Wadinambiaratchi v. Hakeem Ahmad* Bernard JA stated[27]:

> *"... The charter of April 1962 became law in all contributing colonies, of which Trinidad and Tobago was one. In the result, I entertain the view that with the coming into force of the Independence of this country on 31st August 1962, the charter of April 1962, continued to be part of the laws of this country, having regard to the broad saving provisions of section 4 of the Trinidad and Tobago (Constitution) Order in Council 1962 and section 5 of the Constitution of the Republic of Trinidad and Tobago Act. In other words, on and after 1962 it had and continued to have the force of law ..."*

45. The original charter would have preceded the Independence Constitution and may therefore been saved by the saving provisions in the Order in Council 1962. However the subsequent comprehensive amendment in 1972, was, in effect a legislative act that was done otherwise than by Parliament which was then the only lawmaking body for this country [28]. How is Parliament's exclusive right to legislate to be reconciled with the continued parallel legislative acts of the Monarch (Visitor) by successive amendments to the Charter in 1972 and 2018? Does this offend Parliament's exclusive power to legislate? Can the Visitor through exercise of its exclusive jurisdiction deprive our citizens of the protection of law which is inconsistent with the Charter?

46. The savings provisions of our Constitutions as they relate to the Charter were last considered by the Court of Appeal of this country over three (3) decades ago in *Wadinambiaratchi v. Hakeem Ahmad*. Since then constitutional jurisprudence in this jurisdiction has not been static. Conversely it has grown exponentially and has proven itself a keen, robust and audacious guardian of the Constitution of this country, thereby spearheading an indigenous body of law for the independent Caribbean territories. The Court of Appeal would not have had the benefit of this constitutional scholarship in *Wadinambiaratchi v. Hakeem Ahmad*, which may now underpin a contemporary revisit.

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[27] *Wadinambiaratchi v. Hakeem Ahmad*, 337 at letter c.
[28] *Constitution of Trinidad and Tobago*, section 53.

47. In 2007, Baroness Hale giving the majority decision in the Privy Council in *Suratt v. AG*[29] on the constitutionality and role of the Tribunal gave the following guidance[30], which can also be applicable to the dated doctrines that this jurisdiction inherited from its colonial past –

> *"... The complexity of the modern world has seen the emergence of new problems which need new solutions. In the United Kingdom, for example, specialist jurisdictions have been set up to cater, not only for the myriad of disputes which may arise between citizen and state, but also for some disputes between private persons. The most important examples are disputes between employer and employee and between landlord and tenant, where a different way of doing justice is thought necessary because of the perceived imbalance in power and resources between the parties...* [emphasis added]"

48. The Act is one of the solutions of contemporary jurisprudence intended to redress imbalances in power and resources between parties to disputes involving inter alia certain species of discrimination.

49. Rampersad J, just over a year ago, in April 2018 in delivering the judgment in *Jason Jones v. Attorney General & others*[31] considered the utility of the savings clause. He opined –

> *"... it is this court's respectful view that the time has long passed for a review of the function of the savings clause in a jurisdiction in which the Constitution is supreme. The sad reality, however, is that the very noble intention that was intended to be addressed by the Constitution has been rendered powerless in the face of the savings clause in so far as it relates to provisions falling under that section..."*

50. Rampersad J. went on to cite an excerpt from the address of Professor Richard Drayton, to the Judicial Education Institute of Trinidad and Tobago on 2 March 2016[32]:

> *"It is true that the parliaments of the Caribbean were always able to repeal old laws or introduce new ones, but the savings clauses wrapped an externally imposed legal order formed by centuries of despotism and structural inequality in a knot which naturally became encrusted with political and public inertia until it became our own. Like victims of a long period of confinement, we thus carry the manners of the prison even after our liberation."*

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[29] *Suratt and others v. Attorney General of Trinidad and Tobago* [2007] UKPC 55.
[30] Ibid. para 42.
[31] CV2017-00720. 16 para 47. (On appeal).
[32] Ibid. para 52

51. The difficulty in aligning the legal concept of the Crown as the University Visitor is perhaps well illustrated in the 2015 decision of the Jamaican High Court (Civil Division) in *Suzette Curtello v. University of the West Indies*[33] where the court sought to examine and reconcile the several authorities over the centuries with modern legal principles.

52. I cite these progressive dicta, if only to make the point that the moment may be opportune for our courts to re-examine the saving clauses in our respective Constitutions and the viability of the Charter in the light of the Republican Constitution (1976) that finally removed the Royal Monarch as our Head of State.

53. Against this backdrop, I would therefore have been prepared to hold that the Tribunal has jurisdiction to determine this Complaint as it is not a matter of the interpretation or application of the domestic laws of the Respondent. The declarations and orders being sought by the Complainant are matters that fall outside of the regulations, statutes and ordinances of the Respondent and within the exclusive jurisdiction of the Tribunal. Therefore the jurisdictional application would have floundered on this limb as well. I am satisfied that this decision would not have been inconsistent with the authorities that were cited by the Respondent and in particular *Wadinambiaratchi v. Hakeem Ahmad* that is binding on this Tribunal.

54. Lastly, without prejudice to, and or attempting to prejudge, the outcome of the instant matter in any way, I make a short observation. As we embrace this exciting, developing jurisdiction of anti-discrimination law under the Act, I take the opportunity to provide some overarching guidance to the practitioners and litigants who are now expectantly coming before the Tribunal.

55. This Tribunal does not review alleged unfair, unlawful or wrongful employment practices *per se*. The limited purview of this Tribunal includes the determination of whether discrimination/victimisation that fall under the Act occurred in the process of hiring, firing or in the course of employment, and to provide redress where it does. At times the line may be fuzzy or vague but the jurisdictional demarcation must be recognised, even if it may sometimes produce an undesirable result. Therefore although the conduct or practice complained of may be unfair, unlawful and or wrong, or even tainted with discrimination or victimisation, unless

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[33] Claim No 2015HC05012.

the conduct is of a discriminatory nature under the Act and or there has been victimisation under the Act, it is not actionable before the Tribunal.

56. Further, an allegation that there was victimisation does not, without more, invoke a cause of action under this Act, unless it can be shown that some alleged discriminatory conduct under the Act, provoked the purported victimisation alleged under it. Notwithstanding the generality of the provisions in the Act with respect to victimisation, to ground a successful complaint, there ought to be sufficient pleadings supported by justiciable evidence that the conduct complained of that led to the alleged victimisation is *per se* discriminatory conduct that is precluded by the Act.

DISPOSITION

57. I therefore make the following orders -

(i) The Respondent's application filed on 21 January, 2019 to extend time is dismissed;

(ii) The Respondent's application for a declaration that the Tribunal has no jurisdiction in this matter is refused;

(iii) The Respondent shall pay the Complainant's costs occasioned by its Notice of application dated 21 January, 2019 to be assessed by the Registrar in default of agreement.

58. An appeal lies from the Tribunal to the Court of Appeal, whether as of right or with leave, on grounds specified in section 50(2)34 of the Act, but subject to that the orders, awards, findings or decisions of the Tribunal in any matter may not be challenged, appealed against, reviewed,

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[34]50. (1) Subject to subsection (2), the hearing and determination of any proceedings before the Tribunal, and an order or award or any finding or decision of the Tribunal in any matter (including an order or award) — (a) shall not be challenged, appealed against, reviewed, quashed or called in question in any Court on any account whatever; and (b) shall not be subject to prohibition, mandamus or injunction in any Tribunal on any account whatever. (2) Subject to this Act, any party to a matter before the Tribunal is entitled as of right to appeal to the Court of Appeal on any of the following grounds, but no other: (a) that the Tribunal has no jurisdiction in the matter, but it shall not be competent for the Court of Appeal to entertain such grounds of appeal, unless objection to the jurisdiction of the Tribunal has been formally taken at some time during the progress of the matter before the making of the order or award; (b) that the Tribunal has exceeded its jurisdiction in the matter; (c) that the order or award has been obtained by fraud; (d) that any finding or decision of the Tribunal in any matter is erroneous in point of law; (e) that the Tribunal has erred on a question of fact saved that no appeal shall lie except by leave of the Court of Appeal sitting in full Court; or (f) that some other specific illegality not mentioned above, and substantially affecting the merits of the matter, has been committed in the course of the proceedings..

quashed or called in question on any account whatever and the Tribunal may not be subject to prohibition, mandamus or injunction in any Tribunal on any account whatever (s 50 (1))[35].

H. H. Donna Prowell-Raphael

Judge/ Chairman

[35] See *Suratt and others v. Attorney General of Trinidad and Tobago* [2007] UKPC 55. para 6.