

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE EQUAL OPPORTUNITY TRIBUNAL

E.O.T. No. 0001 OF 2017

BETWEEN

RISHI PERSAD MAHARAJ

Complainant

AND

CASCADIA HOTEL LIMITED

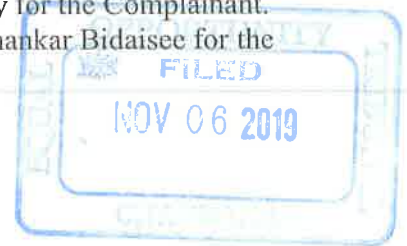
Respondent

DECISION ON PRELIMINARY ISSUES

BEFORE: Madame Justice Donna Prowell-Raphael.

APPEARANCES: Stacey Mc Sween instructing Lemuel Murphy for the Complainant.
Rachael Latchme Jaggernauth instructing Shankar Bidaisee for the Respondent.

DELIVERED ON: November 6, 2019.



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THE EQUAL OPPORTUNITY TRIBUNAL

1. The Equal Opportunity Tribunal¹ (“the Tribunal”) is an anti-discrimination court established by the Equal Opportunity Act² (“the Act”). The Act permits a person who claims that he has been discriminated against or victimised because of sex, race, religion, ethnicity, disability, origin and marital status³ in the areas of⁴ employment, education, accommodation or the provision of goods and services to submit⁵ “*a written complaint ... setting out the details of the alleged act of discrimination*” to the Equal Opportunity Commission (“the Commission”). The Act also prohibits offensive conduct⁶ in public which may offend, insult, humiliate or intimidate another person or a group of persons because of their gender, race, ethnicity, origin or religion and which is done with the intention of inciting gender, racial or religious hatred.
2. In the event that a 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 Tribunal is of the same status, and has power under the Act, like the High Court to grant injunctions, compel persons to appear and or produce documents, make orders for damages in an unlimited amount, and can fine and or commit for contempt. The Tribunal is entirely separate and independent from the Commission.

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. 2

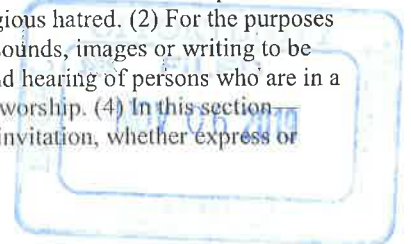
2:03, Laws of the Republic of Trinidad and Tobago.

³ Section 3 of the Act.

⁴ Section 4 of the Act.

⁵ *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.*

⁶ Section 7 of the Act: 7. (1) A person shall not otherwise than in private, do any act which— (a) is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of persons; (b) is done because of the gender, race, ethnicity, origin or religion of the other person or of some or all of the persons in the group; and (c) which is done with the intention of inciting gender, racial or religious hatred. (2) For the purposes of subsection (1), an act is taken not to be done in private if it— (a) causes words, sounds, images or writing to be communicated to the public; (b) is done in a public place; (c) is done in the sight and hearing of persons who are in a public place. (3) This section does not apply to acts committed in a place of public worship. (4) In this section— “public place” includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.



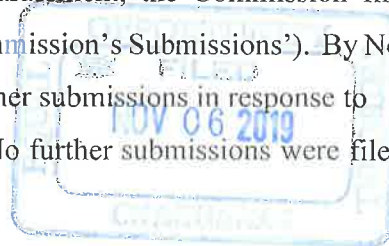
THE PROCEEDINGS

The Pleadings

3. These proceedings were initiated by referral ('the Referral') from the Commission dated February 20, 2017 and filed on March 2, 2017. The Complaint Form ('the Complaint') was filed on July 14, 2017. The Complainant is claiming damages (general and special) for discrimination by way of sex and or sexual harassment and or him being subject to a detriment, interest and costs.
4. An Appearance was entered on October 2, 2017. Pursuant to an Order dated June 12, 2018 an Amended Defence was filed on July 11, 2018. The Reply to the Amended Defence was filed on September 21, 2018. A Pre-Trial Review was held on December 10, 2018. All Pre-trial orders have been complied with and (subject to the disposition of the Preliminary Issues below) the Complaint is pending trial.

Preliminary Issues

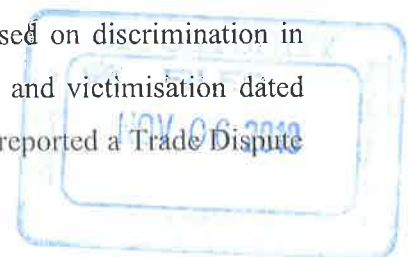
5. At the Pre-Trial Review on December 10, 2018, the parties were ordered to file and exchange Legal Propositions of Law and Relevant Facts with Authorities on three (3) issues ('preliminary issues') –
 - (i) Whether the Complaint ought to be struck out on the grounds that the Respondent was not the employer of the Complainant;
 - (ii) Whether the proceedings in this Tribunal and at the Ministry of Labour are duplicitous and or an abuse of the process;
 - (iii) Whether the Tribunal has the jurisdiction to hear and determine the issue of sexual harassment in these proceedings.
6. The Respondent filed its Propositions of Law on March 7, 2019. The Complainant filed its Propositions of Law on March 15, 2019.
7. In response to a request by the Tribunal to provide submissions on the jurisdiction of the Tribunal to hear and determine issues of sexual harassment, the Commission filed a Statement as Amicus Curiae on March 29, 2019 ('Commission's Submissions'). By Notice dated May 1, 2019, parties were permitted to file further submissions in response to. The Respondent filed its submissions on May 6, 2019. No further submissions were filed by



the Complainant. This decision (which unfortunately has had to be adjourned on three (3) previous occasions since April 2019), disposes of the preliminary issues.

Material facts

8. The Referral instituting the Complaint by the Commission is intitled between Rishi Persad Maharaj as the Complainant and Cascadia Hotel Limited as the Respondent.
9. The Complainant claims that he was employed by the Respondent on September 4, 2014 and was terminated on October 5, 2015. The Complainant avers that between March 2015 and September 2015 the Respondent's Director of Operations used inappropriate words such as "sexy", "baby", "hot" and "bae", to him slapped him on his buttocks and pinched him on his waist (these acts are collectively referred to as the 'alleged sexual harassment'). He asserts that the Respondent is vicariously responsible for the alleged sexual harassment.
10. The Respondent claims that his relationship with the Director of Operations deteriorated after he blocked her on Whatsapp and he avoided contact with her. He references alleged complaints by the Director of Operations about his work performance. He avers that he made his discomfort with the alleged sexual harassment known to the Director of Operations sometime in September 2015, and that he made two (2) complaints in writing bearing July 24, 2015, - and October 5, 2015 (the same day that he was terminated) respectively. He further alleges that his termination was without notice on the basis that the position he occupied was unavailable.
11. The Complainant asserts that the Director of Operations ought to have known that her acts caused him anxiety, embarrassment discomfort distress and detriment. In support of his claim for damages the Complainant relies on a purported report by Dr. Ramdeo Ramsoondar, Psychiatrist. Subsequent to his termination, the Complainant avers that he lost a future employment opportunity after receiving an unfavourable reference in relation to unprofessional behaviour and sexual misconduct.
12. The Complainant lodged a complaint with the Commission based on discrimination in employment on the basis of sex, by way of sexual harassment and victimisation dated November 17, 2015. Subsequently through his Trade Union he reported a Trade Dispute



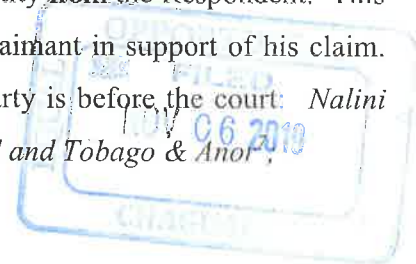
(No 4 of 2016). ('The said Trade Dispute') to the Ministry of Labour by letter dated December 15 2015.

13. The Respondent avers that it is the Banquet and Conference Centre Limited ('BCCL') and not Cascadia Hotel Ltd. It avers that no complaint has been made against it whatsoever in accordance with the Act. It further avers that BCCL and the Cascadia Hotel Ltd. (the Respondent) are separate legal entities and therefore submits that the wrong entity is before the Tribunal. The Respondent affirms that BCCL was the employer of the Complainant and not Cascadia Hotel Ltd. The Respondent asserts that the Complaint ought to be struck out.
14. The Respondent asserts that the Complainant disclosed during its interview process that he was a homosexual. This allegation has not been disputed by the Complainant. The Respondent avers that it has an open door policy and does not tolerate any form of discrimination against its employees.
15. The Respondent states that the Director of Operations is the wife of its Managing Director. She is the mother of three (3) children, an upstanding citizen and graduate of the University of the West Indies in Literature and Economics. She has held directorships on several boards and mentors young women. She has worked in senior Communications Specialist positions in several large organisations. She has a zero tolerance for discrimination, demoralising, and disrespectful behaviour.

The Respondent's Submissions filed on March 7, 2019.

16. The Respondent concluded that the Tribunal ought to strike out the Complaint. It submitted

- (i) The Complainant's employer is not the Respondent. The Complainant's employer is BCCL. BCCL is a separate and distinct legal entity from the Respondent. This is supported by the documents tendered by the Claimant in support of his claim. The claim ought to be struck out as the wrong party is before the court: *Nalini Kokaram-Maharaj v. Attorney General of Trinidad and Tobago & Anor*.



⁷ CV 2017 -04173; per Quinlan-Williams J.

- (ii) A party should not be twice vexed in the same matter. *Johnson Gore Wood & Co.*⁸. See also *Dr John Prince v. Telecommunications Authority of Trinidad and Tobago*⁹.
- (iii) “Parties are not permitted to bring fresh litigation because they may entertain fresh views of the law, or new versions which they present as to what should be a proper apprehension by the court of the legal result. If this were permitted litigation would have no end”: *Hoystead and others v. Commissioner of Taxation*¹⁰.
- (iv) The proceedings are duplicitous because the terms of the settlement of the Trade Dispute brought by the Claimant, arising out of the same termination includes compensation for the injury (if any) claimed in this action.
- (v) The Act does not provide for sexual harassment nor does it set it out as a status under section 3;
- (vi) The Complainant has not stated any grounds under section 4 of the Act that amount to breaches of the Act.

The Complainant’s Submissions filed on March 15, 2019.

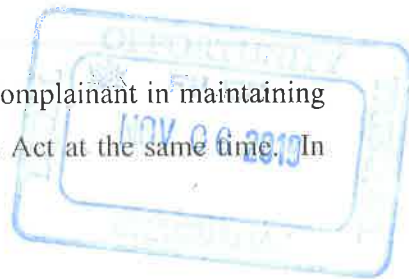
17. The Complainant submitted *inter alia* that -

- (i) The Respondent was aware that the Complainant was employed by the BCCL since his claim was investigated by the Commission and referred to the Tribunal. The Tribunal has the jurisdiction to substitute the BCCL for the Respondent under and by virtue of Part 19.5(1) of the CPR.
- (ii) The claim ought not to be struck out at this stage without the actual evidence that the Respondent as sued is not the proper party as there has been no admission as to same by him. If the Respondent wants to strike out the claim the relevant application supported by evidence must be made.
- (iii) That there is no duplicity or abuse of process by the Complainant in maintaining claims under both the Industrial Relations Act and the Act at the same time. In

⁸ [2001] 1 All ER 481.

⁹ CV 2009 – 03367.

¹⁰ (1926) AC 155.



support of this the Complainant relies on *Kelvin Field, Doolarie Ramcharan v. Probhadaï Bissessar and Sookdeo Ramcharan and Bracebridge Engineering Ltd. v. Darby*¹¹.

- (iv) The Act provides for the Tribunal to hear complaints referred to it pursuant to section 39(1),
- (v) Sexual harassment can amount to a detriment: *see Harvey Issue 122 at page L86A and Porcelli v. Strathclyde Regional Council*¹².
- (vi) Discrimination in the workplace based on sexual harassment existed when persons were made to suffer a detriment based on their sex: *Harris v. Forklift Systems Inc*¹³; *Jensen v. Paltry Enterprises Ltd*¹⁴.
- (vii) No comparators were necessary to prove persons were treated less favourably and that sexual harassment is tantamount to a form of sexual discrimination in the workplace.
- (viii) The Act provides for the Tribunal to hear and determine the issue of sexual harassment.

The Commission's Amicus Brief

- 18. The Commission's Submissions were filed on March 29, 2019: The Tribunal notes the alacrity and willingness of the Commission to provide these submissions on short notice.
- 19. The Commission indicated that it was aware of the issue concerning the striking out of the Respondent, and submitted that this was a matter for the Tribunal upon hearing the consideration of the relevant evidence.
- 20. With respect to the issue of the Tribunal's jurisdiction to determine matters of sexual harassment under the Act, the Commission concluded that -

"...the Act does not specifically provide for sexual harassment but it prohibits discrimination on the ground of sex, and there is precedent in

¹¹ [1990] IRLR 3.

¹² [1986] ICR 564, [1986] SC 137, [1985] ICR 1977.

¹³ (1993) s10 US 7.

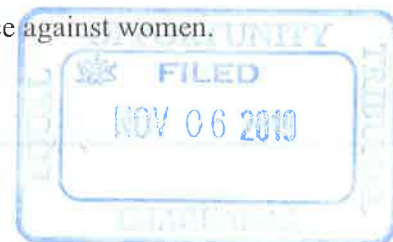
¹⁴ (1989) 1SCR 1252.



the UK, the US and the UN system for saying that sexual harassment is a form of sex-based discrimination.”

21. In reaching this conclusion the Commission relied in summary on Paras 33 to 38 of its Report dated January 30, 2017, and added -

- (i) The Act is a human rights statute and must be interpreted broadly and purposefully. In support of this the Commission cited the Privy Council decisions of *Attorney General of Trinidad and Tobago v. Wayne Whiteman*¹⁵, *Kenneth Suratt & ors v. The Attorney General of Trinidad and Tobago*¹⁶, *Leighton v. Michael and Charalambous*¹⁷ (a decision of the UK Employment Appeals Tribunal and a number of Canadian decisions).
- (ii) Sexual harassment is a form of sex discrimination. The Commission considered the similar provision of the UK Sexual Discrimination Act, ('1975 SDA') and the Act. It quoted extensively to illustrate how the SDA was interpreted and applied in *Porcelli v. Strathclyde Regional Council*.
- (iii) The Tribunal has no jurisdiction to hear claims of sexual harassment under the Act. *Porcelli v. Strathclyde Regional Council*¹⁸ is not applicable. It is distinguishable as this case hinged not so much on sexual harassment but rather was based on the Complainant being targeted because of her sex.
- (iv) The US position and the Civil Rights Act and the approach taken by the US courts in certain cases.
- (v) Sexual harassment in international documents. The Commission stated that the United Nations and International Labour Organisation systems have recognised sexual harassment as a form of discrimination and violence against women.



¹⁵ [1992] 2 All ER 924.

¹⁶ [2007] UKPC 5.

¹⁷ [1996] IRLR 67.

¹⁸ (1986) IRLR 134.

- (vi) UN General Assembly Resolution 48/104 on the Declaration on the Elimination of Violence Against Women that defines violence against women to include sexual harassment
- (vii) *The Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW) was ratified by Trinidad and Tobago on 12th January 1990. It made reference inter alia to paragraph 18 of the General Assembly Recommendation which was adopted by CEDAW in 1992, which states:

“...Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions, Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”

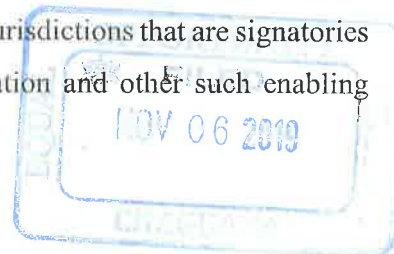
- (viii) Declaration and Platform for Action adopted by the Fourth World Conference on Women held in Beijing, China in September 1995, which inter alia

“...called on governments to enact and enforce laws against gender discrimination in the workplace and called on governments, trade unions, and community organisations to develop programs and procedures to eliminate sexual harassment in educational institutions workplaces and elsewhere.”

The Respondent's Submissions in response to the Commission was filed on May 6, 2019.

22. The Respondent submitted *inter alia* that-

- (i) The Act ought not to be construed as a human rights statute.
- (ii) Trinidad and Tobago is no longer a signatory to any Convention on human rights. Cases cited by the Commission were adjudicated in jurisdictions that are signatories to and or are bound to interpret its primary legislation and other such enabling legislation.



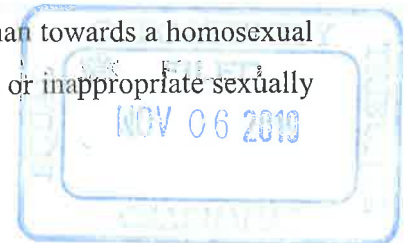
- (iii) The Act is intended to debar only certain types of discrimination on grounds provided in the Act which did not include sexual harassment.
- (iv) The prevention of sexual harassment is a policy issue which must be decided and adopted by the Executive and the Legislature and included in the Act.
- (v) The Tribunal ought not to adopt *carte blanche* the interpretation of 'detriment' used in the UK's SDA.
- (vi) The Canadian cases cited by the Commission in support of the contention that sexual harassment is a form of sex discrimination were based on the interpretation of certain Human Rights Codes in Canada, the terms of which are materially different to the Act.
- (vii) The Tribunal has no jurisdiction to hear claims of sexual harassment under the Act. *Porcelli v. Strathclyde Regional Council*¹⁹ is not applicable. It is distinguishable as this case hinged not so much on sexual harassment but on the Complainant being targeted because of her sex.
- (viii) In adopting a purposive approach to the interpretation of the Act the Tribunal ought to give consideration to the intention of Parliament in enacting it as can be gleaned from Hansard: see *Pepper v. Hart*²⁰. The clear intention of Parliament is that the Act was not intended to address sexual harassment. This was intended to be done by subsequent legislation. The Tribunal ought not to interpret the Act to defeat the clear intention of Parliament.

LAW AND ANALYSIS

23. The Complainant is male. He has not denied that he is homosexual. He alleged sexual harassment. The alleged perpetrator is a married woman and mother. These are the relevant characteristics in this Complaint because the alleged sexual harassment consists of unwelcome and or inappropriate words and or contact by a woman towards a homosexual man. The Complaint spotlights the spectre whether unwelcome or inappropriate sexually

¹⁹ (1986) IRLR 134.

²⁰ (1993) 1 All ER 42.



nanced conduct towards a homosexual is premised on his sex or his sexual orientation and in any event whether sexual harassment falls within the remit of the Act.

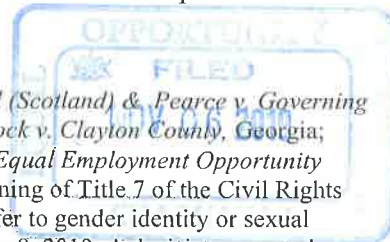
24. I intend to consider the issues raised in the following order –
- (i) Whether the Tribunal has the jurisdiction to hear and determine the issue of sexual harassment in these proceedings;
 - (ii) Whether the proceedings in this Tribunal and at the Ministry of Labour are duplicitous and or an abuse of the process; and
 - (iii) Whether the Complaint ought to be struck out on the grounds that the Respondent was not the employer of the Complainant.

Jurisdiction of the Tribunal to hear and determine Sexual Harassment Complaints

25. I am grateful for the extensive research and assistance provided by the Commission and the parties. It has been extremely helpful. I have been referred to authorities from many jurisdictions including the UK, the US, Canada and Australia and Trinidad and Tobago. I have referred to authorities from the House of Lords, the Privy Council, the Supreme Court of Canada, several United States Courts, Employment Tribunals in the UK and the Industrial Court of Trinidad and Tobago among others. Several international Conventions have been cited. I have reviewed these authorities judiciously.

26. I do not intend in this decision to repeat or reconcile the many judicial pronouncements to which I have been referred. Many of these judgments are persuasive, and some highly so. International Conventions have been useful and I have been guided by the central principle of the elimination of all forms of discrimination they incorporate. My take away is that interpretation of the relevant sections of the comparable legislation to the Act has challenged and troubled eminent international jurists and courts²¹. A lot of reliance has been placed on authorities from the UK which have interpreted material provisions of the

²¹ For examples the cases of *Macdonald (AP) v. Advocate General for Scotland (Scotland) & Pearce v. Governing Body of Mayfield School* Mc Donald – UK House of Lords; *Gerald Lynn Bostock v. Clayton County, Georgia*; *Altitude Express v. Melissa Zarda*; and *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission* are presently before the US Supreme Court. At issue was the meaning of Title 7 of the Civil Rights Act, which forbids discrimination because of “sex” but does not specifically refer to gender identity or sexual orientation. The 9 Justices were divided when arguments were heard on October 8, 2019. A decision expected around June 2020.



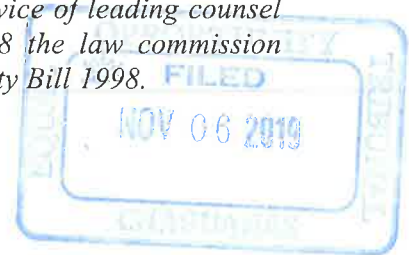
1975 SDA that are similar to the Act. In my opinion however, limited assistance can be gained from considering what could or could not be done in the United Kingdom, which unlike Trinidad and Tobago, has no entrenched Constitution²². A common thread however is that where the courts have held that sexual harassment is a form of sex discrimination their rationale has been supported by their respective statutes that follow applicable conventions that deem sexual harassment as sex discrimination.

27. I have duly considered the submissions of the Commission and the parties. I intend to treat holistically with these submissions. Where there is no individual ruling on a submission it is neither due to oversight nor failure to take it into consideration in reaching the decision.

History of the Equal Opportunity Act ('the Act').

28. Lord Bingham in the Privy Council in *Suratt and others v Attorney General of Trinidad and Tobago*²³ aptly set out the early history of the Act²⁴ –

“[3] For historical reasons which it is unnecessary to explore, there is in the population of Trinidad and Tobago a degree of racial, religious and cultural diversity which, while enriching and strengthening the national life, has also been recognised as giving rise to problems of discrimination. Section 4 of the Constitution provides that the fundamental human rights and freedoms listed in the section had existed and should continue to exist 'without discrimination by reason of race, origin, colour, religion or sex', but it is common ground that this refers only to discrimination by the state on the grounds specifically mentioned. Harmful discrimination may, however, be exercised otherwise than by the State and on grounds, such as disability, other than those mentioned. In 1987 an eminent Constitution Commission was appointed, which reported in 1990 and considered the establishment of an Equal Rights or Equal Opportunities Commission, strongly advocated by Dr La Guerre. In January 1996 the Law Commission of Trinidad and Tobago published a Working Paper on Equal Opportunity Legislation, which included a comparative survey of such legislation in other jurisdictions. A Joint Select Committee of Parliament was appointed to consider this Working Paper, and it submitted its Report in November 1997. The Attorney General obtained the advice of leading counsel in England in June and July 1998, and in June 1998 the law commission reported on the constitutionality of the Equal Opportunity Bill 1998.



²² See discussion of 'detriment', post.

²³ (2007) 71 WIR 391.

²⁴ Ibid. para 3.

29. The Act was eventually passed in 2000. There was a short amendment in 2001²⁵. An attempt was made to amend the Act in 2007²⁶ which was never completed. The State challenged the constitutionality of the Tribunal in the much quoted decision of *Suratt and others v Attorney General of Trinidad and Tobago*. The Privy Council eventually upheld the constitutionality of the Tribunal and ordered that it be implemented. Over a decade later the Tribunal remains a work in progress – judicially obscure, underutilised and under resourced.
30. Another attempt at amendment of the Act floundered in 2012²⁷. Neither the Act nor subsequent proposed Bills confronted frontally the issue of sexual harassment. In 2019 a *National Policy on Sexual Harassment* was laid in Parliament²⁸. To date no legislation treating definitively with sexual harassment has been passed by the Parliament in Trinidad and Tobago.

What is Sexual Harassment?

31. Sexual harassment has become a menace that contemporary enlightened societies are enjoined in their promise to eradicate. The term embraces a gamut of offensive conduct that permeates all social structures, strata, religion, race, age and culture. Sexual harassment is gender-blind and includes rape, sexual assault, sexual extortion, sexual discrimination, sexual taunting and or bullying and or unwanted romantic relationships. Sexual harassment in the workplace is perhaps its most common manifestation. It rears its foul head with comparable malignance in large organisations as it does in domestic employment. Leaders and rogues can be the perpetrators and or the victims. Judicial eloquence cannot displace the satirical condour of Singing Sandra²⁹ in her ageless ditty “*Die with my Dignity*”³⁰ as she gives description, voice and optic to the dichotomy of some

²⁵ Equal Opportunity (Amendment) Act 2001, Act No 5 of 2001.

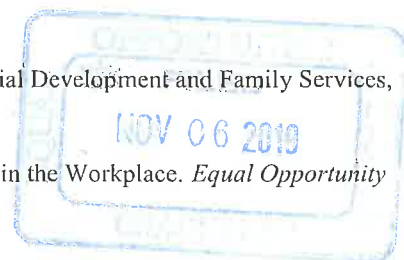
²⁶ Equal Opportunity (Amendment) Bill 2007.

²⁷ Equal Opportunity (Amendment) (No 2) Bill 2011.

²⁸ *Social Sector Investment Programme 2020*. Port of Spain: Ministry of Social Development and Family Services, Government of the Republic of Trinidad and Tobago.

²⁹ Calypsonian Sandra Des Vignes-Millington.

³⁰ Equal Opportunity Commission. (2018). Guidelines on Sexual Harassment in the Workplace. *Equal Opportunity Commission of Trinidad and Tobago*, (p. 11). Chaguanas, Trinidad.



women as they encounter sexual harassment in the workplace. Their battle to overcome the hurt and denigration it engenders resonate in the haunting refrain -

*“...I have my pride and I have my ambition,
I want to hold up my head up high as a woman,
So brother they could keep their money,
I go keep my honey and die with my dignity!!...”*

32. Historically sexual harassment has been primarily (though not solely) a woman’s issue. Within the recent past the uncloseting of non-heterosexual gender identity has revealed a different dimension of sexually based harassment. If we are to stick with the analogy of the social commentary through calypso then the ditty “*Norman is that You*” in 1976 may have heralded that era³¹. The stigmatisation, intolerance and segregation of non-heterosexuals may have its genesis in biblical philosophy and or the country’s medieval past³². This differentiation is no less obvious today, as the Act makes a clear distinction on the protection to be given to individuals based on their biological sex as opposed to their sexual preference or orientation, although the categorisation of the latter is highly dependent on the former³³.
33. Harassment is a crime in Trinidad and Tobago³⁴. Section 30A³⁵ of the *Offences Against the Person Act* which prescribes the scope of criminal harassment is broad enough to bring

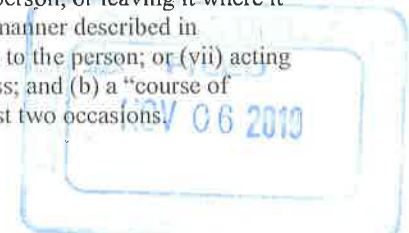
³¹ Sung by Calypsonian Dennis Williams Francis, (May 19 1943 – May 1st 1999),

³² See *Jason Williams v. AG & Others* CVO17-00720 , per Justice Devindra Rampersad paras 18-20, quoting The Hon. Michael Kirby AC CMG9 in his article “*The Sodomy Offence: England’s Least Lovely Criminal Law Export?*” “*It all goes back to the Bible. At least it was in the Old Testament Book of Leviticus, amongst ‘divers laws and ordinances’, that a proscription on sexual activity involving members of the same sex first relevantly appeared 11: ‘If a man ... lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon you.’*”

³³ See Post under the Rubric, *Constitutionality*.

³⁴ Offences Against the Person Act, Chap 11:08 section 30 A et seq.

³⁵ 30A. (1) For the purpose of this section— (a) “harassment” of a person includes alarming the person or causing the person distress by engaging in a course of conduct such as— (i) following, making visual recordings of, stopping or accosting the person; (ii) watching, loitering near or hindering or preventing access to or from the person’s place of residence, workplace or any other place frequented by the person; (iii) entering property or interfering with property in the possession of the person; (iv) making contact with the person, whether by gesture, directly, verbally, by telephone, computer, post or in any other way; (v) giving offensive material to the person, or leaving it where it will be found by, given to, or brought to the attention of the person; (vi) acting in any manner described in subparagraphs (i) to (v) towards someone with a familial or close personal relationship to the person; or (vii) acting in any other way that could reasonably be expected to alarm or cause the person distress; and (b) a “course of conduct” involves conduct of the kind referred to in paragraph (a) carried out on at least two occasions.



within it appropriate acts of sexual harassment. Under this legislation³⁶ the court may grant protective orders to victims of harassment and or make limited orders for compensation. Sexual harassment may also manifest as indecent assault³⁷ which is a criminal offence.

34. Sexual harassment may also be a civil wrong that creates a civil remedy where persons can have redress such as injunctions, damages, and compensation for it. Some jurisdictions have done so and have made express provision for it in various forms, in their anti-discrimination legislation³⁸, thereby creating a In the UK sexual harassment is governed by the *Equality Act 2010*³⁹(section 26). In the Commonwealth Caribbean Belize⁴⁰ and Barbados⁴¹ have stand-alone sexual harassment legislation. Guyana⁴² provides protection against sexual harassment at work in their anti-discrimination legislation. In the Bahamas⁴³ and St Lucia⁴⁴ some protection is offered against sexual harassment as a sexual offence. The central issue being addressed in this Complaint is whether sexual harassment has been provided for in the Act, thereby providing similar relief in this jurisdiction.
35. It is common ground among the parties and the Commission that the Act makes no express provision for sexual harassment. The words sexual harassment are not found in the Act.

³⁶ 30D. (1) A Court sentencing a person convicted of an offence under section 30A or 30B may, in addition, make an Order, in the prescribed form, for protection or compensation. (b) a “course of conduct” involves conduct of the kind referred to in paragraph (a) carried out on at least two occasions.

³⁷ Section 15, Sexual Offences Act, Chapter 11:28: 15. (1) A person who indecently assaults another is guilty of an offence and is liable on conviction to imprisonment for five years for a first offence and to imprisonment for ten years for a subsequent offence. (2) A person under the age of sixteen years cannot in law give any consent which would prevent an act being an assault for purposes of this section. (3) In this section, “indecent assault” means an assault accompanied by words or circumstances indicating an indecent intention.

³⁸ See para 29

³⁹ 26. Harassment (1) A person (A) harasses another (B) if—(a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of— (i) violating B’s dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. (2) A also harasses B if— (a) A engages in unwanted conduct of a sexual nature, and (b) the conduct has the purpose or effect referred to in subsection (1)(b). (3) A also harasses B if— (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex, (b) the conduct has the purpose or effect referred to in subsection (1)(b), and (c) because of B’s rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct. (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect. (5) The relevant protected characteristics are— age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

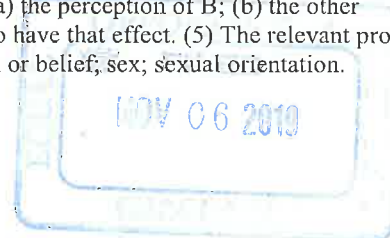
⁴⁰ *Prevention Against Sexual Harassment Act Cap 107* (1996),

⁴¹ *Employment Sexual Harassment (Prevention) Act 2017*.

⁴² *Prevention of Discrimination Act Chap 99:09*, section 8.

⁴³ *Sexual Offences and Domestic Violence Act Cap 99*.

⁴⁴ *Criminal Code Chap 3:01* section 139



The Act does not expressly censure sexual harassment, provide definition and or provide redress for it. Taking the submissions conjointly in essence, I am being urged by the Complainant and the Commission to sidestep the inertia of Parliament and provide relief to the vulnerable demographic by-

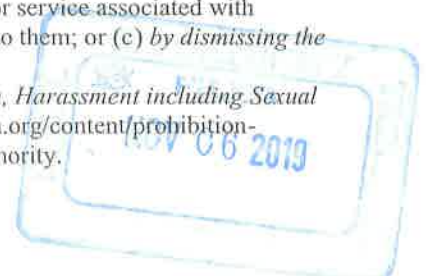
- (i) adopting (possibly adapting) a common law definition(s) of sexual harassment extracted from decided cases and incorporating it into the Act;
 - (ii) by finding that sexual harassment (so defined) is a detriment under section 9(c)⁴⁵ of the Act; and
 - (iii) deeming sexual harassment to be sex discrimination.
36. Unfair treatment in the workplace can take various forms including discrimination, harassment or abuse of power. The distinction (and overlap) among discrimination, harassment or abuse of power is well explained in the United Nations Bulletin on the *Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority*⁴⁶:

“...1.1 Discrimination is any unfair treatment or arbitrary distinction based on a person’s race, sex, religion, nationality, ethnic origin, sexual orientation, disability, age, language, social origin or other status. Discrimination may be an isolated event affecting one person or a group of persons similarly situated, or may manifest itself through harassment or abuse of authority.

1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under

⁴⁵ 9. An employer shall not discriminate against a person employed by him— (a) in the terms or conditions of employment that the employer affords the person; (b) in the way the employer affords the person access to opportunities for promotion, transfer or training or to any other benefit, facility or service associated with employment, or by refusing or deliberately omitting to afford the person access to them; or (c) *by dismissing the person or subjecting the person to any other detriment [emphasis mine]*-

⁴⁶ (Secretary-General’s bulletin. (2008, February). *Prohibition of Discrimination, Harassment including Sexual Harassment and Abuse of Authority*. Retrieved from UN HR Portal: <https://hr.un.org/content/prohibition-discrimination-harassment-including-sexual-harassment-and-abuse-authority>.



the provisions of this policy but in the context of performance management.

1.3 Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

1.4 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority... ”

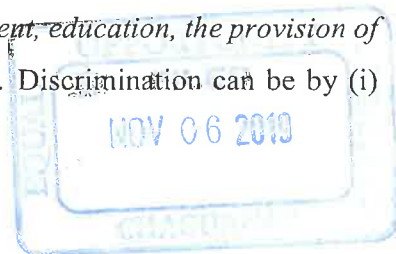
37. The scope of discrimination protected by the Act is narrower and more restricted than the ambit of the discrimination defined in the UN Bulletin referred to above. The Act speaks to discrimination based only on the statuses categorised in section 3 as follows -

“... “status”, in relation to a person, means— (a) the sex; (b) the race; (c) the ethnicity; (d) the origin, including geographical origin; (e) the religion; (f) the marital status; or (g) any disability of that person; ...”

38. Section 3 also defines “sex” as excluding “sexual orientation or preference”. In comparison with the UN Bulletin, the Act does not protect discrimination based on age, language, nationality or any other status.

39. The Act applies to⁴⁷ “discrimination in relation to employment, education, the provision of goods and services and the provision of accommodation”. Discrimination can be by (i)

⁴⁷ Section 4 of the Act.



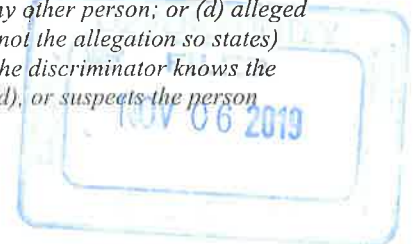
discrimination as defined in section 5⁴⁸ on the ground of status; or (ii) discrimination by victimisation as defined in section 6⁴⁹. The Act treats expressly with discrimination in the context of unfavourable treatment or victimisation. It does not treat expressly with harassment or abuse of authority, although some types of the harassment or abuse of authority may eventually manifest as discriminatory conduct that draw protection from the Act. One facet of harassment is sexual harassment which is generally the product of some form of abuse of authority and is not expressly protected by the Act. The only manner in which sexual harassment could gain protection under the Act is if it could be construed to be a form of sex discrimination. The issue that frontally confronts this Complaint is whether sexual harassment could be considered to be sex discrimination under the Act.

40. The terms sexual harassment and sex discrimination are sometimes used interchangeably although they are not synonymous. The prefix 'sex' in both terms is ambiguous and somewhat misleading and blurs the distinction between them. The Lord Rodger in *MacDonald* put it this way -

"...The starting point here is to note that the expression 'sexual harassment' is ambiguous. The adjective 'sexual' may describe the form of the harassment; for instance, verbal abuse in explicitly sexual terms. Or it may be descriptive of the reason for the harassment; for instance, if a male employee makes office life difficult for a female employee because he does not wish to share his office with a woman. It is only in the latter sense that, although not as such prohibited by the Sex Discrimination Act, sexual harassment may nevertheless be within the scope of the Act as less favourable treatment accorded on the ground of sex. A claim under the

⁴⁸ 5. For the purposes of this Act, a person ("the discriminator") discriminates against another person ("the aggrieved person") on the grounds of status if, by reason of— (a) the status of the aggrieved person; (b) a characteristic that appertains generally to persons of the status of the aggrieved person; or (c) a characteristic that is generally imputed to persons of the status of the aggrieved person, the discriminator treats the aggrieved person, in circumstances that are the same or are not materially different, less favourably than the discriminator treats another person of a different status.

⁴⁹ 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 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.



Act cannot get off the ground unless the claimant can show she was harassed because she was a woman. A male employee may make office life difficult for a female employee, not because she is a woman, but because he objects to having anyone else in his office. He would be equally unwelcoming to a male employee. Harassment of a woman in these circumstances would not be sex discrimination... ”

41. Hence, a person can be the victim of harassment that leads to victimisation or discrimination because of their gender (male or female). This form of gender based sex discrimination is expressly protected by the Act, which guards male or female persons from less favourable treatment and victimisation on the basis of their biological gender⁵⁰. This specie of gender based sexual discrimination excludes discrimination that is based on sexual orientation or preference.⁵¹ Therefore, although harassment may be described as sexual, the conduct is not prohibited unless the reason for the harassment is the sex of the victim. Conduct is not prohibited merely because the form of the harassment may be sexual.
42. More often than not however (as is alleged in this Complaint), sexual harassment in employment refers not to gender issues but to abuse of authority in the form of different forms of sexual bullying for which a satisfactory response is a precondition for continued employment and or employment opportunity or advancement. In this jurisdiction this is the ordinary man’s (or woman’s) perception of sexual harassment and the most present concern. It is in this context that feelings of indignity, humiliation and discrimination are used.
43. The culture of this country and the Caribbean is peculiar and different from that of the metropolis whose legal definition the Tribunal is invited to copy and incorporate into the Act. Trinidad and Tobago is well known for its affability and warmth. The quaint balance between liberalism and conservatism, so visible for example at Carnival, can be

⁵⁰ “3. 3. In this Act— ... “status”, in relation to a person, means— (a) the sex; (b) the race; (c) the ethnicity; (d) the origin, including geographical origin; (e) the religion; (f) the marital status; or (g) any disability of that person;

4. This Act applies to— (a) discrimination in relation to employment, education, the provision of goods and services and the provision of accommodation, if the discrimination is— (i) discrimination on the ground of status as defined in section 5; or (ii) discrimination by victimisation as defined in section 6; (b) offensive behaviour referred to in section 7.

⁵¹ 3. In this Act— ... “sex” does not include sexual preference or orientation;

disconcerting to a stranger who is greeted with the refrain “*gimme a wine dey*”⁵². The tolerance for the off-the-cuff sexually tainted comment may be peculiar.

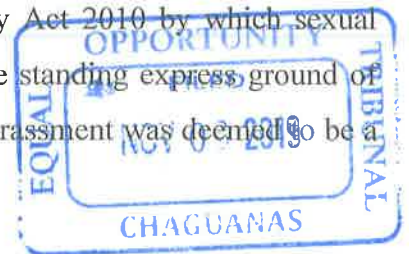
44. Conversely, the demand for respect and fair play in Trinidad and Tobago is deep-seated in the culture and the constitutional mandate for it entrenched in the fundamental human rights that is guaranteed to all citizens. I would be slow for example to hold that in the culture of this country words such as ‘sexy’, or ‘bae’ unless accompanied by discriminatory conduct within the scope of the Act can be actionable. These are every day words in the idiom of this country that can be regarded by some as complimentary while they may be offensive to others. I would be less tolerant however of the refusal or dismissal of a worker because of their sexual orientation or because they rebuffed a sexual invitation.
45. As the House of Lords sought to define sexual harassment in *Macdonald (AP) v. Advocate General for Scotland (Scotland) & Pearce v. Governing Body of Mayfield School -*

“...It is not for the courts to extend the ambit of the discrimination legislation, however desirable this may seem, under the guise of interpretation of provisions which are unambiguously clear. The Equal Treatment Directive (Council Directive 76/207/EEC) has recently been amended by Council Directive 2002/73/EC of 23 September 2002. In article 2 of the Equal Treatment Directive as amended, sexual harassment is specifically identified by reference to the form of the harassment and is, as such, prohibited. Sexual harassment is defined as ‘any form of unwanted verbal, non-verbal or physical conduct of a sexual nature’ having ‘the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment’. Sexual harassment, as so described, is deemed to be discrimination on the grounds of sex. Thus sexual harassment is treated as an independent, free-standing ground of complaint. Member States are required to give effect to the amendments to the Equal Treatment Directive by 5 October 2005...” [Emphasis added]

46. In the UK the difficulties of treating with a definition of sexual harassment was cured by legislation by incorporating the directive into The Equality Act 2010 by which sexual harassment was treated independently and was made a free standing express ground of complaint in the legislation⁵³. By statute therefore sexual harassment was deemed to be a

⁵² Calypso sung by Nadia Batson (2019).

⁵³ See above.



form of sex discrimination⁵⁴. This approach is commendable as well for this jurisdiction (although this is not to be interpreted as suggesting the verbatim adoption of the UK definition into our laws).

47. Unfair treatment in the workplace is a multi-faceted problem that falls primarily under the Industrial Relations Act (“IRA”)⁵⁵. Workers can obtain protection and redress for unfair treatment in the workplace under the IRA. Disputes between employer and employee may be reported through the mechanism provided by the IRA as a trade dispute⁵⁶. Sexual harassment is one facet of unfair treatment in the workplace. The IRA makes no express provision for sexual harassment. However, the Industrial Court has recognised it as a factor that would be taken into account in determining a trade dispute⁵⁷ because of the power given to the court to look at equity good conscience and principles of good industrial relations.

48. It has also recognised a common law duty of the employer to provide a safe work environment that includes protecting workers from sexual harassment. His Honour Bernard J stated in *Bank Employees’ Union v. Republic Bank Limited* that⁵⁸ –

“There is a common law obligation on an employer to provide a safe system of working.....That obligation may well extend to the provision of a work environment which is free of the threat or application of sexual coercion by one employee towards another.”

49. His Honour Bernard J. in that decision explained sexual harassment in this way

“...Therefore when we speak of sexual harassment or any derivative thereof, we mean no more than sexual misconduct, directed, in the

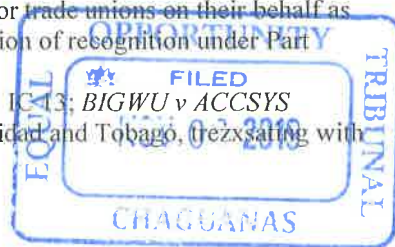
⁵⁴ Equal Treatment Directive as amended (Council Directive 2002/73/EC of 23 September 2002) Article 2.

⁵⁵ Chap. 88:01.

⁵⁶ Ibid. section 2: “trade dispute” or “dispute”, subject to subsection (2), means any dispute between an employer and workers of that employer or a trade union on behalf of such workers, connected with the dismissal, employment, non-employment, suspension from employment, refusal to employ, re-employment or reinstatement of any such workers, including a dispute connected with the terms and conditions of the employment or labour of any such workers, and the expression also includes a dispute between workers and workers or trade unions on their behalf as to the representation of a worker (not being a question or difference as to certification of recognition under Part III);”

⁵⁷ See *Bank Employees Union v. Republic Bank Limited* (25 March 1996) TT 1996 IC 13; *BIGWU v ACCSYS Limited* (10 March 2008) TT 2008 IC 37 (decisions of the Industrial Court of Trinidad and Tobago, (re-examined with sexual harassment in a Trade Dispute).

⁵⁸ TD 17/95.

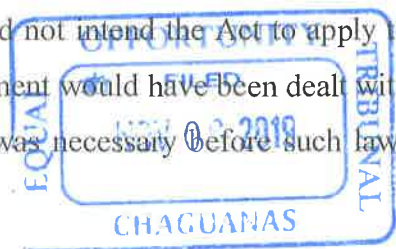


workplace, at an unwilling victim to whom that misconduct is offensive, unsettling, upsetting, psychologically damaging or otherwise stressful.”

50. This definition is not adequate as a universal definition that incorporates all forms of sexually based discriminatory practices. A definition of sexual harassment must plainly and succinctly in simple gender neutral language embed in the minds of the victims and perpetrators alike that behaviour such as that complained of by Singing Sandra and flagged by Merchant is outlawed. Such a definition ought not to omit a remedy for the peripheral victim of sexual harassment who is deprived of deserved employment opportunity or advancement on the basis of merit because the aspired position has fallen prey to such mischief.
51. The definition and incorporation of a definition of sexual harassment into Equal Opportunity legislation in my view ought to be given wide national engagement before it is adopted. The definition of what constitutes sexual harassment is one of mixed law and mores. Parliament ought to decide the scope of the definition. When this is determined the appropriate amendment can be made to the Act or new legislation enacted to ascribe conduct as sexual harassment and or to deem it to be sex discrimination with appropriate remedies. This would give the citizens clarity, certainty and precision. Any adventurism into legislating morality properly belongs to the Parliament in a democratic society.

Sexual harassment as a 'detriment'

52. It has been submitted that the Act ought to be interpreted as human rights legislation, broadly and purposively. Approached in this way the term “*any other detriment*”, in section 9 (c) of the Act, could implicitly capture conduct such as sexual harassment that could be attributed to having a genesis in an individual’s sex. Intertwined in a purposive interpretation is the mischief that Parliament intended the legislation to redress. The Tribunal has been referred to an excerpt from Hansard that reports that the contribution then Attorney General as promoter of the legislation.
53. It has been submitted that the Attorney General stated in the contribution in moving the passage of the relevant Equal Opportunity Bill that he did not intend the Act to apply to sexual harassment. It was his intention that sexual harassment would have been dealt with in subsequent legislation as further public engagement was necessary before such laws

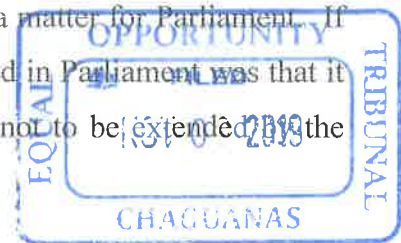


could be enacted. The Tribunal is mindful however that the expression of the Attorney General is not necessarily decisive of the intention of Parliament and this can only be gleaned from a full and thorough analysis of the relevant Parliamentary debate. There is no contention or authority before the Tribunal to suggest that the Parliament did not accept the will of the Attorney General. Even so it still lies for the Tribunal to determine whether the words of statute as framed can bear the natural and proper interpretation advocated.

54. In *Relaxion Group plc v. Rhys-Harper; D'Souza v. London Borough of Lambeth Jones v. 3M Healthcare Limited (Respondents)*⁵⁹ Lord Hope surmised that although legislation must be construed purposively the scope to be given to the legislation is a matter for Parliament. He stated⁶⁰ -

*“...78. It is a remarkable fact that, although discrimination on whatever grounds is widely regarded as morally unacceptable, the common law was unable to provide a sound basis for removing it from situations where those who were vulnerable to discrimination were at risk and ensuring that all people were treated equally. Experience has taught us that this is a matter which can only be dealt with by legislation, and that it requires careful regulation by Parliament. The Community has adopted the same approach in its promotion of the principle of equal treatment as part of its social action programme. The fact is that the principle of equal treatment is easy to state but difficult to apply in practice. In the result the legislation which is under scrutiny in these appeals is designed to be specific and particular rather than universal in its application, and it is still being developed incrementally. It must, of course, be construed purposively, as Waite LJ said in *Jones v Tower Boot Co Ltd* [1997] ICR 254, 261-262. But the scope to be given to the legislation is essentially a matter for Parliament. The question which lies at the heart of these appeals is what its intention was when it enacted the provisions in each of these three Acts which deal with discrimination by employers against applicants and employees...” [Emphasis added].*

55. Accepting and applying this principle, the scope of the Act is a matter for Parliament. If the policy underlying the legislation at the time it was promoted in Parliament was that it should not apply to sexual harassment, then the scope ought not to be extended to the Tribunal to apply to it.



⁵⁹ [2003] UKHL 33.

⁶⁰ *Ibid*, para 78.

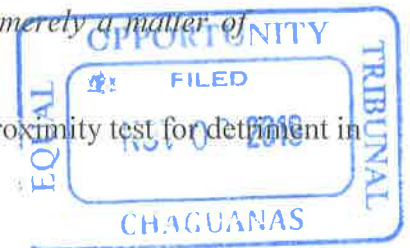
56. Whether the term “any other detriment” as used in the Act could be construed to mean sexual harassment, turns first of all on the meaning of the word “detriment” used in the context of section 9 of the Act which provides:

*“9. An employer shall not discriminate against a person employed by him— (a) in the terms or conditions of employment that the employer affords the person; (b) in the way the employer affords the person access to opportunities for promotion, transfer or training or to any other benefit, facility or service associated with employment, or by refusing or deliberately omitting to afford the person access to them; or (c) by dismissing the person or subjecting the person to **any other detriment.**”*
[Emphasis added].

57. The word “detriment” is not defined in the Act. There is therefore some element of discretion in determining how it should be interpreted. There is no clear or natural universal meaning of the word “detriment”. Black’s Law Dictionary gives a general definition of “detriment” as “Any loss or harm suffered by a person or property”. The exact meaning of the word varies with the context in which it is used. There can be little doubt that the context of the detriment as used in section of the Act, suggests that it relates to some form of injury or maltreatment sustained in the course of employment that is not expressly provided for in the preceding subsections. In *Relaxion* Lord Hobhouse in interpreting “detriment” in the analogous UK legislation stated –

“...139. The words "subjecting her to any other detriment" are general and undefined but it can be seen that the problem of construction is to decide what breadth they should be given and whether, on the facts of any given case, the facts fall within them. Guidance upon the scope can again be derived from the content of the provision. What are the detriments which an employer may subject an employee to which can fairly be referred to as "any other detriment" in the context of this subsection? The answer must lie in a test of proximity. Does the conduct complained about have a sufficiently close connection with her employment? Is it sufficiently similar to the other conduct mentioned in the subsection? Any criterion of proximity has as its antithesis the concept of remoteness. Remoteness can have, as an element, remoteness in time. The further removed the conduct is in time from the employment, the greater the likelihood that the conduct is too remote and that the employment has become merely a matter of history ...” [Emphasis added].

58. Lord Hobhouse was thereby advocating a three (3) pronged proximity test for detriment in this context -



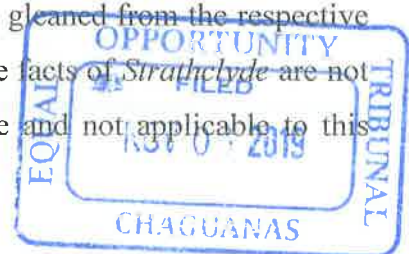
- (i) Does the conduct complained about have a sufficiently close connection with her employment?
- (ii) Is it sufficiently similar to the other conduct mentioned in the subsection?
- (iii) Is it too remote in terms of time?

59. This approach is very persuasive and is readily adaptable and can be applied to the interpretation of “detriment” in the Act.

Are Comparators necessary?

60. Section 5 of the Act provides that the discriminator discriminates against an aggrieved person if “...*the discriminator treats the aggrieved person, in circumstances that are the same or are not materially different, less favourably than the discriminator treats another person of a different status*”. It therefore requires that a comparison be done between the treatment that would be meted out to an unaffected person in materially similar circumstances and the treatment meted out to the aggrieved person.

61. In the respective arguments that sexual harassment is a detriment that could be deemed to be sex discrimination that does not require a comparator, as it is by its very nature comparatively unfavourable treatment. A lot of reliance has been place on *Porcelli v. Strathclyde Regional Council*⁶¹.and the supporting line of authority. In *Macdonald (AP) v. Advocate General for Scotland (Scotland) & Pearce v. Governing Body of Mayfield School*⁶² the House of Lords arduous and thought provoking rationales did not agree that a comparator was not necessary in hybrid cases of sex discrimination/sexual harassment. The House of Lords found that no general principle of law could be derived from the decision of *Porcelli v. Strathclyde Regional Council* and it was disapproved⁶³. Although *Strathclyde* was not expressly overruled the best consensus that could be gleaned from the respective judgments is that it ought to be confined to its own facts. The facts of *Strathclyde* are not replicated in this Complaint. It is therefore distinguishable and not applicable to this Complaint.



⁶¹ [1986] ICR 564, [1986] SC 137, [1985] ICR 1977.

⁶² [2003] UKHL 34.

⁶³ Ibid, para 105 per Lord Hobhouse.

62. Further, even if the impugned conduct could be deemed to be on the basis of sex, the treatment complained about would have to be measured against the likelihood of similar treatment being meted out to an appropriate (hypothetical) comparator. Lord Hobhouse in *Macdonald (AP) v. Advocate General for Scotland (Scotland) & Pearce v. Governing Body of Mayfield School*⁶⁴ reasoned –

“... 94. There is no escape, then, from the need to resort to a comparison. The words “less favourable treatment” in section 1(1) (a) render this inevitable. It may be that the conduct complained of is so specific to the claimant’s gender that there is no need to do more than to ask the question, to which the answer may well be, as Ward LJ put in *Smith v Gardner Merchant Ltd* [1999] ICR 137, 148, *res ipsa loquitur*; Deakin and Morris, *Labour Law 3rd ed*, (2001) p 598, note 6. But that conclusion may be more easily drawn in cases of sexual harassment which do not involve any homophobic element than in cases such as those of Mr Macdonald and Ms Pearce where the context for the abuse is the abuser’s belief that the victim is a homosexual...”

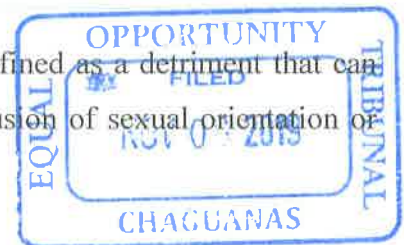
The exclusion of sexual orientation and preference

63. In this jurisdiction, it is unnecessary to introduce the common law approach (adopted in the UK cases) to excluding sexual orientation from sex discrimination as the House of Lords was constrained to do in *Macdonald (AP) v. Advocate General for Scotland (Scotland) & Pearce v. Governing Body of Mayfield School* because the Act expressly defines sex as excluding sexual orientation or preference⁶⁵. It would be mandatory given that definition of “sex” that any sexual harassment coming within the provisions of the Act must exclude harassment that is attributed to “sexual orientation or preference.” However unlike the UK, in this jurisdiction the courts are constrained by the Constitution. Having regard to the anomaly in the treatment of heterosexuals and persons who have other gender orientation or identity, if detriment were deemed to include sex discrimination, would such an interpretation breach the guaranteed constitutional right to equality of treatment and or equality before the law, guaranteed by section 4 of the Constitution?

64. If it were to be accepted that sexual harassment can be defined as a detriment that can ground sex discrimination, then having regard to the exclusion of sexual orientation or

⁶⁴ Para. 94.

⁶⁵ See section 3 of the Act, above.



preference from the definition of sex in the Act, this approach would give rise to the anomaly that persons who admit non-heterosexual gender identity, may be taunted, fired, denied employment and or be subject to other hostile work environment merely because of sexual orientation or preference, while heterosexuals experiencing the same injury may benefit from protection under the Act. The “Normans” who have been the victims of demeaning taunting and or sexual bullying for employment opportunity or advancement is in no less odious position than the woman in Singing Sandra’s ditty. It is this seeming injustice and inequity that the facts of the instant Complaint have invited the Tribunal to confront and remedy judicially.

65. Archie CJ in delivering the majority decision of the Trinidad and Tobago Court of Appeal in *Suratt v. AG* stated⁶⁶:

“...it is axiomatic that all legislation has to be construed and applied so as to remain in conformity with the Constitution and in particular the guaranteed rights to equality of treatment and equality before the law under section 4 of the Constitution...”

66. The learned Chief Justice goes on to say:

“...In respect of the exercise of statutory powers, the authorities are clear that, in the absence of some compelling justification, it is unreasonable for a decision-maker to reach a decision that contravenes or might contravene fundamental rights⁶⁷.”

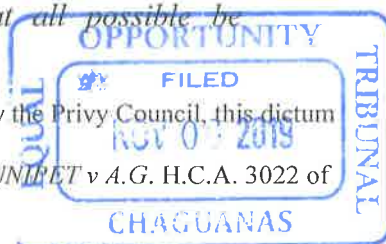
67. The obligations of Trinidad and Tobago prescribed by International treaties to which it has acceded cannot be shunted by the Tribunal. Through these conventions the country is committed to promote gender equity and non-discrimination. It is the duty of the court to interpret legislation as far as is reasonable in keeping with Treaties to which the country is obligated. The legal position in this regard has been mooted by the Caribbean Court of Justice in the cases of *Tomlinson v the States of Belize and Trinidad and Tobago*⁶⁸:

“...that in common law jurisdictions such as Trinidad and Tobago, there is a sacrosanct rule that statutory provisions should if at all possible be

⁶⁶ At paragraph 42. Although the decision of the Court of Appeal was overturned by the Privy Council, this dictum of Archie JA was not disapproved.

⁶⁷ See e.g. *R v Lord Saville of Newdigate, ex. parte A & ors.* [2000] 1 WLR 1855; *UNIFET v A.G.* H.C.A. 3022 of 2003 (unreported).

⁶⁸ CCJ applications Nos OA1 and 2 of 2013.



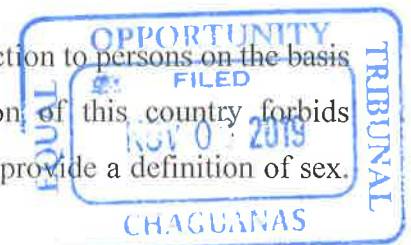
interpreted as compliant with the State's treaty obligations rather than in breach of those obligations; Salomon v Commissioners of Customs and Excise... The rule of construction is not confined only to statutes which are directed at implementation of an international convention but is directed at all statutes as a general canon of statutory interpretation..."

68. I find it difficult to isolate concepts of sexual orientation or preference from biological gender as they seem same inextricably intertwined. The determination and categorisation of a person's sexual orientation or preference is determined by a comparison with their biological sex. However the definition of sex in the Act makes it mandatory to make a distinction between sex and sexual preference and or orientation and to do so may produce a result that is averse to the sacrosanct canons of statutory interpretation referred to above. The Privy Council in *Suratt* found that Parliament was within its Constitutional remit to enact the Act in the terms that it did and to make a distinction between sex (biological gender) and sexual orientation or preference. I am respectfully bound by the Privy Council analysis. Baroness Hale in delivering the majority judgment of the Board stated:

"...Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The courts may on occasion have to decide whether Parliament has achieved the right balance. But there can be little doubt that the balance which Parliament has struck in the EOA is justifiable and consistent with the Constitution. Section 7 does impinge upon freedom of expression but arguably goes no further in doing so than the existing law; if it does go further, by including gender as well as racial or religious hatred, it is merely bringing the law into conformity with all modern human rights instruments, which include sex or gender among the prohibited grounds of discrimination..."

69. Therefore to construe detriment in section 9 of the Act to imply that as a universal or general principle it includes sexual harassment as a form of sex discrimination may be inconsistent with the intention of Parliament not to provide for sexual harassment in the Act.

70. I recognise that the Act in defining sex, expressly denies protection to persons on the basis of their sexual orientation or preference. The Constitution of this country forbids discrimination on the basis of sex. The Constitution does not provide a definition of sex.



Lord Bingham in delivering the dissenting judgment in *Suratt and others v. Attorney General of Trinidad and Tobago*⁶⁹ stated that the definition of sex' in the Constitution did not include sexual orientation or preference⁷⁰. However more recently in *Caleb Orozco v AG of Belize*⁷¹ (the Belize Supreme Court received assistance from a decision of the UN Human Rights Committee ('UNHRC') to conclude that the word 'sex' in the Belizean Constitution was to be interpreted as including 'sexual orientation. International treaty obligations however incline the Tribunal more to the *Orozco* approach of the Belize Supreme Court, than that Lord Bingham's in *Suratt*. Although in contemporary jurisprudence there may be attraction in the *Orozco* approach, it is not the remit of this Tribunal to determine how the word 'sex' in the Constitution should be construed.

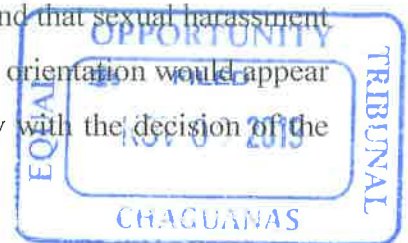
71. In *Suratt*, the Privy Council held that Parliament intended and clearly expressed the distinction of the protection it intended to give to persons claiming sex discrimination on the basis of their biological gender, and persons claiming sex discrimination because of their orientation or preference. The Privy Council reasoned that Parliament intended to make this distinction, and it was within its purview so to do. On the contrary, in the instant case, Parliament did not intend that sexual harassment would come under the purview of the Act. The upshot of this argument is if Parliament did not intend to include sexual harassment into the Act, then to bring it through the back door by stretching the definition of "detriment" in the manner suggested would be outside the remit of this Tribunal. To do so may not only be an affront to the Constitution but may also defeat the expressed intention of Parliament and reject the treaty obligations of the country.
72. Notwithstanding the broad statement of principle expressed by the in *Suratt and others v. Attorney General of Trinidad and Tobago*⁷², the apparent inequality and discrimination intrinsic in deeming sexual harassment to be sex discrimination that excludes sexual orientation and or preference was not explicitly addressed. To find that sexual harassment is a form of sex discrimination that includes sexual preference or orientation would appear to be inconsistent with the Parliament's intention and implicitly with the decision of the

⁶⁹ (2007) 71 WIR 391.

⁷⁰ At para 35.

⁷¹ 2016) 668/2010, para.94,

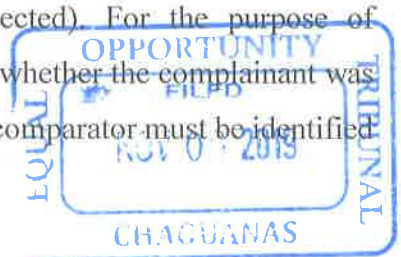
⁷² (2007) 71 WIR 391



Privy Council in *Suratt* to validate the intent of Parliament. I am therefore constrained to hold that sex discrimination in the Act refers only to discrimination premised on biological gender and excludes sexual preference or orientation. I am not prepared however to construe detriment under the Act as including sexual harassment on the basis that it is a form of sex discrimination as to do so would implicitly discriminate against persons on the basis of their sexual orientation or preference, which may offend constitutionally guaranteed rights to equality of treatment and equity and trespass upon the treaty obligations of the country.

73. I therefore hold that the Act does not provide for complaints to be brought under it on the ground of sexual harassment. I further hold that sexual harassment cannot be deemed to be sex discrimination under the Act. The Act allows the Tribunal (inter alia) on a case by case basis to examine conduct of any kind to determine whether it amounts to a detriment that triggers sex (in the sense of biological gender) discrimination and or victimisation under it. The fact that the alleged conduct may have a sexual connotation or overtone may aggravate a complaint, but it is incidental and not decisive or mandatory.
74. The term “*any other detriment*” in section 9 of the Act is an umbrella that shelters other forms of unfair treatment in the workplace not expressly specified in that section. What constitutes detriment is fact specific. The test could be considered one of proximity: *Does the conduct complained about have a sufficiently close connection with the employment? Is it sufficiently similar to the other conduct mentioned in the subsection? Is it too remote in terms of time? ...*⁷³ To determine whether the impugned conduct falls within the Act, the appropriate status of discrimination - race, sex, ethnicity, origin, religion, or marital status or disability must be identified. So that for example, a non-heterosexual individual can ground a complaint on his race or even sex (save that in the case of sex any allegations alluding to sexual orientation or preference will be rejected). For the purpose of determining whether the conduct was discriminatory, that is whether the complainant was treated less favourably under section 5 of the Act, a suitable comparator must be identified

⁷³ See above.



on which to base the comparison of less favourable treatment intrinsic to the definition of discrimination.

75. From the foregoing it will be deduced that in apposite circumstances there is a window where protection from sexual harassment at the workplace, though not expressly mentioned, may get some traction under the Act. This window is not large enough to allow all forms of it to sidle through. In particular, while harassment that is premised on biological sexual identity may be protected, harassment premised on sexual identity caused by sexual preference or orientation is not.

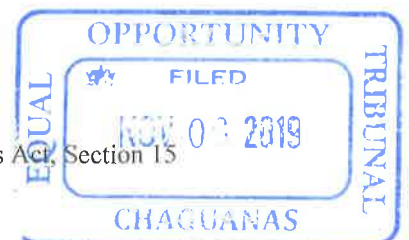
Summary of the law of sexual harassment

76. There is no legislation that expressly provides for sexual harassment in Trinidad and Tobago. Presently, certain acts of sexual harassment may constitute harassment and acts of sexual indecency or assault and are thereby criminalised⁷⁴. Acts of sexual harassment in the workplace may be used to support a claim (such as unfair or wrongful dismissal in a trade dispute) under the Industrial Relations Act⁷⁵. There is no provision for bringing a claim for sexual harassment for determination by the Tribunal under the Act. There is some scope on a case by case basis to determine whether injurious conduct of a sexual nature or with a sexual nuance or undertone accompanied by actionable unfavourable treatment may be discriminatory under the Act.
77. The law as it presently exists encourages adhocism and spawns tangled improvisation and imprecision, which may expose vulnerable sectors to unequal and discriminatory treatment and frustrate the expectations of distressed persons. While this form of entrenched social inequity in the treatment of non-heterosexuals in particular may have been tolerable ‘back in the day’, it is contrary to contemporary principles of equality and impartiality that are the flagships of the enlightened legal dogma. There is an exigent pressing need for specific legislation to be enacted to treat expressly and definitively with sexual harassment. To this end I join the Commission in its statement⁷⁶-

⁷⁴ Offences Against the Person Act, Section 30 A et seq; Chapter 11:28. Sexual Offences Act, Section 15

⁷⁵ Chap. 88:01.

⁷⁶ Ibid,



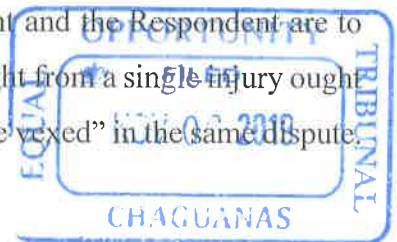
“... specific legislation on sexual harassment would name and define sexual harassment, provide a mechanism for preventing harassment, articulate the employer’s legal obligation to take immediate and appropriate action through a sexual harassment policy, contribute to the fair treatment of the harasser and the harassed/victim, define where is “work,” pre-empt the utilisation of mandatory arbitration agreements which employees are often compelled to sign (thereby stripping them of their freedom of choice and of their rights of recourse/redress to the Courts), and provide just and effective remedies for the misconduct...”

Application to this Complaint

78. In the event that the matter may have progressed to trial I would give the following guidance. Before the Tribunal for consideration is whether the conduct complained of was a detriment that resulted in sex (male or female) discrimination under the Act. Whether the conduct occurred is a matter of fact, which can only be determined at trial. Whether it is a detriment is a matter of law.
79. The evidential burden on the Complainant first of all is to prove that the conduct he alleges occurred. He must then satisfy the proximity test to show that the conduct complained about had a sufficiently close connection with his employment, that it was sufficiently similar to the other conduct mentioned in the section 9 and that it is not too remote in terms of time. In so far as he is alleging sex discrimination, the onus is on him so show that that the alleged discriminatory conduct occurred because of his sex and not because of his sexual orientation or preference. The facts that the alleged conduct may have had a sexual overtone is incidental and does not remove the onus on him to show that he was treated less favourably than a non-heterosexual female.

Duplicitous Proceedings

80. For completion, I note that the Complainant had already compromised and settled the Trade Dispute and has received the agreed settlement. This Trade Dispute arises from contemporaneous proceedings from the same termination in the Complaint. The authorities on abuse of process cited by both the Complainant and the Respondent are to like effect: that is to say that the various forms of redress sought from a single injury ought to be raised in the same action so that a party will not be “twice vexed” in the same dispute.



81. The principle that “*an unimpeached compromise represents the end of the dispute or dispute from which it arose*” was accepted in *Prudential Assurance Company Ltd. v Mc Bains Cooper*⁷⁷. As the authors in *Foskett on Compromise* stated⁷⁸:

“This principle applies whether or not litigation was commenced in relation to the dispute and if it was whether or not the compromise has been embodied in a consent order or judgment of the court. The foundation of the principle lies in two aspects of public policy: the need for there to be an end to disputation and the desirability of parties being held to their bargains...”

82. For this reason I do not accept the suggestion that, although matters surrounding the termination were settled, the issues of sexual harassment discrimination survived. The issue of sexual harassment is relevant in a Trade Dispute. When the said Trade Dispute was settled all issues arising from the termination were extinguished.

83. Parties to Trade Disputes under the Industrial Relations Act are entitled to complain about issues of sexual harassment, which can be taken into account in arriving at a decision in a Trade Dispute⁷⁹. The Memorandum of Agreement expressly stated that it was in full and final settlement of all claims arising out of the Complainant’s termination. I would therefore hold that it would be an abuse of process to maintain this action, where redress for the alleged wrongful termination has already been realised in the Memorandum of Agreement.

Should the Respondent be struck out?

84. The Complainant by paragraph 2 of the Complaint avers to his employment. In support of this averment he has annexed a letter of offer dated September 4, 2014 as part of exhibit “A”. This letter of offer are purported to have been signed by the Complainant.

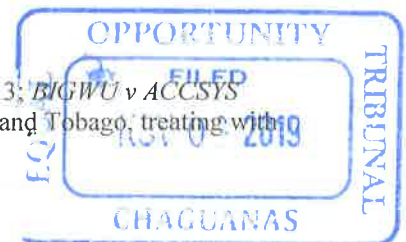
85. Paragraph 1 of the letter of September 4, 2014 states -

*“We refer to your interview with us and now wish to offer you employment at the **Banquet and Conference Center Ltd** as Customer Service /Quality*

⁷⁷ [2000] 1W.L.R.2000, at 2005.”

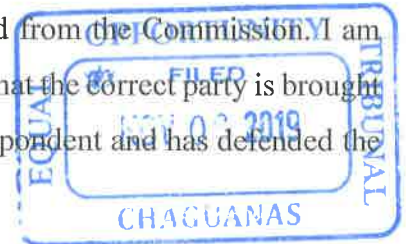
⁷⁸ Foskett, S. D. (2015). *Foskett on Compromise*. London: Thomson Reuters.

⁷⁹ See *Bank Employees Union v. Republic Bank Limited* (25 March 1996) TT 1996 IC 13; *BIGWU v ACCSYS Limited* (10 March 2008) TT 2008 IC 37 (decisions of the Industrial Court of Trinidad and Tobago, treating with sexual harassment in a Trade Dispute).



Assurance Coordinator at a basic salary of \$7500.00 per month gross.
[Emphasis added].

86. The Complainant has also annexed as “I” to his Complaint a document that he avers “*was a manual in relation to the Policy and Procedures of the Defendant (sic)*”. This document purports to relate to BCCL and not the Cascadia Ltd.
87. The letter of offer and the Policy Manual support the submission that the Complainant was employed by BCCL and not Cascadia Ltd.
88. Save that the Complainant contends that the Respondent was aware of the intitulation and took no steps to have it changed there is no other averment by the Complainant in his pleadings to displace the inference arising from these documents that the Complainant was employed by BCCL and not the Respondent. The onus is on the Complainant to ensure that the correct Respondent is before the Tribunal when the matter is initiated,
89. The Complainant has submitted that the Tribunal has the power under Part 19 of the Civil Proceedings Rules 1998 (‘CPR’) to substitute BCCL for the existing Respondent. He contends that there is no application before the Tribunal to strike out the Complaint and therefore it ought not to be struck out. The Respondent contends however that there is no application before the Tribunal to substitute BCCL for the existing Respondent, and if the Tribunal were to substitute BCCL at this stage, BCCL would have lost the opportunity of the process to which it was entitled when the Complaint was before the Commission. This argument must be viewed in light of the decision of the Court of Appeal in *Director of Personnel Administration v. Equal Opportunity Commission & anor.*⁸⁰ that the Tribunal has no jurisdiction to hear a Complainant that has not been investigated by the Commission.
90. The Referral of this matter from the Commission was in the name of the existing Respondent. The issue therefore arises whether the Tribunal can substitute BCCL for the existing Respondent in whose name the matter was referred from the Commission. I am mindful that while the onus is on the Complainant to ensure that the correct party is brought before the Tribunal, BCCL has assumed the position of Respondent and has defended the matter in its own name.



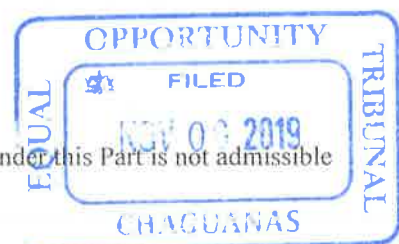
⁸⁰ Civil Appeal No.P291 of.2014.

91. The Referral of this matter from the Commission was in the name of the existing Respondent. The issue therefore arises whether the Tribunal can substitute BCCL for the existing Respondent in whose name the matter was referred from the Commission. This issue of substitution of parties was recently canvassed and decided in the matters of *Andreana Henry v. Princess Entertainment Corporation etc.*⁸¹ the Tribunal cannot substitute for the Respondent a party who was not named in the Referral. I am bound by the decision in the *Director of Personnel Administration v. Equal Opportunity Commission & anor.*⁸² in which the Court of Appeal upheld the decision of the High Court on the interpretation of the Act, that the Tribunal has no jurisdiction to hear or determine a complaint that had not been investigated by the Commission.
92. Notwithstanding the peculiar facts of this matter where BCCL has accepted the role of Respondent, if the Tribunal were to substitute BCCL for the Respondent, it would create a fresh complaint against BCCL that was not lodged at or investigated by the Commission. Section 40⁸³ of the Act prevent the Tribunal from looking into the evidence that emerged before the Commission to determine if and to what extend BCCL participated in those proceedings. The Tribunal would have no jurisdiction to hear or determine that fresh Complaint as its hands are tied by the decision in *Director of Personnel Administration v. Equal Opportunity Commission & anor.*
93. In the premises, I hold that the Complainant was employed at all material times by BCCL and not by the existing Respondent. BCCL is not the Respondent before the Tribunal and has not been named in the Referral. I would further hold that the Tribunal has no power in these circumstances to substitute BCCL for the existing Respondent as this would create a new complaint that was not investigated by the Commission. I do not propose to strike out the Respondent as there is no application before the Tribunal. The Tribunal must therefore view the Complaint in the light of the Complainant's pleadings on which his case is constructed. The lynchpin of the Complaint is that the Complainant was employed by the Respondent that is Cascadia Hotel Ltd. His letter of appointment shows that he was

⁸¹ EOT NO 0002 OF 2016.

⁸² Civil Appeal No.P291 of 2014.

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



employed by BCCL and not the Respondent Cascadia Hotel Ltd. The pleadings therefore cannot support a viable case against the Respondent.

94. The Equal Opportunity Rules of Practice and Procedure make no provision for this event. Rule 24.1 of the EOR provides that where the Rules of the Tribunal are silent, then the rules of the Supreme Court applies *mutatis mutandis*. By CPR 26.1 (k) empowers the Tribunal to dismiss or give judgment on a claim after a decision on a preliminary issue. Part 26.2(1)© of the CPR provides -

“...26.2 (1) The court may strike out a statement of case or part of a statement of case if it appears to the court— (a) that there has been a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings; (b) that the statement of case or the part to be struck out is an abuse of the process of the court; (c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim; or (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10...” [Emphasis added].

95. I therefore propose to strike out the Complaint on the basis that it discloses no ground for bringing the claims made in it against the Respondent⁸⁴.

DISPOSITION

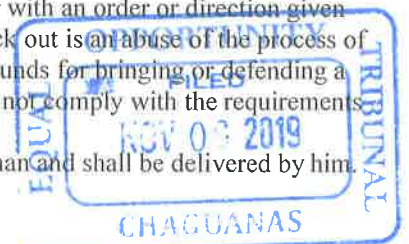
96. I therefore make the following orders -

- (i) The claim for damages for discrimination by way of sexual harassment is dismissed.
- (ii) Further and or in the alternative, the Complaint is struck out and the proceedings are dismissed; and
- (iii) The Complainant to pay the Respondent’s costs to be assessed by the Registrar in default of agreement.

97. This decision is made and delivered by the Chairman pursuant to section 44(7)⁸⁵ of the Act. An appeal lies from the Tribunal to the Court of Appeal, whether as of right or with leave,

⁸⁴ CPR: 26.2 (1) The court may strike out a statement of case or part of a statement of case if it appears to the court— (a) that there has been a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings; (b) that the statement of case or the part to be struck out is an abuse of the process of the court; (c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim; or (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

⁸⁵ (7) The decision of the Tribunal in any proceedings shall be made by the Chairman and shall be delivered by him.



on grounds specified in s 50(2)⁸⁶ 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, 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))⁸⁷.

H. H. Donna Prowell-Raphael
Judge/Chairman

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⁸⁶50. (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..

⁸⁷ See *Suratt and others v. Attorney General of Trinidad and Tobago* [2007] UKPC 55, para 6.

