REPUBLIC OF TRINIDAD AND TOBAGO

EQUAL OPPORTUNITY TRIBUNAL

EOT No. 0015 of 2017

BETWEEN

CARLISLE ROOPCHAND

Complainant

AND

PCS NITROGEN TRINIDAD LIMITED

Respondent

DECISION ON PRELIMINARY POINTS

APPEARANCES: Mr. Sarfraz N. Alsaran for the Complainant.
Mr. Faarees F. Hosein for the Respondent.

DATED: May 29, 2020.

Contents

THE APPLICATION

1. These proceedings[1] were instituted by referral from the Equal Opportunity Commission ('the Commission') dated 16th August 2017. By Notice of Application on March 6, 2019 ('the Application') the respondent sought the following orders-

   (i) That the Equal Opportunity Tribunal ('the Tribunal') lacks the jurisdiction to hear and determine the complaint ('the Complaint') as the Complaint does not come within the meaning of Section 3[2] of the Equal Opportunity Act, Chap 22:03 ('the Act');

   (ii) Alternatively, that on the facts and matters set out in the complainant's Claim [*sic*][3] Form and/or on the averments contained in the Claim Form the claim under the Act is unmaintainable and/or wholly misconceived and the same ought to be struck out as an abuse of process in accordance with Part 26[4].2(1)(a) and/or (b) and (c) of the

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[1] The Complaint was filed on May 16, 2018, the Complainant is seeking the following relief-
(i) A Declaration that the Respondent has discriminated against the Complainant on the basis of his disability in breach of section 5[1] of the Equal Opportunity Act, Chap 22:03;
(ii) A Declaration that the Respondent has discriminated against the Complainant in the way it made arrangements for determining who should be offered employment and in refusing or deliberately omitting to offer him employment on the basis of his disability in breach of section 8[1] of the Equal Opportunity Act, Chap 22:03;
(iii) Damages as a result of the breaches of the Equal Opportunity Act, Chap 22:03 committed by the Respondent against the Complainant;
(iv) Aggravated Damages;
(v) Exemplary Damages;
(vi) Cost;
(vii) Such further and/or other relief as the Tribunal shall think just in the circumstances;
(viii) Interest.

[2] 3. In this Act— … "disability" means— (a) total or partial loss of a bodily function; (b) total or partial loss of a part of the body; (c) malfunction of a part of the body including a mental or psychological disease or disorder; or (d) malformation or disfigurement of part of the body;

[3] Complaint Form.

[4] "…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…"

Civil Proceedings Rules 1998 (as amended) ('CPR') as the same applies to the Tribunal;

(iii) Any further or other Order consequent on the foregoing reliefs as the Tribunal may deem fit.

THE SUBMISSIONS

2. Orders for the filing of written submissions have been complied with by the parties. I have duly considered these submissions, and I intend to treat with them holistically. Where there is no specific mention or ruling on a submission it is due neither to oversight nor to failure to take it into consideration in reaching the decision.

ISSUES

3. The issues that arise for determination may be set out as –

(i) Whether the Tribunal has the jurisdiction to determine if the medical condition of the complainant is a disability under section 3 of the Act;
(ii) Whether evidence can be adduced at the Tribunal that was not part of the conciliation proceedings;
(iii) Whether the complainant's failure to annex supporting documents to the Complainant Form is fatal to the Complaint;
(iv) Would evidence be required to determine the applicability in law of section 3 of the Act in the circumstances of this case; and
(v) Whether the complainant has shown some ground for bringing the Complaint.

LAW AND ANALYSIS

4. The thrust of the Application is that the medical condition of the complainant is not a disability under the Act, and the Tribunal either lacks jurisdiction to hear the Complaint or it is an abuse of process. In either case the Complaint ought to be dismissed at this stage.

Jurisdiction of the Tribunal

5. The first limb of the Application challenges the jurisdiction of the Tribunal to hear and determine the Complaint. The respondent submits that the facts alleged do not constitute a disability within the Act and therefore the Tribunal lacks the jurisdiction to hear the Complaint.

6. The respondent has submitted that the Tribunal does not have an inherent jurisdiction. Section 41[5] of the Act states that the Tribunal is a superior court of record that is addition to the powers and jurisdiction conferred on it by the Act, has the inherent jurisdiction of a court of that status. The jurisdiction of the Tribunal to hear and determine a complaint must be distinguished from the issue as to whether the facts alleged fall within a statutory ground of complaint. In this matter the Complaint is premised in discrimination on the status of disability within sections 3 and 5 of the Act.

7. Whether the nature of that disability falls within the preview of the definition of disability in the Act is a proper issue for the Tribunal to determine. The possibility that the facts alleged may not support the claim does not compromise the jurisdiction of the Tribunal to hear the complaint and make an appropriate determination on the merits. The issue as to whether the Tribunal has jurisdiction to entertain the claim *simpliciter* must therefore be answered in the affirmative.

Limits on the evidence that can be adduced at the Tribunal

8. The respondent has submitted that the Tribunal reviews the decisions of the Commission and in so doing is restricted in the evidence it can admit to what was considered by the Commission. The Tribunal and the Commission are distinct and separate entities with entirely different functions under the Act[6]. The Commission receives complaints, investigates

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[5] 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.

[6] Sections 26, 27, and 41 of the Act.

them and facilitates the resolution of these complaints by the parties through conciliation. Where the parties are unable to resolve their dispute, the complainant can opt to have the Commission refer the complaint to the Tribunal for judicial determination[7].

9. The Commission is not a court and is not empowered by the Act to make findings or to determine the legal rights of the parties. The views and or opinions of the Commissions on the facts set out in its Report are not admissible as evidence to prove any issue before the Tribunal. These sentiments are not decisive of the issues before the Tribunal and do not influence or bind the Tribunal in its determination of a complaint. Evidence of anything said or done in the course of conciliation proceedings at the Commission is not admissible in proceedings before the Tribunal[8]. At the core of conciliation is that it is carried out in an impartial forum that is not empowered to make findings, rulings and or decisions on the law and or the merits of the issues in dispute. Where issues of law (especially concerning jurisdiction) arise for determination at the conciliation of a complaint at the Commission the best practice would be to refer them to the Tribunal for determination at the earliest possibility.

10. The link between the Commission and the Tribunal is the referral of the complaint under section 39(1) of the Act that was lodged by the complainant under section 30(1) of the Act for determination. The ventilation of the unresolved issues or matters at the Tribunal for adjudication has the caveat of being restricted to those raised in the complaint that were investigated by the Commission[9]. The caveat on issues or matters raised to be raised at the Tribunal is not equivalent to a caveat on evidence. The parties are at liberty to adduce, and the Tribunal is empowered to receive, any admissible evidence the parties may wish to proffer to support their respective

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[7] Ibid, s 39.
[8] Section 40 of the Act.
[9] *Director of Personnel Administration v. Equal Opportunity Commission & anor*. CA No. P 291 of 2014. See also *Burton Baptiste v. U.T.T.* EOT. 008/2017.

contentions on the issues that are before the Tribunal, as they would in similarly constituted courts of law.

11. The suggestion that this Tribunal is restricted to hearing only 'evidence' that was raised at the Commission is plainly wrong. The Tribunal can admit such evidence as it considers relevant and necessary to determine any complaint that was referred to it by the Commission[10]. Neither the Court of Appeal nor the High Court in *Director of Personnel Administration v. Equal Opportunity Commission & anor (the "DPA case")* held otherwise. The court, in the *DPA case,* in construing the Act agreed that from the onset of the investigation of a complaint by the Commission, the respondent ought to know and consider the allegations being made against it. For this reason, a complaint must be lodged with the Commission and the issues complained of investigated by the Commission before they could progress to the Tribunal.

12. At the Tribunal the legal process of determining the complaint includes the parties setting out their respective cases, the adducing and testing of evidence of competent witnesses, making findings on the facts in dispute, and interpreting and applying the law to these facts in order to determine the legal rights of the parties. In so doing, principles of law and legally binding precedents emerge that support the Tribunal's rulings, decisions, judgments and or orders. The procedure at the Tribunal is governed by the Equal Opportunity Tribunal Rules ('EOTR') and by the CPR and section 50 of the Act provides a limited right to appeal the decisions and orders of the Tribunal[11].

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[10] See Rule 14 of the Equal Opportunity Tribunal Rules.

[11] 50. (1) Subject to subsection (2), the hearing and determination of any proceedings before the Tribunal, and an order or award or any finding or decision of the Tribunal in any matter (including an order or award)— (a) shall not be challenged, appealed against, reviewed, quashed or called in question in any Court on any account whatever; and (b) shall not be subject to prohibition, mandamus or injunction in any Tribunal on any account whatever. (2) Subject to this Act, any party to a matter before the Tribunal is entitled as of right to appeal to the Court of Appeal on any of the following grounds, but no other: (a) that the Tribunal has no jurisdiction in the matter, but it shall not be competent for the Court of Appeal to entertain such grounds of appeal, unless objection to the jurisdiction of the Tribunal has been formally taken at some time during the progress of the

Annexure of supporting documents to the Complaint

13. The Respondent has submitted that Documentary evidence ought to have been annexed to the Complaint. As there is no Rule in the EOTR that expressly provides for this, the provisions of the CPR apply *mutatis mutandis*[12]. CPR 8.6(2) prescribes that the Complaint *"*

> *"…must identify* ***or*** *annex a copy of any document which the claimant considers necessary to his case…" [Emphasis added].*

It is not fatal to the claim that documents identified in the Complaint are not annexed thereto, if appropriate reference is made in the claim[13]. This can be cured in the discovery process[14].

The Striking Out Application

14. The second limb of the application is that the claim is unmaintainable and/or wholly misconceived and the same ought to be struck out as an abuse of process. The principles applicable to a striking out application were considered in *UTT v. Ken Julien et al*[15]. Kokaram J. (as he then was) surmised–

> *"…A striking out application is a draconian remedy only to be employed in clear and obvious cases where it is possible to demonstrate at an early stage before further management of the claim for trial that the allegations are incapable of being proved or the Claimant is advancing a hopeless case, either accepting the facts as pleaded as proven or as a matter of law. See* ***Caribbean Court Civil Practice*** *2011,* ***Mc Donald Corporation v Steel*** *[1995] 3 AER 615. Zuckerman on Civil Procedure, A. Zuckerman p 279.*

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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

[12] EOTR 24.1.

[13] Civil Proceedings Rules (1998): Claimant's duty to set out his case 8.6 (1) The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies. (2) The claim form or the statement of case must identify or annex a copy of any document which the claimant considers necessary to his case.

[14] *Real Time Systems Limited v Renraw Investments Limited and Others* [2014] UKPC 6.

[15] CV 2013-00212.

15. At the heart of the Striking Out Application is the interpretation of section 3 of the Act. Attorney for the respondent has submitted that the definition of 'disability' in section 3 of the Act lacks the precision and detail of comparative legislation such as the *UK Disability Discrimination Act 1995*, the *UK Equality Act 2010* and the Australian *Disability Discrimination Act 1992*, which are more detailed and precise in setting out the ambit of disability they are respectively intended to cover. The lack of this detail in the Act, leaves a lacuna that the Tribunal does not have the power to fill. Therefore, the Tribunal, is restricted by the precision of the words used in section 3 and must conclude that the medical condition of the complainant is outside of that section.

16. Attorney for the complainant contends that the application involves an exercise of statutory interpretation which requires the Tribunal to determine the meaning of section 3 of the Act in the context in which they are used. The ultimate objective is to give effect and meaning to the words used consonant with the true spirit and intent of the legislation. The application of accepted principles and guidelines of statutory interpretation will show that the state of remission of the complainant's leukemia is a disability within the Act.

17. Not only has human rights legislation been accorded certain quasi-constitutional supremacy[16], but a purposive approach like that used in construing constitutional provisions has been adopted to such interpretation. In the Canadian decision of *Canada (Attorney General) v. Mossop*[17] the court stated–

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[16] *Quebec (C.D.P.D.J) v Montreal City* [2000] 1 S.C.R. 666; 683: As Philippon J. pointed out, given its fundamental and quasi-constitutional status, human rights prevails over other legislation. That principle has been reiterated by this Court on several occasions: *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 British Columbia c. Heerspink, [1982] 2 R.C.S. S.C.R. 150; *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84*; Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

[17] [1993] 1 S.C.R. 554.

> *"…It is well established in the jurisprudence of this Court that human rights legislation has a unique quasi-constitutional nature, and that it is to be given a large, purposive and liberal interpretation.:* ***Insurance Corp. of British Columbia v. Heerspink****, [1982] 2 S.C.R. 145;* ***Ontario Human Rights Commission v. Simpsons-Sears Ltd.****, [1985] 2 S.C.R. 536;* ***Bhinder v. Canadian National Railway Co****., [1985] 2 S.C.R. 561;* ***Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)****, [1987] 1 S.C.R. 1114* ***('Action Travail des Femmes'); Robichaud v. Canada (Treasury Board),*** *[1987] 2 S.C.R. 84; Zurich, supra (for a general review, see Alan L. W. D'Silva, 'Giving Effect to Human Rights Legislation — A Purposive Approach' (1991), 3 Windsor Rev. L. & S. Issues 45). This long line of cases mandates that courts interpret human rights legislation in a manner consistent with its overarching goals…"*

18. Another illustration of the principle that human rights legislation is quasi-constitutional and should be given a wide and purposive interpretation is found in *Gould v. Yukon Order of Pioneers*[18], where the court enunciated-

> *"Principles Applicable to the Interpretation of Human Rights Legislation*
> *The review of a human rights tribunal's interpretation of anti-discrimination legislation must also be guided by the principles that this Court has developed to take account of the special nature of such legislation. It was the current Chief Justice who first articulated the basic attitude to be taken towards the interpretation of human rights legislation. In Insurance Corporation of British Columbia v. Heerspink, 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145, at p. 158, Lamer J. (as he then was) made it clear that a human rights code "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law".*
> *The special nature of human rights legislation has remained axiomatic in this Court's approach to the interpretation of human rights legislation. For example, in Robichaud v. Canada (Treasury Board), 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84, at p. 89, La Forest J. explained that, by reason of its quasi-constitutional nature, human rights legislation should be interpreted generously so as to advance its broad purposes:*

[18] 1996 CanLII 231 (SCC), [1996] 1 SCR 571, 635.

> *As McIntyre J., speaking for this Court, recently explained in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, the Act must be so interpreted as to advance the broad policy considerations underlying it."*

19. The courts in this country have also adopted a purposive approach to the construing human rights provisions in the Constitution. In *Jason Jones v. The Attorney General*[19] Honourable Justice Devindra Rampersad accepted that–

> *"… The general principle was stated in AG of the* ***Gambia v Jobe***[53] *where Lord Diplock said: "A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction."*

20. If the Act like its Canadian counterparts is to be designated as a quasi-constitutional statute, then the principles for construing those provisions, ought not to transgress from the classic traditional approach of interpreting similar clauses in the Constitution[20]. At the Privy Council, Lord Bingham in *Reyes v. The Queen*[21] explained the principles governing the interpretation of Human Rights provisions in the Constitution in this way -

> *"26. … Decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation: see, among many other cases,* ***Weems v United States*** *(1909) 217 US 349 at 373;* ***Trop v Dulles*** *(1958) 356 US 86 at 100-101;* ***Minister of Home Affairs v Fisher*** *[1980] AC 319 at 328;* ***Union of Campement Site Owners and Lessees v Government of Mauritius*** *[1984] MR 100 at 107;* ***Attorney-General of The Gambia v Momodou Jobe*** *[1984] AC 689 at 700-701;* ***R v Big M Drug Mart Ltd*** *[1985] 1 SCR 295 at 331;* ***State v Zuma*** *1995 (2) SA 642;* ***State v Makwanyane*** *1995 (3) SA 391;* ***Matadeen v Pointu*** *[1999] 1 AC 98 at 108. It is*

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[19] *Jason Jones v The Attorney General* CV 2017-00720, 18 et seq.
[20] See the discussion of *Ideology Informs Interpretation* of the Constitution joint dissenting judgment of Archie CJ and Jamadar JA, in *Barry Francis & anor. v. State* Criminal Appeals 5 & 6 of 2010; para 128.
[21] [2002] UKPC 11 at para 26.

> *unnecessary to cite these authorities at length because the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the constitution. But it does not treat the language of the constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society (see Trop v Dulles, above, at 101)…"* [Emphasis added].

21. The Act introduces the novel concept (*inter alia*) of prohibiting discrimination based on disability by private employers such as the respondent. Section 3 of the Act does not in the strict sense define disability. Instead it lists the broad nature of the conditions that would be disabilities under the Act. The legislature has left it open to the Tribunal to educe and articulate the plethora of health and or medical conditions that may fall within the term. This element of discretion makes the section arguably imprecise, but not sufficiently so that the objective of the section is lost. Indeed, the broad ambit of the section facilitates the Tribunal adopting a purposive and generous approach to interpreting it.

22. As contemporary Caribbean jurists we ought not to recoil or to be paralysed by the opportunity to be guided by logic and good common sense. Sometimes there may be no finite, absolute and or all-embracing ripostes to the issues that arise. In human rights legislation, the goal must be to extract the underlying essence and spirit from the statutory syntax, to afford the individual the enjoyment of the protected rights. The Tribunal is not restricted to a blinkered interpretation premised on semantics and grammar. Matters must be judiciously and meticulously examined on a case by case basis. The complaint before us is a typical illustration.

23. The respondent has submitted that Hairy cell leukemia, is a chronic disease that does not fall within limbs (a) or (b) of the description of disability in the Act section 3 of the Act. It is a type of blood cancer that is not a malfunction of part of the body or a malformation or disfigurement of a part of the body. As a chronic disease it can be put into remission by chemotherapy. In all the circumstances the Complainant has no reasonable prospect of success. The claim is unmaintainable and/or wholly misconceived and the same ought to be struck out as an abuse of process.

24. The complainant has rejoined that the application of accepted principles and guidelines of statutory interpretation will show that the state of remission of the complainant's leukemia is a disability within the Act. The respondent is seeking, at this stage, to have the Tribunal make findings of fact on the nature, extent and prognosis of the complainant's medical condition in the absence of evidence and a trial. Neither the parties themselves nor Counsel possess the medical knowledge to discuss the characteristics and prognosis for the medical condition of the complainant and evidence may be required at the trial. The complainant has shown ground for bringing the Complaint and the striking out application ought to be dismissed. It would be an improper use of the court's jurisdiction to strike out the complaint at this stage.

25. The submissions of the parties possess a medical dimension that necessitates making findings concerning the pathophysiology of the complainant's Hairy Cell Leukemia, his prognosis and his safe employment within the respondent's workplace[22]. This Tribunal is impotent to progress the resolution of these issues without helpful evidence. Moreso, as the Tribunal proposes to take a purposive approach to the interpretation of the relevant sections of the Act.

[22] See section 14 of the Act as well.

26. I would therefore hold that the determination of the issue as to whether the medical condition of the complainant constitutes a disability under section 3 of the Act is neither clear nor obvious. It is one of mixed fact and law that cannot be determined in the absence of evidence on the medical nuances. This issue is best determined at trial where this evidence may be available.

27. Moreover, in all the circumstances, it is impossible to say with any certainty, that the complainant's case is hopeless, or incapable of being proved either accepting the facts as pleaded as proven, or as a matter of law. I would further hold that the complainant has shown some ground for bringing the complaint and it is not an abuse of process.

DISPOSITION

28. In the premises the respondent's Notice of Application dated March 6, 2019 is dismissed.

29. The respondent will pay the complainant's costs of this application to be assessed by the Registrar in default of agreement.

30. A Case Management Hearing is fixed for July 30, 2020, at 10:00 am at the main courtroom of the Tribunal, Manic Street, Chaguanas.

31. This decision is made and delivered by the Chairman pursuant to section 44(7)[23] of the Act.

HH. Donna Prowell-Raphael CEOT.

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