

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE EQUAL OPPORTUNITY TRIBUNAL

E.O.T. No. 0004 of 2016

BETWEEN

MORIBA BAKER

Complainant

AND

THE UNIVERSITY OF TRINIDAD AND TOBAGO

Respondent

JUDGMENT

BEFORE: Madame Justice Donna Prowell-Raphael
Lay-Assessor Leela Ramdeen.

APPEARANCES: Mr. Lennox Marcelle for the Complainant.
Mr. Dayle Connelly for the Respondent.

DATED: November 19th 2020.

Contents

The Proceedings.....	3
Issues.....	3
Evidence.....	4
The Complainant’s Evidence.....	4
The Respondent’s Evidence.....	6
Analysis and Law.....	8
The Time-barred Issue	8
The Discrimination Complaint	10
The Victimisation Complaint.....	20
Costs.....	23
Disposition	23

THE PROCEEDINGS

1. In his complaint filed on November 16th, 2016 ('the Complaint') the complainant claims that the respondent, his former employer has discriminated against, and victimised him at the workplace, and as a result terminated his employment. He claimed compensation, damages, and costs. The complainant averred in the Complaint that there were four (4) "aspects" of the Complaint. Two (2) of these were already determined in the Decision on Preliminary Issues dated February 13th, 2019. The remaining aspects are –
 - a) Discrimination by the respondent in not being selected and promoted to the post of Senior Manager, Sports and Recreation, ('Senior Manager') having acted in this position for approximately eleven (11) months and having the required experience and qualifications as required by the Job Description" ('the discrimination complaint'); and
 - b) Victimisation because the complainant lodged a complaint against the respondent at the Equal Opportunity Commission ('the Commission') and being terminated because of this complaint" ('the victimisation complaint').
2. The respondent, in its Defence filed on November 20th, 2016 ('the Defence') denied that the complainant was discriminated against or victimised as alleged and that the complainant was entitled to any of the relief sought.

ISSUES

3. The following issues arise for determination-
 - a) Whether the Complaint is time-barred and ought to be dismissed;
 - b) Whether there was discrimination by the respondent in the selection process for the position of Senior Manager, and the respondent's ensuing non-selection of the complainant for the position; and
 - c) Whether there was victimisation in the complainant's termination because he lodged the Complaint at the Commission.

EVIDENCE

4. The complainant filed one (1) Witness Statement on his own behalf on December 23rd, 2016. He was cross-examined by Counsel for the respondent on it.
5. On behalf of the respondent-
 - a) Leah Ramgattie provided a Witness Statements dated December 23rd, 2016, and a supplemental Witness Statement dated April 30th, 2019. She was cross-examined by Counsel for the complainant on them.; and
 - b) Arlene Nicole Connor provided a Witness Statement dated April 30th, 2019. Counsel for the complainant declined to cross-examine her.

The Complainant's Evidence

The Complainant

6. Through his Witness Statement the complainant testified that –
 - a) The complainant was first employed as an Assistant Sports Coordinator from the January 1st, 2007. He acted in the position of Executive Manager – Academy of Sports and Leisure Studies from October 2011 – October 2012. The position of Executive Manager was renamed Senior Manager of Sports and Recreation in October 2012. Thereafter he continued acting in that position up to August 2013, when he proceeded on vacation. On February 21st, 2014 he entered into a contract as Senior Instructor.
 - b) He was paid \$28,350.00 per month in the position of Senior Manager.
 - c) In March 2013, while he was acting in the position of Senior Manager, it was advertised. He applied for the position and was short listed and interviewed. He asserts that he possessed all the required qualifications and experience for the position as indicated by the Job Description and evidenced by his Resume.
 - d) On Sunday November 3rd, 2013 he stumbled upon a local newspaper article which indicated that the comparator was awarded the position of Senior Manager.

- e) By letter dated December 2nd, 2013 the complainant was informed by the respondent that he was not selected for the position of senior Manager. He stated at paragraph 17 of his Witness Statement –

“I felt treated less favourably in the time frame and manner of UTT’s [the respondent] update of my application for the post of Senior Manager and I felt greatly discriminated against by the overlooking and non-selection of myself for the position having satisfied the requirements as described in the Job Description and having acted continuously in the position for eleven (11) months. In addition, the selection of an external applicant in the form of [the comparator] was contrary to the UTT’s [the respondent] policy as referenced; of utilizing internal applicants and only external applicants when a suitable internal applicant could not have been found or meet the job specifications.”

- f) He submitted the Complaint to the Commission on May 26th. 2014.
- g) He was dismissed by letter dated October 1st, 2014 upon the conclusion of certain parallel disciplinary proceedings. The dismissal is the subject of the victimisation complaint.
7. In cross examination -
- a) The complainant identified his name as one of the recipients on an email dated October 3rd 2013¹, which was purportedly sent to him and Mustaque Mohammed and referenced the comparator starting work on Monday October 7th. 2013. The complainant stated that he could not remember if he had received that email.
- b) The complainant was shown a Memo dated October 16th 2013² that was issued by the Vice President Human Resources to all members of staff of the comparator and published via intranet announcing the appointment of the comparator to the position of Senior Manager with effect from Monday October 7th 2013. The complainant stated that he did not recall seeing it.

¹ Item 3 in the Respondent’s Supplemental Bundle filed on March 14, 2019.

² Item 4 in the Respondent’s Supplemental Bundle filed on March 14, 2019.

- c) The complainant was also shown a copy of Minutes of High-Performance Unit Meeting dated Wednesday October 30th 2013³, in which both the comparator and he were signatories as attendees. The complainant testified that he had no recollection of attending that meeting.
- d) When the comparator assumed duty on the October 7th, 2013 although he was still a member of the Academy of Sport and Leisure Studies, he reported to Professor Paul Blair as part of the Academic Unit (and not to the comparator). The complainant admitted that he may have been aware of the appointment of the comparator prior to the said November 3rd, 2013 newspaper article, but he was not aware of his qualifications before he read the article on that day.
- e) The complainant testified that although there were two (2) applicants who had been awarded higher scores than his, both were external candidates. The respondent had a policy of only sourcing employees externally if it could not find a person internally with the required skills, qualifications, and experience. The complainant was not sure whether he had filed any document referring to the said policy but suggested that the respondent's witness could speak to the policy.

The Respondent's Evidence

Leah Ramgattie

8. Ms. Ramgattie testified that she was the Senior Manager Human Resources of the respondent.

9. At paragraph 4 of her Witness Statement Ms Ramgattie stated –

“The complainant has alleged that his non-selection for the position of Senior Manager, Sport and Recreation amounted to discrimination against by reason of his race/ethnic and family origin. However, the complainant was short-listed from among a large number of candidates who responded to the advertisement for the position and was interviewed along with six (6) other candidates. Although the complainant surpassed the minimum score for selection, he did not attain the highest score in the

³ Item 5 in the Respondent's Supplemental Bundle filed on March 14, 2019.

interviews and placed third overall as is set out in the Interview Report.”

10. At paragraph 3 of her supplemental Witness Statement Ms. Ramgattie further testified that the Board of Governors of the Respondent approved a recommendation that the comparator be appointed to the position of Senior Manager. Pursuant thereto a letter of offer was prepared and issued to the comparator, who indicated his acceptance on June 9th, 2013. The comparator’s basic monthly salary was \$22,000.00 per month plus allowances.
11. At paragraph 5 of the said supplemental Witness Statement Ms. Ramgattie states that the comparator assumed duty on October 7th, 2013
12. Ms Ramgattie stated at paragraph 5 of her supplemental Witness Statement that on October 16th, 2013⁴, the Vice President Human Resources issued a Memorandum to all staff of advising of the appointment of the comparator as the Senior Manager, Sports and Recreation effective October 7th, 2013. A copy of this Memorandum was published on the intranet of the respondent.
13. She stated in cross examination that -
 - a) A memo was emailed to the complainant early in October 2013 advising of the comparator’s appointment. She said that all staff had access to the intranet and had the responsibility to check for emails intranet posts and so on, but could not say whether the complainant had received it.
 - b) There was a policy for positions to be advertised internally via intranet and website and externally, she could not state whether or how the position in issue had been advertised. She was not aware of any policy that employees must be sourced internally before going externally. She could identify at least three (3) employees of the respondent by name who had applied for the position. She had no information that the comparator’s appointment was pre-ordained.

⁴ Item 4 on the Supplemental Bundle filed on March 14, 2019.

Arlene Nicole Connor

14. Ms Connor stated in her Witness Statement that she was the Administrative Officer for the High-Performance Unit of the respondent. From the records of that Unit she observed that an email was sent to the complainant dated October 3rd, 2013⁵ advising that the comparator would assume on October 7th, 2013. She also observed Minutes of a meeting convened on October 30th, 2013⁶ by the comparator at which the complainant had signed the list of attendees.

ANALYSIS AND LAW

15. I am grateful for the research and submissions of attorneys for the parties. They have been extremely helpful. Where there is no specific mention and or ruling on a submission it is neither due to oversight nor failure to take it into consideration in reaching a decision.

The Time-barred Issue

16. The respondent submits that the discrimination complaint was lodged at the Equal Opportunity Commission ('the Commission') outside the 6-month period required by section 30 (2)⁷ of the Equal Opportunity Act ('the Act') and ought to be dismissed, as there were no exceptional circumstances under section 30(3) to save it.
17. Counsel for the complainant does not dispute that the Complaint was lodged outside of the 6-month statutory limitation. In reliance on the Decision on the Preliminary Issues⁸ in this matter, Counsel for the complainant urges the Tribunal to find that it was proportionate for the Commission to have treated the failure as inadvertence, accepted the complainant's clarification and extended the time for

⁵ Item 3 on the Supplemental Bundle filed on March 14, 2019.

⁶ Item 5 on the Supplemental Bundle filed on March 14, 2019.

⁷ 30. (1) A person who alleges that some other person has discriminated against him or has contravened section 6 or 7 in relation to him may lodge a written complaint with the Commission setting out the details of the alleged act of discrimination. (2) A complaint under subsection (1) shall be lodged with the Commission within six months from the date of the alleged act of discrimination. (3) Notwithstanding subsection (2), the Commission, in exceptional circumstances, may accept a complaint which is lodged more than six months after the date of the alleged act of discrimination

⁸ EOT No 0004 of 2016 dated February 13, 2019.

the filing of the complaint against the respondent. He contends that even in the use of the proportionality tests there is some consideration of just and equitable principles.

18. The complainant did not provide any reason in his Complaint for not having lodged it within the 6-month period stipulated in the Act for so doing. Nor does the complainant attest in his Witness Statement (so that he may have been cross-examined on it) the reason for the late submission of his Complaint. Counsel for the complainant proffers in his submissions that –

“...there were issues related to the end of his contract. There was a contractual mix-up where the complainant genuinely believed that the start date of his new contract was the end of his acting appointment...”

19. I find, based on the evidence of the complainant, that he would have been aware of the appointment of the comparator and his alleged comparative lack of certification and experience for the position of Senior Manager on or before November 3rd, 2013. The 6-month period would have started to run from that date.
20. The complainant does not provide any nexus between the end of his acting that he admits was in August 2013, his new contract which was executed in February 2014 and the submission of his claim. Nor does he disclose any fact that would have impeded the submission of the complaint to the Commission between November 3rd, 2013 when he became aware of the circumstances giving rise to the complaint and when it was eventually lodged on May 26th 2014. I am therefore unable to find that there were any exceptional circumstances for the discrimination complaint to have been lodged outside the 6-month statutory limitation period.
21. This Tribunal has already held in its prior Decision on the Preliminary Issues⁹ in this matter, that the complainant’s inadvertence and or mistaken belief would not constitute exceptional circumstances in the instant case. Even if ‘just and equitable’ principles were to be applied, the starting point must be some consideration of the

⁹ EOT No 0004 of 2016 dated February 13, 2019.

precise reason for the default and the promptitude of the complainant when he became aware of the circumstances giving rise to the discrimination complaint¹⁰.

22. The complaint was lodged on May 26th, 2014. Section 30(3) of the Act stipulates that save for exceptional circumstances a complaint must be submitted within six (6) months of the making of the complaint. Therefore, save for some exceptional circumstances, the discrimination complaint ought to have been lodged at the Commission no later than May 3rd, 2014. I therefore hold that the discrimination complaint was submitted out of the 6-month period required by section 30 of the Act and that there were no exceptional circumstances.
23. It may be a useful practice guide, where complaints are lodged at the Commission outside of the stipulated 6-month period, for complainants to plead in their complaints the circumstances that gave rise to the delay and where challenged to provide appropriate evidence. It must be borne in mind that the Tribunal is precluded, by section 40¹¹ of the Act, from admitting into evidence anything said or done during conciliation proceedings at the Commission.
24. This decision would, in the normal course, dispose of the discrimination complaint. However, the issues raised with respect to the burden of proof in complaints under the Act are germane to the evolution of the jurisprudence of this Tribunal and for general guidance and completeness I propose to treat with the submissions on these issues.

The Discrimination Complaint

25. The discrimination complaint arises from the non-appointment of the complainant to the position of Senior Manager by the Respondent. The complainant stated at paragraph 7 of the Complaint that he -

¹⁰ *British Coal Corporation v. KEEBLE and others* [1997] IRLR 336.

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

“... was not selected for the said position due to his race¹²/ethnicity¹³ even though he was more qualified than the person selected. [The comparator] is of East Indian racial/ethnic background. He did not have the core qualifications of Sport Management.”

26. In paragraph 9 of its Defence, the respondent responded –

“In response to paragraph 7 of the Claim, the Respondent denies that the Complainant was not selected based on his race or ethnicity as is alleged or at all. Six candidates were interviewed for the position and the Complainant placed third in the interviews. Even if [the comparator] had not been selected, the Complainant was not the next highest ranked candidate.

The Burden of Proof

27. Counsel for the complainant in his closing submissions, raised issues concerning the requisite burden of proof of discrimination on the complainant. He contended that the definition of discrimination under the Act -

“...is circumscribed and controlled. Therefore in a general sense there is discrimination 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. [See Section 5 of the EOA...¹⁴”.

28. The burden of proof in discrimination cases before the Tribunal was recently considered in *Patti Ann Adena Dick Williams v. Ministry of Rural Development and Local Government*¹⁵. The Tribunal adopted the criteria enunciated by Lady Hale delivering the judgment of the Privy Council in *Annisia Webster & others v.*

¹² Section 3 of the Act : ...“race”, in relation to a person, means a group of persons of common ethnic origin, colour or of mixed race;

¹³ Ibid: ...“ethnicity”, in relation to a group of people, means the origin, characteristics, classification and distinctive cultural or aesthetic traditions of that group of people;

¹⁴ 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;

¹⁵ EOT 007 of 2017.

*The Attorney General of Trinidad*¹⁶ to sustain a claim for discrimination under the Act. These criteria can be summarised and placed in the context of the Act as follows –

- a) The situations between the comparator and the complainant must be comparable, analogous, or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment;
 - b) Once such broad comparability is shown, it is for the respondent to explain and justify the difference in treatment;
 - c) To be justified, the difference in treatment must have a legitimate (that is to say genuine or valid within the policy, rules or regulations of the respondent) aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised;
 - d) Weighty reasons will be required to justify differences in treatment based upon status mentioned in sections 3 and 5 of the Act: (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; and
 - e) It is not necessary to prove mala fides on the part of the respondent (unless of course this is specifically alleged).¹⁷
29. This approach places the burden on the complainant to show criterion a) above. Once this is done the burden shifts to the respondent to show b)¹⁸ bearing in mind the requirements of d). There is some obvious commonality between criteria a) and c)¹⁹, and between b) and d). Although the onus is on the respondent to provide an explanation for the difference in treatment, to show that the difference had a legitimate aim and the means and end were reasonably proportional, it may be necessary for the complainant to adduce some evidence in rebuttal.

¹⁶ [2015] UKPC 10.

¹⁷ Ibid. para. 24.

¹⁸ See paragraph 21, supra per Lady Hale: *The burden is on the complainant to show both “likeness” and differential treatment, but once this is done, “the burden shifts to the State to show reasonableness, objective purposefulness, justification, accommodation, etc.”*

¹⁹ Per Lady Hale in *Annissa Webster et al v. Attorney General etc*, para 2525. *It must, however, be acknowledged that there is a considerable overlap between the “sameness” question at (1) above and the justification question at (3). This is because the question of whether a difference between the two situations material is will to some extent at least depend upon whether it is sufficient to explain and justify the difference in treatment.”*

30. As in all civil cases the standard of proof is on the balance of probability²⁰. Where there is conflicting evidence, the Tribunal would decide which evidence to accept on the weight or preponderance of evidence adduced²¹. The nature, quality of the evidence adduced and respective weight determine whether the requisite standard of proof is met.

Discrimination by Race or Ethnicity

31. Of direct concern to the respondent with respect to the discrimination complaint, were sections 8 and 9²² of the Act, which treats with discrimination by virtue of employment. To obtain relief under the Act however, such discrimination must have occurred because of a status set out in section 3²³ of the Act. The Complainant urges the Honourable Tribunal to find that “*the respondent, UTT, discriminated in its selection process for the position of Senior Manager Sport and Recreation by the selection of [the comparator], a person of East Indian descent to the position to the exclusion of Mr. Baker, a person of African descent on the ground of race.*”
32. On the other hand, the respondent maintains that the complainant has adduced no evidence to establish that the Respondent discriminated against him by not selecting him as the Senior Manager and that it did so by reason of race, or ethnicity.

²⁰ *Kerwin Simmons v WASA* EOT No. 0002 of 2014; para 31.

²¹ See Part 19, Equal Opportunity Rules, 2016.

²² 8. An employer or a prospective employer shall not discriminate against a person— (a) in the arrangements he makes for the purpose of determining who should be offered employment; (b) in the terms or conditions on which employment is offered; or (c) by refusing or deliberately omitting to offer employment. 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.

²³ “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;

33. It has been judicially recognised that employers may rarely if ever admit to discriminatory racist practices, or overtly engage in them²⁴. There is no doubt that racism is often nebulous and subtle, so that complainants may be hard-pressed to adduce direct evidence of racist or ethnic favouritism in employment that may not lend itself to other inventive and less odious explanations. On the other hand, historically indoctrinated suspicion, distrust and or other underlying social factors may contribute to employee perceptions that cannot be objectively substantiated²⁵. An unbiased rational examination of the surrounding circumstances seen through the lens of good common sense, guided by an understanding of cultural nuances and idiolect of a maturing post-colonial society, provides an equitable, (if not the only), framework for decision-making.
34. It would often be insufficient to discharge the evidential burden on the complainant, to place before this Tribunal bare evidence of race or ethnicity and to invite or expect adverse inferences to be drawn. Such cases would be unique and where these decisions are made, they ought to be limited to their own peculiar facts²⁶. The complainant must frontally confront the evidential challenges and advance a rational nexus to relate the evidence to the discriminatory conduct being alleged.
35. The complainant having provided this evidence, shifts the onus to the respondent, who cannot remain silent or shrug off the allegations nonchalantly. The respondent must not only provide an explanation. The explanation or justification must show a real and valid reason for the impugned act, that is proportional in its aim and the means employed to achieve it. The respondent's explanation cannot be flimsy or fanciful, it must be weighty, credible and fair.

²⁴ See e.g. *Nagarajan v London Regional Transport Board* [1999] 4 All ER 6524 where the House of Lords indicated that “*Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Normally the grounds of the decision will have to be deduced or inferred from the surrounding circumstances.*” Followed in *Kerwin Simmons v. WASA* EOT No. 0002 of 2014 -.

²⁵ Professor Selwyn Ryan, Dr. John La Guerre. *Ethnicity and Employment Practices in the Public and Private Sectors in Trinidad and Tobago*. St Augustine: The University of the West Indies, Centre for Ethnic Studies.

²⁶ See e.g.: *Kerwin Simmons v WASA; Michael Mark Archibald v Trinidad and Tobago Defence Force* EOT No. 0001 of 2016.

36. This approach requires an evidential foundation on either side, from which a judicious analysis can be made. In this regard, extensive disclosure, circumstantial and or corroborative evidence and or statistics of employment practices²⁷, though not essential, can be valuable tools in plugging any evidential disparities²⁸ and or rebutting evidence adduced by either side. This would assist the Tribunal in making an impartial and well-balanced assessment of the conflicting perspectives of the parties.
37. In this matter, both the comparator and the complainant, were applicants competing for the same job of Sports Manager. They were both interviewed by the same interviewing panel. Notwithstanding the spirited cross-examination by Counsel for the complainant on the methodology used to assess the applicants by the interviewing panel, all applicants were assessed using the same methodology.
38. Unlike the complainant, the comparator did not possess a Master's Degree or the experience of the complainant working in the capacity of Sports Manager with the respondent, but he was able to score the highest average mark, outperforming the complainant into third place at the interview. The recommendation of the interviewing panel that the comparator be appointed Sport Manager was accepted and the Comparator was offered the job and appointed. This realisation triggered a certain level of distrust in the complainant in the fairness of the comparator's

²⁷ "One of the most powerful tools to establish an inference of discrimination is the use of statistical data. Statistics may be used either to show discriminatory impact or to discount a non-discriminatory reason offered to explain a situation. A prima facie case established through statistical evidence may be rebutted either by evidence which offers a non-discriminatory explanation of the specific situation or by challenging the statistical evidence. In sum, statistical evidence can provide another bit of circumstantial evidence, which may or may not be sufficient on its own to support an inference of discrimination": *Angecone v. 517152 Ontario Ltd.* (1993), 19 C.H.R.R. D/452 (Ont. Bd. Inq.).

²⁸ See *Supreme Court of Canada in Law v. Canada (Minister of Employment and Immigration)*, 1999 Can LII 675 (SCC), per Iacobucci J: *First, I should underline that none of the foregoing discussion implies that the claimant must adduce data, or other social science evidence not generally available, in order to show a violation of the claimant's dignity or freedom. Such materials may be adduced by the parties and may be of great assistance to a court in determining whether a claimant has demonstrated that the legislation in question is discriminatory. However, they are not required. A court may often, where appropriate, determine on the basis of judicial notice and logical reasoning alone whether the impugned legislation infringes s. 15(1). Second, it is equally important to emphasize that the requirement that a claimant establish a section 15(1) infringement in this purposive sense does not entail a requirement that the claimant prove any matters that cannot reasonably be expected to be within his or her knowledge.*

selection and appointment, especially since it seems he was not provided with any explanation by the respondent his non-selection. Notably however, the basic salary that the comparator was offered was less than the basic salary that the complainant was receiving although their allowances were comparable, although it is not clear if or when the complainant may have become aware of this.

39. The principal differences between the comparator and the complainant are their respective races or ethnicities, and their qualifications and or experience. It would be in very rare cases, in this diverse society boasting a plethora of races and ethnicities, that the outcome of an interviewing process could be flawed merely because the successful individual was of a different racial or ethnicity from any of his competitors. Further, it is not to be assumed that because the applicant possesses a higher level of tertiary educational certification, that he would automatically oust a less certified applicant. The difficulty would be to identify, as in this case, whether the comparator being of a particular ethnicity influenced the interviewing panel and eventually the board of the respondent to overlook shortcomings or deficiencies of the comparator's qualifications and or experience, or whether he was so favoured or his appointment "*preordained*".
40. Ms Ramgattie pointed out in her cross examination that the advertisement for the position, although detailing a list of qualifications (including a Master's Degree), gave the respondent the discretion to consider and appoint any applicant with appropriate qualifications and experience. The question of the comparator's qualification and skills for the position was also raised in the meeting of the Board of the respondent of April 25th, 2013 that approved the appointment of the comparator to the position of Sports Manager. The view was expressed that
- "... not only did the comparator have the necessary qualifications but he had a proven track record at Petrotrin and had exemplified leadership qualities in the sporting arena."*
41. This explanation is mirrored in the newspaper article from which the complainant claims to have received information on the qualifications of the comparator. The newspaper article purports to quote Navneet Boodhan, VP Human Resources of the respondent, who explained that the comparator had been appointed "*based on*

his wealth of sporting experience, mentorship and leadership qualities”, that he had more than 20 years’ experience in sports at the local, regional and international levels successfully and had successfully mentored athletes, which was part of his role at UTT. The newspaper article also recognised the comparator’s service as a sports ambassador and former national cricket captain and noted that he was the recipient of the Hummingbird Medal Gold in the area of sports.

42. Whatever evidential weight could be ascribed to the newspaper article (whose author did not give evidence at the trial), the complainant cannot approbate and reprobate at the same time. If he accepts as true what is in his interest in the said newspaper article that he has relied on to provide the comparators qualifications, he cannot (without more) reject, at the same time, the explanations provided by the respondent for employing the comparator.
43. The merits or demerits of superior certification or demonstrated experience are not matters for this forum. This Tribunal is concerned with whether, in assessing that certification and experience, the respondent was influenced by and gave more favourable treatment to the comparator because of the alleged status. Counsel for the complainant alluded to this when he asked Ms Ramgattie in cross examination (which she denied knowledge of) whether the appointment of the comparator was “*preordained*”. There was no rebuttal evidence adduced and save for this salvo, the complainant has advanced no evidence or argument that links (even covertly) the race or ethnicity of the comparator to being offered the job or being more favourably considered.

Family origin

44. Ms Ramgattie referred in her Witness Statement to allegations of discrimination based on family origin. However, although there was some mention of family related issues by the complainant in the Complaint, discrimination based on this status was not directly pleaded or pursued.

Policy of recruitment

45. The complainant raised a new issue in his Witness Statement that the respondent had violated its policy that an applicant would not be sourced externally unless a duly certified and competent person could not be found internally. The onus was on the complainant to provide evidence of this policy. He stated in cross-examination that he was not sure if any evidence has been filed and that the respondent's representative could speak to that.
46. Ms. Ramgattie testified that there was a policy for positions to be advertised internally via intranet and website and externally, in parallel. She was not aware of any policy that employees must be sourced internally before accepting an external candidate. She could not state whether or how the position in issue had been advertised. She could identify at least 3 employees of the respondent by name who had applied for the position.

Findings

47. On the evidence, I find as follows-
 - a) There was sufficient evidence that both parties were in similar positions competing for the same job. The comparator was selected from a field of several applicants in which the complainant placed third at the interviews. *Ceteris paribus* the superior academic qualifications and experience of the complainant working in the position for just short of two (2) years, ought to have placed him in a more favourable position for the selection for the position than the comparator who had lower level academic qualification and no prior experience in the position.
 - b) The respondent omitted to provide an explanation to the complainant for the reason for his non-selection cogently, in a timely manner, or at all. The complainant was sent generic emails of the appointment of the comparator prior to being formally advised by letter of December 2, 2013 "*that it was decided not to progress his application*". This letter did not provide a reason for his non-selection. This omission contributed to the complainant's distrust

and suspicions of having been treated unfairly and gave weight to the complaint.

- c) There is no evidence that the recruitment process violated the respondent's employment policy. Despite suggestions in cross-examination that another methodology of assessment at the interview may have produced a more favourable outcome for the complainant, there was no cogent evidence adduced that the method used disproportionately favoured the comparator.
 - d) The complainant did not provide sufficient evidence or an evidential foundation from which it could be inferred, that there was any, or any systemic or other racially or ethically premised favouritism for the comparator, or that such consideration was influential in his selection.
 - e) The comparator's monthly salary was \$22,000.00 over 20% less than that of the complainant of \$28,350.00. Their respective allowances were similar.
 - f) Apart from possessing a BSc, the comparator possessed experience, as a national Sports Ambassador and cricket captain, possessed demonstrated leadership qualities and had a record in mentoring high-performance sportsmen. I find that this evidence of the combination of the comparator's academic qualification, experience, and skill were not outside the advertisement for the position and were decisive factors in his ultimate selection.
48. With respect to the law, having regard to the view I have taken of the evidence, as it relates to the criteria set out in the above, I find as follows:
- a) The situations between the comparator and the complainant were analogous and similar. Their differences are in race or ethnicity, and qualifications and experience. This is sufficient to discharge the burden on the first limb of the criteria on the complainant and shift the burden to the respondent for an explanation.
 - b) The respondent has justified and explained the difference in treatment in a manner that appears to be genuine, not out with its policy or rules and

proportionate and in keeping with its aim and objective. It is noted that the remuneration of the comparator was substantially less than that of the complainant. In this regard, the comparator was treated less favourably than the complainant.

- c) This explanation/justification in the absence of any credible rebuttal evidence is of sufficient weight to satisfy the requirements of limb b) - d) of the applicable criteria. Although there was evidence that the difference in treatment was premised in qualifications of the comparator, there is no evidence of a nexus of race or ethnicity in the appointment of the comparator to the position of Senior Manager.
 - d) The issue of mala fides does not arise.
49. In totality I find that there is no evidence upon which this Tribunal can draw an unbiased rational inference or make a finding that race or ethnicity impacted the non-selection of the complainant to the position of Senior Manager or favoured the appointment of the comparator.

The Victimisation Complaint.

50. The underlying facts of the victimisation complaint are as follows -
- a) By letter dated May 15th, 2014 the respondent laid a disciplinary charge against the complainant. The particulars of the charge are not material to the disposition of this Complaint, but it related to certain allegations that came to light in the prior months of April and March, 2014. A disciplinary hearing was held on June 4th, 2014 and a written response was submitted to the charge at the hearing by the complainant. By letter dated July 14th, 2014 the respondent requested further responses from the complainant. Attorney for the complainant, after some delay eventually responded by letter dated August 28th, 2014 denying all the charges. By letter dated October 1st, 2014 the complainant was dismissed by the respondent; and
 - b) The complainant filed the Complaint on May 26th, 2014. The Commission informed the respondent by letter dated August 29th, 2014 that the Complaint

had been lodged. There is no evidence that the respondent was aware of the Complaint being lodged prior to receiving the letter of August 29th, 2014. However, the complainant was dismissed about one (1) month after the letter informing the respondent of the Complaint was issued by the Commission.

51. The complainant contends that his dismissal on the October 1st, 2014 was an act of victimisation in violation of section 6²⁹ of the Act. His Counsel urges the Tribunal to find it resulted from the complainant bringing the Complaint before the Tribunal. The respondent submits that this complaint is not properly within the Act because it relies on a complaint that is time-barred and therefore void, and in any event the allegation of victimisation is not supported by evidence. It therefore ought to be dismissed.
52. The contention by the respondent that if the Complaint is not viable it cannot support an allegation of victimisation is not supported by section 6 of the Act. Subsections c) and d) of section 6 of the Act are particularly broad and give a wide discretion to the Tribunal to consider the possibility of discrimination by victimisation even where no proceedings or action is eventually taken by the complainant
53. I am mindful that the disciplinary proceedings were instituted before the Complaint was laid. Exchanges between the complainant and or his legal representative and the respondent continued notwithstanding that the Complaint had been lodged at the Commission. Nevertheless, the complainant did not disclose to the respondent that he lodged the Complaint and did not take any steps

²⁹ 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

to have the disciplinary proceedings discontinued while the Complaint was being progressed.

54. Curiously, the complainant's attorney's detailed letter of August 28th, 2014 to the respondent makes no reference to the tangential Complaint (which included complaints of treatment during the said disciplinary proceedings) which was then before the Commission. In his cross-examination, Counsel for the complainant put to Ms Ramgattie that the complainant was not provided with a copy of the Report of the disciplinary hearing or told he could appeal. However (even if this is a flawed policy as the complainant alleges) there is no evidence before Tribunal that such a report was requested or that other persons who were subject to disciplinary proceedings were given a report or told that they had to appeal.
55. In the letter of dismissal dated October 1st, 2014, the respondent states that there was a careful consideration of the issues surrounding the disciplinary charge. The time period of over one (1) month between the letter of August 29th, 2014 from the Commission and the dismissal of the complainant on October 1st, 2014 does not suggest that that the latter was a knee jerk reaction to learning of the Complaint. There was sufficient time for the respondent to have considered the representations in the attorney's letter on the merit and to make a reasoned assessment of them. Counsel for the complainant submitted that he had no evidence to contradict the assertion of the respondent that "... *its action to terminate the complainant was independent of any consideration...*" of the knowledge of the Complaint. He suggested that a *prima facie* case had been made out that the respondent terminated the Respondent because he had initiated action against it.
56. I do not agree. I find that the complainant has not adduced any credible evidence to show that there was any connection between his dismissal for the disciplinary offence and the lodging of the Complaint. The only evidence before the Tribunal is that the dismissal occurred because of and pursuant to the disciplinary proceedings. The evidence adduced does not disclose that the Complaint and or

consideration of it formed any part of the respondent's decision to dismiss the complainant.

COSTS

57. Costs would usually follow the event. However, the Tribunal has the discretion to deviate from this practice where it finds that it is just to do so³⁰. I have found that the omission of the respondent to provide any clear reasons to the complainant for his non-selection, contributed to the complainant's distrust of the integrity of the selection process that spawned these proceedings. Further the novelty of the Complaint, the diligence of counsel on both sides in assisting the Tribunal in treating with the multifaceted issues that have arisen and the possibility that the costs (if any) incurred by the respondent may have been mitigated by in-house legal support, were all circumstances I have taken into consideration in determining an appropriate costs order. Having taken a "*fresh panoramic view of the landscape*"³¹ of the complaint, after the dust of the decision making has settled, I am of the view that it would be just to deviate from the general rule in making the final order for costs in this matter.

DISPOSITION

58. To borrow and adopt the words of the Privy Council in the *Annissa Webster*³² case, it follows that this Complaint must be dismissed. I have not reached this conclusion lightly or without some hesitation because it is not inconceivable that, had the criteria that are now being postulated been available to the parties at the time of the trial, the evidential approach (on both sides) may have been different.
59. In the premises, I make the following orders—
- a) The Complaint herein filed on November 18th, 2016 is dismissed.

³⁰ See for example - Halsbury's Laws of England, Civil Procedure, Volume 12A (2015). paragraph 1701 *Chief Fire Officer and the Public Service Commission v Sumair Mohan*, Civ. App No 45 of 2008 Mendonca JA similarly addressed to the general rule of awarding costs and the discretion of the court to depart from it, at paragraphs 16 and 17; See also *BS v. Her Worship Magistrate Marcia Ayers Caesar* and the Attorney General CV 2015-02799 per Kokaram J, (as he then was), at paragraph 6.

³¹ See Kokaram J. *supra*, para. 11.

³² *Supra*, para. 50.

b) Each party shall bear its own costs. This includes costs on the Preliminary Decision that was deferred for consideration at the end of the trial.

60. This decision is made and delivered pursuant to section 44(7)³³ of the Act.

HH Donna Prowell-Raphael, CEOT
Judge.

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