

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE EQUAL OPPORTUNITY TRIBUNAL

E.O.T. No. 0004 OF 2016

BETWEEN

MORIBA BAKER

Complainant

AND

THE UNIVERSITY OF TRINIDAD AND TOBAGO

Respondent

DECISION

CORAM: Her Honour Donna Prowell-Raphael, Judge/ Chairman,
Her Honour Ms. Leela Ramdeen, Lay Assessor

Dated the 13th of February, 2019.

APPEARANCES:

Mr. Mr. Lennox Marcelle for the Complainant.

Mr. Dayle Connelly for the Respondent.

CONTENTS

The Equal Opportunity Tribunal.....	3
Context: History and Trajectory	3
The Viability of the Complaint.....	6
Defining the Complaint.....	6
Submissions	7
Judicial Review	10
Single Continuous Event.....	13
Amendment of Complaint.....	15
Timeliness of the Complaint.....	16
Exceptional Circumstances.....	16
Discrimination: Non-payment of extra duty allowance.....	19
Discrimination: Not being selected for the position of Senior Manager, Sports and Recreation	19
Victimisation: Being placed on disciplinary charges.....	20
Victimisation: Arising from Termination	21
The Commission’s Report	23
Order	24

THE EQUAL OPPORTUNITY TRIBUNAL

1. The Equal Opportunity Act¹ (“the Act”) permits a person who claims that he has been discriminated against to submit² “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, 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 the Equal Opportunity Tribunal (“the Tribunal”)³ for judicial adjudication.

CONTEXT: HISTORY AND TRAJECTORY

2. The adjunct complaint was lodged at the Commission on May 26, 2014⁴. The Commission was of the view that it could have been resolved by conciliation. Therefore, with the concurrence of the parties a conciliation session was held on December 8, 2015. The matter was not resolved at the conciliation. As such and further to section 39(1) of the Act, the Commission prepared its Report dated September 7, 2016 (the Commission’s Report)⁵.
3. After the failure of the conciliation, the Commission by summary complaint, filed in the Arima Magistrate Court against the Respondent, sought to have the Respondent convicted for failing to provide the Commission with information it had requested. At the date of the Commission’s Report (September 7, 2016) the summary complaint stood adjourned to September 26, 2016 and remained pending before the Arima Magistrate Court⁶.
4. These proceedings were instituted at the Tribunal on October 3, 2016 by referral from the Commission dated September 30, 2016. The Respondent contends that the complaint as set out in the Complaint and Particulars of Claim (“The Claim”) before the Tribunal contains subject matter that was not extant at the time the original complaint was lodged. In this decision, the Tribunal proposes therefore to distinguish between the original complaint that was lodged at the Commission and the pending complaint before us by referring to the original complaint

¹ Ch. 22:03, Act 69 of 2000 Amended by 5 of 2001 (EOA).

² EOA,30

³ EOA,39(2)

⁴ See Commission’s Report para 4.

⁵ See Commission’s Report para. 29.

⁶ See Commission’s Report para. 31.

lodged at the Commission as ‘the original complaint’ and the complaint set out in the Claim Form as ‘the pending complaint’.

5. In compliance with various orders of the Tribunal, the parties filed *inter alia* the following documents:

Date	Complainant	Defendant
16/11/16	Complaint and Particulars of Claim ('Claim')	-
30/11/16	-	Defence ('Defence')
23/11/16	Witness Statements	Witness Statements
3/1/17	-	Respondent's Issues
16/1/17	Complainant's Issues	-
31/7/18	Agreed Facts ('Statement of Agreed Facts')	-
27/9/18	-	Summary of Legal Propositions, Relevant facts and Evidence to be Relied on by the Respondent ('respondent's Summary of Legal Propositions, Facts and Evidence')
2/10/18	Summary of Legal Propositions, Relevant facts and Evidence to be Relied on by the Complainant ('complainant's Summary of Legal Propositions, Facts and Evidence')	-
2/10/18	Trial Bundle	-

6. The material facts can be summarized as follows:-

- (i) The complainant was employed as an Assistant Sports Coordinator on January 1, 2007 on a three (3) year contract. In 2010 his contract for the same position was re-renewed for a further three (3) years. During this second contract period, he was given certain acting positions. From October 2011 to October 2012, he acted in the position of Executive Manager. Subsequent to that, for the period October ,1 2012 to August 2013, he acted in the position of Senior Manager, Sports and Recreation;
- (ii) The complainant applied for the position of Senior Manager, Sports & Recreation in in or about the February 2013.

- (iii) Mr. Ganga, the comparator, assumed the office of Senior Manager, Sports and Recreation in October 7, 2013, whereupon the complainant commenced reporting to him.
- (iv) By letter dated December 2, 2013 the complainant was advised that he was not selected for the position;
- (v) The complainant was promoted to the position of Senior Instructor of Sports & Leisure Studies on February 21, 2014 on contract;
- (vi) The complainant was sent on administrative leave with half pay by letter dated April 15, 2014. He nevertheless was paid his full salary for the months of April and May through company payroll and by cheques from June –September 2014⁷;
- (vii) A disciplinary charge was laid against the complainant by letter dated May 15, 2014;
- (viii) The original complaint was lodged on May 26, 2014;
- (ix) The complainant appeared before the Respondent's Disciplinary Tribunal in June 4, 2014. The complainant was promised his half pay would be restored and he would hear from the Tribunal within four (4) days.
- (x) The complainant was refused a job letter on June 24, 2014;
- (xi) The Disciplinary Tribunal next communicated with the complainant by letter dated July 14, 2014;
- (xii) The complainant commenced receiving his full pay by instalments with effect from July 10, 2014 and continuing up to September 25, 2014;
- (xiii) Attorneys for the complainant responded to the letter of July 14, 2014 with respect to the disciplinary charges by letter dated August 28, 2014;
- (xiv) The respondent was issued its First Notice ('Commission's First Notice') of the complaint being laid dated August 29, 2014;
- (xv) The complainant was terminated by the respondent by letter dated October, 1 2014;
- (xvi) The Commission referred the original complaint to the Tribunal on October 3, 2016;
- (xvii) By letter dated December 2, 2016 the complainant was offered an extra duty allowance for the period during which he had acted.

⁷ Commission's Report para. 35.

7. The trial was fixed for hearing on October 15, 2018. At the trial, the Tribunal by order of even date, certified the following issues for preliminary determination and directed the parties to file written submissions thereon:-

(i) Whether the complaint (the original complaint) lodged at the Equal Opportunity Commission on the 26th May 2014 is time barred and if so, how does it affect the viability of the complaint (the pending complaint) filed on the 3rd October, 2016?

(ii) Whether the Report and Recommendations of the Equal Opportunity Commission dated 7th September 2016 or any part thereof is admissible into evidence having regard to S.40 of the Equal Opportunity Act 22:03.

8. The respondent filed its submissions ('Respondent's Submissions') on October 29, 2018, the complainant ('Complainant's Submissions') responded by submissions filed on November 11, 2018 and the respondent filed its submissions in response ('Respondent's Reply') on November 19, 2018.

THE VIABILITY OF THE COMPLAINT

Defining the Complaint

9. In paragraph 5 of his Particulars of Complaint, the complainant (without making any reference to the dates on which they allegedly occurred) sets out the four (4) aspects of the pending complaint as:-

- (i) Discrimination by the respondent in not being paid extra-duty allowance for acting in positions more senior than his substantive post including and not limited to the position of Senior Manager, Sports and Recreation;
- (ii) Discrimination by the respondent in not being selected and promoted to the post of Senior Manager, Sports and Recreation, having acted in this position for approximately eleven (11) months and having the required experience and qualifications as required by the Job Description;
- (iii) Victimisation by the respondent in being placed on disciplinary charges in respect of a purported conflict of interest which resulted in being suspended on half-pay, not receiving his restored half-pay as indicated by the respondent in a timely or proper manner and eventually being terminated; and

- (iv) Victimization because the complainant lodged a complaint against the respondent at the Commission and being terminated as a result of this complaint.
10. There are two (2) aspects complaining about alleged discrimination by status, and two (2) allegations complaining about alleged discrimination by victimisation. The allegations of discrimination by status concern non-payment of extra duty allowance and of not being selected for the position of *Senior Manager, Sports and Recreation* that occurred prior to the original complaint being lodged. The allegations of discrimination by victimisation concern being placed on disciplinary charges and certain events that allegedly followed, including his termination. The disciplinary charges occurred before the original complaint was lodged. However, the complainant was terminated after the original complaint was lodged.

Submissions

11. With respect to the question at paragraph 7 (i) above⁸, the respondent submits that: -
- (i) The allegations of discrimination set out in paragraphs 9(i)⁹ and 9(ii)¹⁰ above were lodged outside the six-month limitation period prescribed by section 30(2) of the Act and ought to be dismissed;
 - (ii) According to the complainant the 'extra-duty' would have been payable during the period that the complainant acted in positions more senior to his substantive position. That is between October 10, 2011 and July 19, 2013. Time therefore, should have started to run with the end of the Acting and or his request for payment of either duty allowances, that is, from July 20, 2013 - September 20, 2013. The six-month period to lodge a complaint with respect to this allegation would have expired by the time the original complaint was lodged on May 26, 2014¹¹;
 - (iii) With respect to the allegation of non-selection, the complainant and six (6) other persons were interviewed for the position of *Senior Manager, Sports and Recreation* on March 27, 2013. Mr. Ganga was offered the position on June 3, 2013 and took up

⁸ *Whether the complaint lodged at the Equal Opportunity Commission on the 26th May, 2014 is time barred and if so, how does it affect the viability of the complaint filed on the 3rd October, 2016?*

⁹ Discrimination by the UTT in not being paid extra- duty allowance for acting in positions more senior than his substantive post including and not limited to the position of Senior Manager, Sports and Recreation

¹⁰ Discrimination by the UTT in not being selected and promoted to the post of Senior Manager, Sports and Recreation, having acted in this position for approximately eleven (11) months and having the required experience and qualifications as required by the Job Description;

¹¹ Respondent's Submissions para 4 (b).

duties on October 7, 2013. The time for the complainant to lodge a complaint of alleged discrimination in relation to his non-selection would have begun to run from October 8, 2013 at the latest¹²;

- (iv) The alleged victimisation by laying of the disciplinary charge set out at paragraphs 9(iii)¹³, occurred before the date that the complaint was lodged with the Commission¹⁴. Under the Act the victimisation cannot occur before the complaint was lodged;
- (v) The Commission did not exercise a discretion pursuant to section 30(3) of the Act for lodging a complaint because of exceptional circumstances¹⁵ to extend the time for the original complaint to be lodged. The pending complaint can only be viable if the original complaint was compliant with section 30(2) of the Act.
- (vi) The Act does not provide for the amendments of complaints and in any event there is no evidence of an amended complaint being lodged¹⁶; and
- (vii) Alternatively, the complaint is not within section 5 of the Act because the Respondent adduced no evidence with respect to status under which he was claiming discrimination¹⁷.

12. With respect to the question at paragraph 7 (i) above¹⁸, the Complainant submits that:-

- (i) The respondent is asking the Tribunal to review a substantive procedural decision of the Commission. The Tribunal does not have a Judicial Review jurisdiction to oust the Commission's decision under the Act¹⁹;
- (ii) The complaint can be²⁰ "*seen as a single and continuous event in the generous and purposive sense*";

¹² Respondent's Submissions para 5(b)-(e).

¹³ Victimisation by the UTT in being placed on disciplinary charges in respect of a purported conflict of interest which resulted in being suspended on half- pay, not receiving his restored half- pay as indicated by UTT in a timely or proper manner, and eventually being terminated

¹⁴ Respondent's Submissions para 3.

¹⁵ Respondent's Submissions para 4(a).

¹⁶ Respondent's Submissions para 3.

¹⁷ Respondent's Submissions para 4 (f).

¹⁸ *Whether the complaint lodged at the Equal Opportunity Commission on the 26th May, 2014 is time barred and if so, how does it affect the viability of the complaint filed on the 3rd October, 2016?*

¹⁹ See paragraph 8, page 5 of the complainant's Summary of Legal Propositions, Facts and Evidence.

²⁰ Complainant's Submissions, para 2.

- (iii) The Commission properly exercised its discretion/power under section 30(3) of the Act and lawfully enlarged time²¹ for the filing of the original complaint. Therefore, the pending complaint is not time-barred;
- (iv) The complainant was victimised by the laying of disciplinary charges against him after his attorney had requested that he be reinstated;
- (v) The complainant was victimised by the respondent when it terminated him after it was notified by the Commission that he had lodged the original complaint; and
- (vi) The Commission ought to be joined as a party to the proceedings²².

13. In his Reply on the law, the respondent submitted: -

- (i) The plea of limitation is a legitimate defence to the pending complaint.
- (ii) There is nothing in the Act that precludes the Tribunal from considering it. A plea of limitation is not a plea of Judicial Review²³;
- (iii) Judicial Review will not be granted where an alternative remedy exists: Section 9 of the Judicial Review Act²⁴ ('JRA'). The Tribunal is a court of competent jurisdiction to treat with the issue whether a complaint was lodged within the timeframe stipulated in section 30(2). In any event the availability of the remedy of Judicial Review is not a bar to the jurisdiction of the Tribunal²⁵;
- (iv) The submission of "single continuous event" relies on jurisprudence of the UK that is not applicable in this jurisdiction²⁶;
- (v) The Commission did not consider section 30(3) of the Act. In so far as the complainant's submissions rely on the submission that "exceptional circumstances" should take into account *continuing act* jurisprudence, that the submission is erroneous²⁷; and
- (vi) The submissions of the complainant relating to section 52 of the Industrial Relations Act are not relevant to this matter.

²¹ See Complainant's Submissions at p.8, I-III; See also paragraph 8, page 5 of the Complainant's Summary of Legal Propositions, Facts and Evidence..

²² Complainant's Submissions, p8, III.

²³ Respondent's Reply at para 2(a) & (b).

²⁴ Ch 7:08. Laws of the Republic of Trinidad and Tobago.

²⁵ Respondent's Reply at para 2(c) - (e).

²⁶ Respondent's Reply at para 2(f).

²⁷ Respondent's Reply at para 2(g).

14. The Tribunal has not had sight of the original complaint that was lodged with the Commission. The complainant does not provide any dates or time period for the allegations in the Claim but accepted that the dates provided by the respondent in paragraph 3 and 4 of the Respondent's Submissions are acceptable²⁸.

Judicial Review

15. Counsel for the complainant has submitted that the respondent is asking the Tribunal to review a substantive procedural decision of the Commission and that the Tribunal does not have a Judicial Review jurisdiction to oust the Commission's decision under the Act²⁹.
16. Counsel for the Respondent responds that a plea of limitation is a legitimate defence to the original complaint. There is nothing in the Act that precludes the Tribunal from considering it. A plea of limitation is not a plea of Judicial Review³⁰;
17. Judicial Review³¹ has emerged in the recent past as a powerful and popular remedy to ensure that governmental bodies and inferior courts or tribunals do not act irrationally, illegally, or ultra vires their statutory remit, and or that a person's legitimate expectation and right to natural justice are respected and protected. The JRA gives a court exercising the power of Judicial Review powerful remedies.
18. The Tribunal and the Commission both derive their responsibilities, functions and power to resolve complaints of discrimination, victimisation or offensive behaviour from the Act. The Act however insulates their respective prerogatives so that they function as distinct, independent entities. Consequently, the Commission and the Tribunal each have different and distinct statutory roles in the resolution of complaints in which they intercede. When parties fail to resolve their issues in conciliation before the Commission, the process for dispute resolution begins afresh at the Tribunal where the dispute is determined on its legal merits using the remedies inherent in a superior court of record and or vested in the Tribunal by the

²⁸ Complainant's Submissions, p. 2 at paras. 1 & 2.

²⁹ See paragraph 8, page 5 of the complainant's Summary of Legal Propositions, Facts and Evidence.

³⁰ Respondent's Reply at para 2(a) & (b).

³¹ See Judicial Review Act Chap 7:08

Act. The orders of the Tribunal may be registered and enforced as part of the enforcement jurisdiction of the High Court³².

19. The Commission is a public body or authority that edifies the public on the Act, receives complaints under the remit of the Act and offers a conciliation facility for complainants to resolve their complaints. It provides a platform for conciliation where parties in the glare of information unearthed by the Commission's investigation, can interact, with the guidance of the Commission, to engineer their own solutions to resolve the issues in contention between them. Conciliation is a neutral, impartial and confidential process. There ought to be no findings of fact or law, or determination of the merits of the dispute in conciliation.
20. The Tribunal is a superior court of record with the jurisdiction of such a court to determine the complaints referred to it by the Commission and make declarations and orders thereon. When a complaint is referred to the Tribunal, the dispute resolution process is restarted and determined by adjudication. The Tribunal is headed by a Judge of the same status as that of a High Court Judge³³, who is the sole decision-making authority in the Tribunal³⁴. Having determined the complaint the Tribunal make orders, declarations and may prescribe damages or fines to provide redress as it determines. The Tribunal's statutory remit and the concomitant inherent jurisdiction and power to determine unresolved complaints referred to it by the Commission are neither appellate functions nor the exercise of Judicial Review of the Commission's procedures and or decisions. The Tribunal therefore finds that there is no basis to join the Commission as a party to these proceedings.
21. Inherent in the Tribunal's jurisdiction is the power to interpret and apply the provisions of the Act in the determination of the complaints before it. As a superior court of record, the Tribunal's rulings, decisions, judgments and or orders create legal precedents. Hence, where the Tribunal is asked to determine whether a complaint is time-barred, it is not reviewing the decision of the Commission to accept the complaint out of time, but rather it is interpreting and

³² "48(3) Upon the filing of a certificate issued under subsection (2) in the Registry of the High Court of Justice, the order or award shall as from the date of filing be of the same force and effect and proceedings may be taken thereon and the order or award may be enforced as if it had been a judgment originally obtained or entered upon the date of filing in the High Court of Justice. (4) The High Court of Justice shall have the same control and jurisdiction over the order or award as it has over the judgments given by itself but in so far as it relates to execution."

³³ Section 43(2) of the Act.

³⁴ Section 44(7) of the Act.

or applying the Act, to determine whether a viable complaint has been lodged under the Act that the Tribunal has the jurisdiction to hear and determine. Subject to the oversight of the appellate courts, the guidance and decisions of the Tribunal on the interpretation and application of the Act are binding on all persons and entities, (including the Commission) who have recourse to the Act.

22. Counsel for the respondent has submitted that Judicial Review will not be granted where an alternative remedy exists³⁵. A similar issue as to whether a complaint under the Act could be considered as a parallel or alternative remedy to a Constitutional Motion for equality of treatment by a public body was considered in *Damian Morris v. Comptroller of Customs*³⁶, Seepersad J considered that an application under the Act for protections from discrimination was an alternative or parallel remedy available to the Claimant who was seeking constitutional redress for alleged inequality of treatment by the Comptroller of Account.

23. The learned Judge, asserted:

*“...In this land of diversity, where issues of discrimination and unequal or unfair treatment are not unusual, the legislature, to its credit, has laid the necessary legislature framework for citizens to challenge certain defined classes or types of discrimination before the Equal Opportunity commission and the Equal Opportunity Tribunal in an effort to encourage and ensure that there is equality of opportunity. **It is rather unfortunate that the services provided under the Act seem to be underutilized and citizens should be encouraged to avail themselves to recourse under the Act, where applicable...**” [Emphasis mine]*

24. The Tribunal supports the view of Seepersad J. that the Act provides an alternative and or parallel remedy for citizens seeking relief for discrimination by public bodies, and aligns itself with the foregoing sentiment expressed by Seepersad J as to the failure of citizens to avail themselves of it. The Tribunal joins the learned judge in lamenting that the services provided by the Act may be underutilised.

25. Under the Act citizens have the right to seek redress for discrimination and victimisation by a **public** body as they would in a Constitutional Motion or an application for Judicial Review. Additionally, under the Act citizens are provided with a new and inimitable opportunity to seek

³⁵ Section 9 of the JRA

³⁶ . CV2015-03606. (On appeal).

redress where they are victimised or discriminated against on the basis of their race, sex, age, or origin by a **private** entity³⁷ for example in their employment, their education, or accommodation, provision of goods and services or on account of disability. Even more the Act provides some protection from offensive and humiliating language pertaining to gender, race, ethnicity, origin or religion in a wide range of circumstances³⁸.

26. The issue as to whether the process provided by the Act is a parallel remedy and or alternative remedy to Judicial Review and or Constitutional redress, will no doubt have to be decisively determined at some stage by an appellate court. In determining the issue raised in this application, the Tribunal holds that the availability of the remedy of Judicial Review under the JRA, of the Commission's decisions, is not a bar to the jurisdiction of the Tribunal to interpret and apply the provisions of the Act in the determination of a complaint before it.

Single Continuous Event

27. Counsel for the complainant has injected into his submissions the Commission's explanation that the original complaint could be '*a single and continuous event*'. The Commission explained³⁹ -

*"... it was felt that [the allegations] could be seen as part of a single and continuous event in the general and purposive sense: that is, (per his allegations) he acted in the position of Senior Manager, Sports and Recreation for **eighteen (18) months** from November 2011 to **February 2014** and he was never paid an extra duty allowance for the said period,... Apart from not being paid the said allowance continuous events unfolded; **he was subsequently suspended on half pay**, he was summoned to attend a hearing at which he was told in the presence of his attorney **that within 4 days he would be re-instated in the said position with full pay**. This did not happen as he was not contacted by [the respondent] until 40 days after the said hearing to notify him that the panel who sat at the hearing did not believe his account of the issues raised in the said hearing. After receiving the Commission's First Notice letter dated August 29, 2014 his employment was terminated at the Respondent. Hence due to the aforementioned chain of events the complaint falls within the six-month timeframe..."* [Emphasis mine.]

28. There are several inconsistencies between the explanation provided by the Commission and the facts as agreed between the parties. The parties have agreed that the complainant carried

³⁷ See sections 4 and 5 of the Act.

³⁸ Section 7 of the Act.

³⁹ See letter dated 30th. October 2014. See also

out functions of Senior Manager, Sports and Recreation up to July 2012, not February 2014. In any event the period between November 2011 and February 2014 does not amount to 18 months. The complainant has stated that his suspension on half pay was brought about by an unrelated event concerning a conflict of interest dispute. This was not part of a continuous event. The allegation that the complainant was told in the presence of his attorney that within four (4) days he would be reinstated, is not repeated in the pending complaint. As a result of these inconsistencies the Tribunal is of the view that the Commission's explanation would not apply to these proceedings.

29. In *Salandy v. Petrotrin*⁴⁰, this Tribunal cited with approval the decision of the UK Court Appeal, in *OKORO & Anor. v. Taylor Woodrow Construction Ltd. & others*⁴¹ which distinguished between a state of affairs that continued for a protracted period and a one-off event that had continuing consequences. In *Salandy* Joseph J. was of the view that where, for example, the same act of discrimination persists over a protracted period, they may be considered as one act of discrimination. So, for example, the allegation of extra duty allowance spans almost two (2) years. This allegation may be considered one act even though the alleged discrimination occurred over a period⁴². Where however, there is a one-off event the situation is not the same.

30. The three (3) allegations— discrimination in not being paid extra-duty or acting allowances (which the Tribunal concludes as one allegation), discrimination for non-selection to the managerial position, and victimisation for being placed on disciplinary charges – are all separate and distinct one-off events. There is no evidential chain of overarching discriminatory behaviour toward the complainant by the respondent that spans the separate allegations. These allegations are of a different species of discrimination or victimisation with different statuses⁴³, and possess their own comparators (if any), geneses and occurred at different times (some before the original complaint was lodged and some after). The Tribunal therefore finds that these three (3) allegations do not form one (1) single continuous event.

⁴⁰ E.O.T. OO02 OF 2016, per Joseph J.

⁴¹ [2012] EWCA Civ. 1509.

⁴² In awarding damages however, the Tribunal may need to consider on a case by case basis whether having regard to section 30(1), it could include damages that occurred more than 6 months before the complaint was lodged.

⁴³ See section 3 of the Act.

Amendment of Complaint

31. Further, the issue has arisen as to whether a complaint may be broadened informally by the Commission after it was lodged to include further information disclosed by the investigation. If, during investigation, that complaint is modified by the Commission to the detriment or benefit of either party, the initial complaint may lose its character and the subject matter may change. This has the potential to compromise the process, contemplated by the Act. Testing questions may arise about impartiality and or procedural fairness or of what can be referred to the Tribunal under 39 (2).
32. The Act does not give the Commission the power, on its own initiative or volition, to amend a complaint based on new information on discrimination emerging after the complaint was submitted whether through investigation. The Act does not empower the Commission, based on the complainant's further oral information and or interactions with it, on its own initiative or volition, to amend or change the subject matter of a written complaint lodged pursuant to Section 30(1).
33. If the complainant opts, as the investigation/conciliation progresses, to vary a complaint it has made, the modified version, would essentially create a new complaint, with varied subject matter. Any such amended complaint must, at the minimum, meet the requirements of Section 30(1) in that there must be a clear date when the amendment and or amendments were made with a clear intent in writing to change the complaint that was lodged to include the variation to the complaint and its subject matter.
34. In the instant matter, the complainant has proffered no evidence as to the date and subject matter of an amended written complaint that would make it compliant with Section 30(1) of the Act. In the circumstances, the Tribunal is left with no alternative but to hold that the subject matter of the pending complaint must be restricted to allegations of discrimination and or victimisation that were extant and current at the time the original complaint was lodged. That is to say that the subject-matter of the original complaint lodged on May 26 2014 could only consist of allegations of **discrimination relating to issues concerning non-payment of extra duty allowance and of not being selected for the position of Senior Manager, Sports and Recreation, and allegation of victimisation of being placed on disciplinary charges in respect of a purported conflict of interest** that were extant at that time.

Timeliness of the Complaint

Exceptional Circumstances

35. In *Baptiste v. UTT*, the Tribunal stated that in order to meet the minimum threshold requirements to invoke its jurisdiction, sustainable complaints must *inter alia* be lodged in a timely manner, within the meaning of section 30 of the Act. Therefore, save for exceptional circumstances, the viability of a complaint before the Tribunal depends on the complaint being lodged before the Commission within six (6) months of the occurrence of the alleged discriminatory act.

36. The complainant contends that the Commission properly exercised its discretion/power under section 30(3) of the Act and lawfully enlarged time⁴⁴ for the filing of the original complaint. Therefore, the pending complaint is not time-barred. The respondent submits that the Commission did not exercise a discretion pursuant to section 30(3) of the Act for lodging a complaint because of exceptional circumstances⁴⁵ to extend the time for the original complaint to be lodged. The pending complaint can only be viable if the original complaint was compliant with section 30(2) of the Act.

37. Section 30 of the Act provides: -

“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.

(2) A complaint under subsection (1) shall be lodged with the Commission within six months from the date of the alleged act of discrimination.

(3) Notwithstanding subsection (2), the Commission, in exceptional circumstances, may accept a complaint which is lodged more than six months after the date of the alleged act of discrimination.”

38. The complainant has brought to the Tribunal’s attention the comparative section 118 of the UK Equality Act, as well as section 51(4) of the Industrial Relations Act. Neither is helpful as

⁴⁴ See Complainant’s Submissions at p. 8, I-III; See also paragraph 8, page 5 of the Complainant’s Summary of Legal Propositions, Facts and Evidence.

⁴⁵ Respondent’s Submissions para 4(a).

these sections are both couched differently and are easily distinguishable, as Counsels for the respective parties have recognised.

39. Section 30(2) places a mandatory statutory embargo on the viability of complaints that fall within the remit of the Act, while section 30(3) eases the rigidity of 30(2) in “*exceptional circumstances*”. The Parliament’s intention, gleaned from the literal and clear words of the section, is that complaints **must** be lodged within six (6) months of the alleged act with the Commission. Time therefore starts to run from the date of the alleged discrimination. Save for exceptional circumstances, the failure of the complainant to lodge a complaint within six (6) months results in the loss of the opportunity to make the complaint.

40. Counsel for the complainant has advanced that there were exceptional circumstances falling within section 30(3)⁴⁶ which would authorise the extension of time for the complaint to be lodged. He asks the Tribunal to provide guidance on the term “*exceptional circumstances*” in the context of this provision⁴⁷. The use of the term ‘exceptional circumstance’ is not unknown in legal parlance, but there is no all-embracing definition. Courts have been both measured and cautious to give an unqualified meaning of the term.

41. In *Edwards v. Petrotrin*⁴⁸ Joseph J. stated –

“...the term *exceptional circumstances* can be taken to mean ‘conditions which are out of the ordinary course of events; unusual or extraordinary circumstances’ (*Black’s Law Dictionary*, 6th ed. 1991 @ 389).”

42. In *Hosein v Caroni (1975) Limited*, the Court of Appeal⁴⁹ ruled that exceptional circumstances existed where the subject matter occurred in the interim between the commencement of the Act and the Commission being set up to prevent the complaint being accepted outside of the six (6) month embargo.

43. Additional guidance could be gleaned from the approach of the recent decision *MF (Nigeria)* [2013] EWCA Civ 1192 in which Dyson J. advanced that the test of exceptional circumstances entails a test of proportionality rather than a test of exceptionality in which

⁴⁶ “30(3) *Notwithstanding subsection (2), the Commission, in exceptional circumstances, may accept a complaint which is lodged more than six months after the date of the alleged act of discrimination.*”

⁴⁷ Complainant’s Submissions: p 8 at III.

⁴⁸ E.O.T. No 0002 of 2013

⁴⁹ CA No. P 204 of 2017

refusal would result in unjustifiably harsh consequences for the individual that would be disproportionate in all the circumstances⁵⁰.

44. It would not be appropriate for the Tribunal to attempt to provide an all-embracing definition for such a nebulous term in advance and in the abstract. The meaning of exceptional circumstances in 30(3) of the Act is best left to be determined on a case by case basis so that each occurrence can be examined in the context of the legislative intention and the discretion intended to be conferred by it. The Tribunal considers the legislative intent in the context of section 30(3) to be that the discretion should be used to alleviate, or mitigate, unforeseen hardships that are extraordinary and or outside the ordinary, so as not to subject a complainant to unjustifiably harsh and disproportionate circumstances if the complaint is not accepted.
45. Counsel for the complainant suggested that the complainant's mistaken belief as to when his acting ended may be regarded as inadvertence and was one of the issues and circumstances for the enlargement of time⁵¹. He made this suggestion in the context that the several allegation constituted on single continuous event. The consequence would therefore be that the enlargement of time for one (1) allegation would therefore assist the viability of all of the other allegations.
46. The complainant's mistaken belief or inadvertence is not an unusual or extraordinary circumstance. Therefore, it does not fall within the character of acts or events that display any special factual matrix that would warrant it being considered an exceptional circumstance⁵². Further the complainant is not being subject to any disproportionate hardship if his allegation for not being paid for his extra duty or acting is not accepted. The Tribunal notes that since the filing of the pending complaint the complainant has been offered a settlement by the respondent for his acting or extra duty. The Tribunal therefore does not find that there are any exceptional circumstances to bring this allegation and or the pending complaint within section 30(3).

⁵⁰ In *MF (Nigeria)* [2013] EWCA Civ 1192, Lord Dyson MR interpreted the exceptional circumstances question as one that entails a test of proportionality rather than a test of exceptionality. Searching for a unique or unusual feature was unnecessary.

⁵¹ Complainant's Submissions p.7.

⁵² See Seepersad J. in *Damian Morris v. CoA* (supra), para 12.

Discrimination: Non-payment of extra duty allowance

47. Counsel for the respondent contends that the ‘extra-duty’ would have been payable during the period that the complainant acted in positions more senior to his substantive position. That is between October 10, 2011 and July 19, 2013. Time would therefore have started to run from the end of the Acting period, that is, from July 20, 2013. The six (6) month period to lodge a complaint with respect to this allegation would have expired by the time the original complaint was lodged on May 26, 2014⁵³.
48. Counsel for the respondent accepts the time line of the respondent but submits that this allegation formed part of one (1) single continuous event that spanned October 2011 to when the complainant was terminated in October 2014. Alternatively, that there was an enlargement of time due to exceptional circumstances by the Commission to accept the original complaint. The Tribunal has already stated that it finds the several facets of the pending complaint are individual allegations and not one single continuous event. The Tribunal has already found that there were no exceptional circumstances that warranted the acceptance of the complaint after the initial six (6) month period.
49. Although it spanned eighteen (18) months, the Tribunal accepts this issue as one (1) allegation of discrimination, as there is a clear nexus, continuum and similarity in the nature and cause of the issue, time for the cause of action would be deemed to have started to run when the complainant ceased acting in July or August of 2013 and submitted his request for payment by letter dated September 20, 2018. The original complaint was lodged in May 2014 by which time the six (6) month timeframe permitted under 30(2) would have expired. Therefore, the Tribunal finds that this aspect or subject matter of the complaint which treats with discrimination – in the non-payment of extra duty allowance - is not viable and it has no jurisdiction to entertain it. There is, therefore, no need to consider the issue raised by the respondent with respect to the lack of Comparators for this issue.

Discrimination: Not being selected for the position of Senior Manager, Sports and Recreation

50. With respect to the allegation of non-selection, the respondent submits that the complainant and six (6) other persons were interviewed for the position of *Senior Manager, Sports and*

⁵³ Respondent’s Submissions para 4 (b).

Recreation on March 27, 2013. Mr. Ganga was offered the position on June 3, 2014 and took up duties on October 7, 2013. The time for the complainant to lodge a complaint of alleged discrimination in relation to his non-selection would have begun to run from October 8, 2013 at the latest⁵⁴ when the Mr. Ganga assumed the position. He further asserts that he was informed of his non-selection by letter dated December 2, 2013 and therefore time should run from that date.

51. Notwithstanding the girth of the information before the Tribunal, there is no clear indication as to exactly when the decision was taken by the respondent not to select the complainant for the position and or when or how the complainant first became aware of this. The interview was held on March 2, 2013, but it was not until some nine (9) months after the interview - five (5) months after Mr. Ganga was offered the position and almost two (2) months after Mr. Ganga had assumed - that the respondent communicated by letter to the complainant that he had not been successful at the interview. Neither party has provided an explanation for this protracted process.
52. Such an explanation may be central to determining the circumstances in which the decision not to select the complainant was made, when the decision was in fact made, and or when the complainant reasonably first became aware that he was not selected for the position. All of which would be significant in determining when time started to run. The Tribunal is of the view that this issue may be clarified in cross-examination. **The Tribunal, therefore, proposes to treat with the issue of the viability and timeliness of this complaint at the trial.**

Victimisation: Being placed on disciplinary charges

53. Discrimination by victimisation is provided for by Section 6⁵⁵ of the Act. To ground a complaint of victimisation, the complainant must show that the catalyst for the unfavourable

⁵⁴ Respondent's Submissions para 5(b)-(e).

⁵⁵ 6. (1) *A person ("the discriminator") discriminates by victimisation against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has— (a) brought proceedings against the discriminator or any other person under this Act, or any relevant law; (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act, or any relevant law; (c) otherwise done anything under or by reference to this Act, or any relevant law, in relation to the discriminator or any other person; or (d) alleged that the discriminator or any other person has committed an act, which (whether or not the allegation so states) would amount to a contravention of this Act, or any relevant law, or by reason that the discriminator knows the person*

treatment is that he (the complainant) had either initiated action against him (the discriminator) under the Act (or any relevant law) or assisted some person in doing so. The complainant alleges that he was victimised by the laying of disciplinary charges against him after his attorney had requested that he be reinstated. The respondent rebuts this by saying that it was not aware of the complaint before the Commission when the disciplinary charges were lodged, and, therefore, the laying of the said disciplinary charges were not linked to the complaint. This therefore raises the issue of the timeliness of the allegation.

54. Section 6(1) (a) of the Act requires that there was some preceding complaint before the Tribunal, which provoked the victimisation complained of. In the instant event the alleged victimisation preceded the filing of the complaint, because the disciplinary charges were laid on May 15, 2014 albeit before the Complaint was filed, but also before the respondent received the Commission's First Notice of Complaint dated August 29, 2014. There is no evidence that the respondent knew or had any way of reasonably knowing of the pending complaint at the Commission before the respondent received the said Notice.

55. The Tribunal finds that the complainant has failed to show that he was victimised by being placed on disciplinary charges within the definition of the Act. This allegation therefore is unsustainable. Similarly, the allegations of victimisation for refusal to provide a job letter, or late payment of salaries are not sustainable because the decision not to provide the job letter or pay the salaries in the manner that it was done occurred before the respondent was informed of the complaint pending against it, at the Commission.

Victimisation: Arising from Termination

56. The complainant alleges that the respondent victimised him by terminating him because he had brought a complaint under the Act. The respondent refutes this submission (at this stage) on the preliminary point that this is not a viable complaint because it occurred after the original complaint was filed.

57. As a general rule, a complainant cannot rely on an event that occurred after the complaint was filed to support his allegation. A complainant ought to lodge a fresh or amended complaint

victimised intends to do any of those things referred to in paragraphs (a) to (d), or suspects the person victimised has done, or intends to do, any of them.

whenever the subject matter relied upon changes materially from the complaint that was originally lodged. This includes complaints of discrimination as well as victimisation.

58. However, Section 6 of the Act recognises that victimisation can occur as a result of a discriminator becoming aware of a complaint being lodged. When this happens the allegation of victimisation can be considered as a continuum or part of the discriminatory chain of events emanating from the original complaint, as it relies on the complaint for its viability. In those instances (which must be determined on a case by case basis), the ensuing allegation of victimisation can attach to the complaint, so that it is subsumed in it and becomes part of complaint that was alleged, when it is referred to and or is submitted before the Tribunal. The principles of natural justice require that the respondent must be given an opportunity to respond to the new allegation of victimization and appropriate case management of the complaint must be made to allow for this. Such an approach is not inconsistent with Sections 6 or 30 of the Act.

59. This interpretation of the Act, assimilates and gives effect to the decision of the Court of Appeal in *Equal Opportunity Commission v. Attorney General of Trinidad and Tobago and Director of Personal Administration*⁵⁶. The Court of Appeal⁵⁷ left it open to the Tribunal to determine on a case by case basis, whether it would consider complaints of victimisation that had not been investigated by the Commission, if the allegations of victimisation occurred after the complaint was brought before the Tribunal. In such circumstances, the uninvestigated allegation of victimisation is unlikely to be the subject of a new or amended complaint. By deeming such allegations of victimisation to be subsumed in the complaint that provoked it, the intent of the Court of Appeal is secured.

60. In the instant proceedings, the Tribunal finds that the mere statement that the termination occurred after and or was not part of the original complaint, is therefore not sufficient to defeat its viability. In the particular circumstances of this case, whether or not the allegation of termination can be considered as a continuum of the complaint is inextricably linked to the

⁵⁶ Civil Appeal, No. P291 of 2014

⁵⁷ See also the decision of the Tribunal in *Baptiste v. UTT*.

merits of the allegation. It is therefore, an issue of mixed law and fact and cannot be determined as a preliminary issue.

61. The Tribunal will require the parties to make full and frank disclosure of all documents and records in their possession and or under their control with respect to the allegation concerning the position of Senior Manager, Sports and Recreation and victimisation in being terminated after the respondent received notice of the original complaint. The Tribunal proposes to amend the pre-trial time-table to permit the parties to agree anew issues arising out of this decision and to amend and or supplement their respective lists, bundles and or Witness Statements accordingly. A new pre-Trial Time-table will fixed by the Registrar.

THE COMMISSION'S REPORT

62. In their submissions in response to issue 7(ii)⁵⁸ both the respondent⁵⁹ and the complainant agreed that the Commission's Report does not violate section 40(1) of the Act and is properly admissible into evidence⁶⁰. This compromise however does not obviate the Tribunal's disquiet that information gathered in the investigation to support and further the conciliation process (which is protected by section 40(1) of the Act) has induced comments and or observations in the Commission's Report, on the law and or adjudication of the issues before the Tribunal. Examples of these are contained in paragraphs paragraph 43 of the Commission's Report, where the opinion is expressed –

“...The failure to provide the said information purports that there were perhaps some discrepancies in the recruitment and selection process for the said position;

Or at paragraph 45 -

“The Complainant has established a prima facie case of victimisation under the Act...”

Or at paragraph 47 -

“...it cannot be concluded that the Complainant was treated unfairly with respect to his allegations concerning Mr. D. Ganga...”

⁵⁸ Whether the Report and Recommendations of the Equal Opportunity Commission dated 7th September, 2016 or any part thereof is admissible into evidence having regard to S.40 of the Equal Opportunity Act 22:03.

⁵⁹ Respondent's submissions dated October 29, 2018; complainant's submission dated the November 15, 2018.

⁶⁰ See *Baptiste v. UTT*, supra in which this issue was considered.

63. In addition, there is an exhaustive opinion on the law needed to ground a case of discrimination attached as Appendix III to the Commission's Report. This format is common to many of the Commission's Reports.

64. The Tribunal is neither influenced by nor reliant on these opinions and observations expressed in the Commission's Report. The Tribunal is bound to apply its mind free from preconceived notions, or unconscious bias in its deliberations. In *Sgt. Terrance Roy & others v Her Worship Nalini Singh Coroner, St. George West County*⁶¹, the Court of Appeal considered the issue of apparent/unconscious bias. Jamadar JA reaffirmed: -

"The test for unconscious bias as stated in Porter v Magill [2002] 2 AC 397, is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

65. The Tribunal's vulnerability to arguments of apparent/unconscious bias impacts its perceived impartiality and independence and may undermine its unswerving commitment to procedural fairness as the cornerstone of its work. In an effort to avert the potential fall-out of the foregoing the Tribunal has taken a decision pursuant to Rule 1.3 of the Equal Opportunity Tribunal Rules of Practice and Procedure 2016 to waive the Commission's compliance with Rule 5.1(b) of the Tribunal's Rules which requires it to send the Tribunal a copy of its Report.

ORDER

65.1. The Tribunal holds that it has no jurisdiction to hear the allegations concerning: -

- i) Discrimination caused by the non-payment of acting or extra duty allowance;
- ii) Victimisation for the disciplinary proceedings being brought, the denial of a job letter and the later payment of salaries.

66. The issue of costs will be determined at the end of the Trial.

⁶¹ Civil Appeal P294/2013 Claim No. CV 2012-01211.

67. The foregoing decision is made and delivered by the Judge/Chairman of the Tribunal in accordance with Section 44 (7) of the Act.⁶² There is a limited right to appeal under section 50(2)⁶³ of the Act.

Judge/Chairman
Cantreson
Equal Opportunity Tribunal

⁶² The decision of the tribunal in any proceedings shall be made by the Chairman and shall be delivered by him.

⁶³ 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; (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.

