

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE EQUAL OPPORTUNITY TRIBUNAL

E.O.T. No. 0002 OF 2017

BETWEEN

PATTI ANN ADENA DICK WILLIAMS

Complainant

AND

THE MINISTRY OF RURAL DEVELOPMENT AND LOCAL GOVERNMENT

Respondent

JUDGMENT

BEFORE: Madame Justice Donna Prowell-Raphael

APPEARANCES: Rajiv Chaitoo for the Complainant.
Lianne Thomas instructing Keisha Prosper for the Respondent.

DELIVERED ON: January 30, 2020.

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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 conduct in public⁶ 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 the complaint, after investigation cannot be or is not resolved through conciliation by the Commission, the Commission is mandated, with the consent and on behalf of the Complainant, to institute proceedings before Tribunal for judicial determination of the complaint. The Tribunal has power 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

3. These proceedings were initiated by referral ('the Referral') from the Commission dated March 2, 2017. The Complaint Form ('the Complaint') was filed on June 8, 2017. The Complainant is seeking –
 - (i) A Declaration that the Respondent has discriminated against the Complainant by breaching section 5 of the Equal Opportunity Act, Chap 22:03 by virtue of status on the ground of sex;
 - (ii) A Declaration that the Respondent has discriminated against the Complainant by breaching section 8 of the Equal Opportunity Act, Chap 22:03 by refusing and/or deliberately omitting to offer employment to the Complainant by virtue of her status namely sex because she was pregnant;
 - (iii) Aggravated and/or Exemplary Damages;
 - (iv) Interest;
 - (v) Costs;
 - (vi) Such further and or other relief as the Honourable Tribunal deems just.
4. The Defence was filed on July 13, 2017. All other Pre-trial orders having been complied with, the Complainant filed one Witness Statement on October 2, 2017 and the Respondent also filed one Witness Statement through Dianne Lakhan (Human Resource Officer II (ag)) on the same day. The Trial of the Complaint proceeded on October 10, 2018. The Respondent filed its Closing Submissions on November 21, 2018 and the Complainant responded by Submissions filed on February 21, 2019.

MATERIAL FACTS

5. The Complainant and Ms. Dianne Lakhan testified at the Trial. Both witnesses were generally credible, plainspoken and resolute in their evidence. The material facts are largely undisputed and corroborated by agreed documents, except for the specific terms of the conversation between the Complainant and Ms. Lakhan as to certain assertions made about the Complainant not being granted a renewal of her short term contract after it ended on December 2, 2015.

6. The following undisputed facts are material to the determination of this Complaint:

- (i) The Complainant (a woman) was employed by the Respondent as a Disaster Management Coordinator on a 3 year contract from September 3, 2012 to September 2, 2015 ('the 3-year contract');
- (ii) During the subsistence of the 3-year contract the Complainant was granted maternity leave from February 24th 2014 to May 30th 2014 and was paid the requisite benefits;
- (iii) At the end of the 3-year contract the Complainant accepted a 3-month contract ('short term contract') in the same position of Disaster Management Coordinator commencing September 3, 2015 and ending December 2, 2015. The Complainant was approximately five and a half months pregnant at the time that the short term contract was granted to her in September 2015;
- (iv) The 3-year contract and the short term contract were materially different. Unlike the 3 year contract, the letter of award of the short term contract expressly stated that it proffered no allowances or leave entitlements;
- (v) During the tenure of the short term contract, on September 28, 2015 the Complainant applied for maternity leave from 30th November 2015 – 4th March 2016. She was granted "no- pay leave" for the period November 30, 2015 to December 2, 2015, but received payment for those days. The Complainant sought a renewal of the short term contract for another 3 months commencing December 3, 2015. The maternity leave of the Complainant therefore would have spanned and extended beyond the term of the renewal sought;
- (vi) The Complainant was not considered for and or granted a renewal of the short term contract. Other Disaster Management Coordinators – both male and female – received a 3-month renewal of their contract. None of the female workers who received the 3-month renewal were proceeding on maternity leave for all or any part of the renewed contracts. No further 3-month contracts were granted by the Respondent after March 2016 due to shortage of funds;

7. On the material disputed facts I find that -
- (i) Ms. Lakhan did not state and or it is not a fair inference to draw from the evidence adduced that she represented to the Complainant that the Respondent had a 'policy' not to employ pregnant women;
 - (ii) The Complainant intended to proceed on the maternity leave that she applied for by her letter dated September 28, 2015, from Monday 30th November 2015 to Friday 4th March 2016 return to work after the birth of her child if she was granted a renewal of the short term contract;
 - (iii) Having regard to the contents of the letters of November 11, 2015 from the Ministry of Rural and Local Government to the Complainant and November 6, 2015 from the Ministry of Rural and Local Government to the Chairman, National Insurance Board (that are agreed documents between the parties) the Complainant was granted maternity leave from November 30, 2015 to December 2, 2015. Pursuant to the terms outlined in the letter of Approval of Short Term Employment dated September 2, 2015 this maternity leave was treated as "*no-pay leave*".
8. I find Ms. Lakhan to be a competent, credible and disinterested witness to give evidence on behalf of the Respondent from her own knowledge (having interacted directly with the Complainant with respect to the matters complained of) and as an employee of the Respondent who would have had access to the books and records of the Respondent. I accept the evidence of Ms. Lakhan elicited in cross examination to be that-
- (i) The Complainant was on a short term contract to which leave was not applied unlike the long term contract;
 - (ii) Payment received by the Complainant for the period of *no-pay leave* between November 30, 2015 to December 2, 2015 was an error caused by the manner of processing of pay sheets and miscommunication between the HR and Accounting Units of the Respondent;
 - (iii) She indicated to the Complainant that since she was going on maternity leave she would no longer be put on the list of persons to be considered for the 3-month

period short-term employment. No proposal was put up for the funding for the renewal of the Complainant's short term contract during the period she indicated that she had applied for maternity leave;

- (iv) After the Complainant's short term contract ended on the December 2, 2015, there was nothing preventing her carrying on, to another contract except that she had applied for maternity leave;
- (v) New administration in 2015 reduced the budget allocation of the Respondent which resulted in a lack of funding and uncertainty of funds for employment of Disaster Management Coordinator. 3-month contracts were not offered to these workers after March 2016.

ISSUES

9. I have abridged the agreed and unagreed issues for determination as follows –

- (i) Whether the Respondent treated the Complainant unfavourably by virtue of her sex contrary to sections 5 and or 8 of the Act by omitting and or refusing to renew her short term contract so that she could have proceeded on maternity leave that would have spanned the duration of the renewal;
- (ii) If so whether the reason(s) (if any) given by the Respondent provide reasonable justification for its actions;
- (iii) Whether the policy (if any) of the Respondent not to employ women who are on maternity leave and or pregnant is discriminatory.

THE SUBMISSIONS

10. Attorney for the Respondent contended that there has been no breach of the Act inter alia for the following reasons -

- (i) The burden of proof is on the Complainant to prove her case on the balance of probabilities, which she has not discharged;
- (ii) The outcome of the case will depend on the primary facts found by the Tribunal, and the inferences that can be drawn from these facts. The tribunal can look to the Respondent for an explanation of them where applicable;

- (iii) The 'but for' test was no longer applicable in discrimination cases. The tribunal should ask the question what was the 'true basis', 'genuine basis' or 'real basis' for the treatment meted out to the Complainant. The true and genuine reason the Complainant was not offered employment during the December 2015 to March 2016 was due to her unavailability to work during that period;
- (iv) The appropriate comparator must be identified in light of the peculiar circumstances of the case. An appropriate comparator in this case would have been a person who applied for and was granted leave for the duration of the short term contract. The Complainant failed to identify an appropriate comparator;
- (v) The availability of the Complainant for work during her pregnancy during the proposed renewal of the short term contract was a material consideration. The Complainant provided no evidence that she intended to return to work before the end of the 'maternity leave' after the birth of her child;
- (vi) The Complainant has failed to show on the evidence adduced by her that there was a policy by the Respondent not to employ pregnant women because she was employed while she was pregnant both during the 3-year contract and during the short term contract;
- (vii) With respect to damages the Respondent submitted that -
 - a) Any award of damages should not exceed \$2,000.00 for injury to feelings as she did not adduce any evidence therefor;
 - b) In determining what if any compensatory damages should be awarded to the Complainant that sections 7(1)(b)⁷ and 18⁸ of the Maternity Protection Act⁹ outlined the pay to which the Complainant would have been entitled;

⁷ 7. (1) Subject to this Act, an employee is entitled to— (a) leave of absence for the purpose of maternity leave; (b) pay while on maternity leave; (c) resume work after such leave on terms no less favourable than were enjoyed by her immediately prior to her leave.

⁸ 18. (1) Subject to subsection (2), there is no limit to an employee's right to maternity leave under section 7(1)(a) and her right to return to work under section 7(1)(c). (2) An employee's right to pay for maternity leave under section 7(1)(b) is limited to one payment during each period of twenty-four months commencing at the beginning of such leave.

⁹ Chap 45:57.

- c) That the Complainant was not entitled to aggravated or exemplary damages;
 - d) Damages awarded in defamation cases was not relevant; and
 - e) Any award of interest should not be punitive.
- (viii) The Respondent placed substantial reliance *inter alia* on the cases of *Anissa Webster v. the Attorney General*¹⁰, *Karen King v. Great China Centre*¹¹, *Madarassay v. Nomuro International plc*¹², *Purvis v. State of New South Wales*¹³, *Webb v. E.M.O. Air Cargo (UK) Ltd*¹⁴, *Romauld James v. Attorney General*,¹⁵ *Razack Mohammed v. Attorney General*¹⁶ and *Rookes v. Bernard*¹⁷.
11. Attorney for the Complainant submitted *inter alia* that the Complainant was entitled to the relief sought for the following reasons -
- (i) Ms. Lakhan was not an appropriate person to give evidence on behalf of the Respondent because she was not the decision maker;
 - (ii) A comparator for the purpose of the Act is someone who, because of his different status to that of the Complainant, is treated more favourably than the Complainant. The comparator and the Complainant do not have to be exactly the same. The comparator could be actual or hypothetical. Even if there are no comparators, it does not debar the Tribunal from deciding whether the Complainant was discriminated against;
 - (iii) The Complainant had put forward several comparators. These comparators did not need to be pregnant and or proceeding on leave. They were similar because they were all Disaster Management Coordinators employed by the Respondent on short term contracts who had their short term contracts renewed. Maternity leave cannot

¹⁰ [2015] UKPC 10.

¹¹ [1991] EWCA CIV 16.

¹² [2007] EWCA CIV 33.

¹³ (2003) 217 CLR 92.

¹⁴ [1995] UKHL 13.

¹⁵ [2010] UKPC 23.

¹⁶ Claim No. CV 2009-02792.

¹⁷ [1964] 1 All ER 367.

be treated as regular leave, the law grants privileges to women on maternity leave¹⁸. All of the female comparators would have been denied maternity leave. The male comparators were similar but for their sex;

- (iv) There is no need to focus on a comparator or to engage in a “*sterile search for an actual or hypothetical comparator*”. The only reason the Complainant was treated less favourably was because of her differing status of sex characterised by her pregnancy;
- (v) The circumstances surrounding the first pregnancy of the Complainant are different to the second. During her first pregnancy she applied for maternity leave during her contract, while in the second case she was denied a job at the end of her contract, whilst proceeding on maternity leave;
- (vi) With respect to compensation Attorney for the Complainant cited section 41(4)(c) of the Act which gives the Tribunal jurisdiction to make declarations and or awards of compensation as it thinks fit and contended that –
 - a) The Complainant is entitled to exemplary damages as the case falls within the first category of oppressive, arbitrary or unconstitutional action by servants of government referred to in *Rookes v. Barnard*¹⁹,
 - b) The Complainant claims Prescribed Costs pursuant to Part 20 of the Equal Opportunity Rules of Practice and Procedure;
- (vii) In support of his contentions Attorney for the Complainant has relied substantially on past Judgments of the Tribunal, *Kerwin Simmons v. The Water and Sewerage Authority*²⁰; *Dindial Ragoon v. Ministry of Food Production*²¹; *Geeta Sahatoo v. Ministry of Labour and Small Enterprises Development*²²; *Michael Mark Archbald*

¹⁸ See section 20 of the Act: 20. It is not a contravention of this Act for a person to grant to a woman rights or privileges in connection with pregnancy or childbirth.

¹⁹ *Supra*.

²⁰ EOT No. 0002 of 2014.

²¹ EOT No. 0006 of 2013.

²² EOT No. 0004 of 2013.

*v. The Trinidad and Tobago Defence Force*²³; *Derek Salandy v. Petrotrin*²⁴; *Giselle Glaude v. Quality Bodyguard Services Limited*²⁵; *Vidya Maharaj v. Immigration Division of the Ministry of National Security*²⁶; *Desmond Noel v. The Auditor General of Trinidad and Tobago*²⁷.

LAW AND ANALYSIS

12. I am grateful for the exhaustive research and detailed submissions of attorneys for the parties. They have been very insightful and very helpful. I intend to treat holistically with these submissions. Where there is no specific ruling on a submission it is neither due to oversight nor failure to take it into consideration in reaching a decision.
13. I will consider issue (iii) first –

Whether the policy (if any) of the Respondent not to employ women who are on maternity leave and or pregnant is discriminatory.
14. This is an unagreed issue that was put forward by the Complainant, that was addressed by the Attorney for the Respondent in submissions.
15. It is not contended that the Act **expressly** provides relief for discrimination on the basis of pregnancy. It simply does not. It seems to have been accepted by the parties that discrimination on the basis of pregnancy is subsumed in the status of sex in section 5 of the Act. In this complaint however both men and women were not entitled to leave during the tenure of their 3-month contracts. So no issue of discrimination with respect to the grant of leave *per se* on the basis of sex arises.
16. The first limb of this issue as phrased is whether the policy “*not to employ women on maternity leave*” is discriminatory. In order for a person to be on maternity leave they must first be employed. If they are not employed then the issue of them being on leave does not arise. The evidence adduced by the Complainant is that she applied for maternity leave on 2 occasions –

²³ EOT No. 0001 of 2016.

²⁴ EOT No. 0002 of 2012.

²⁵ EOT No. 0003 of 2013.

²⁶ EOT No. 0003 of 2014.

²⁷ EOT No. 0005 of 2012.

- (i) The first occasion was during her 3-year contract. She was granted maternity leave and paid for it; and
 - (ii) The second application occurred during and up to the end of the short term contract. Her employment was not terminated. Her employment was continued, but she was not granted maternity leave. She was granted “no-pay” leave up to the end of the short term contract.
17. The second limb of the issue as posed concerns the policy not to employ pregnant women. This is not supported by the evidence of the Complainant. She gave evidence that she became pregnant and was granted maternity leave while she was on the 3-year contract. She also gave evidence that while she was pregnant she was granted the short term contract. There is therefore no factual basis to support a contention that the Respondent has a policy not to employ pregnant women and or that, that policy is discriminatory.
18. The Complaint applied for maternity leave for the period of a presumed renewal of the contract. Her contract was not renewed. Whether the omission or refusal of the Respondent to renew her contract was discriminatory is the subject of the issue (i) and (ii) which will be dealt with below. In so far as it is contended that the decision not to grant maternity leave for the period of the presumed renewal of the Respondent’s short term contract forms part of a policy of the Respondent, it is subsumed in the discussion of issues (i) and (ii).
19. I will consider the issues formulated as (i) and (ii) together –
- (i) *Whether the Respondent treated the Complainant unfavourably by virtue of her sex contrary to sections 5 and or 8 of the Act by omitting and or refusing to renew her short term contract so that she could have proceeded on maternity leave that would have exceeded the duration of the renewal?*
 - (ii) *If so whether the reasons (if any) given by the Respondent provide reasonable justification for its actions?*
20. There is no divergence on the facts (however articulated) that at the end of the day the Complainant was considered ineligible for employment on the 3-month contract because she would have been on maternity leave for its duration and that no financial provision was

made for her. This raises on the face of it the concern whether she was being discriminated against because she was pregnant as maternity leave is a customary consequence of pregnancy for a working woman. But can this concern be addressed logically without considering the reason that the Respondent advances for this position. Arguably, before getting to a position as to whether there was a discriminatory act, the entire scenario must be analysed. This includes not only the alleged discriminatory act, but the reason advanced for it.

21. As a starting point I take the guidance of Lord Bingham in the Privy Council in his dissenting Judgment in *Suratt and others v Attorney General of Trinidad and Tobago*²⁸ as he advanced his opinion on the object of the Act²⁹ –

*“[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.**”*

22. Baroness Hale (delivering the judgment of the Board) in the same case also considered the object of the Act:

“[43] The problems addressed by the EOA are a case in point. Since the Second World War, it has been common for human rights instruments and constitutions to protect the citizen against discrimination by the state on grounds such as race or sex. In a separate and more recent development, ordinary statute law has prohibited discrimination on similar grounds by the suppliers of goods, facilities, services, accommodation, education and employment. This was controversial at first, but is now a well-accepted way of countering historic prejudice against particular groups or sections of society and helping to achieve greater equality of opportunity and participation in society for all.

²⁸ (2007) 71 WIR 391.

²⁹ *Ibid.* para 3.

It is a common feature of such laws that they try to proceed by persuasion and agreement rather than by coercion. They tend therefore to have commissions charged with both general duties to work towards the elimination of discrimination and specific duties to receive and investigate individual complaints. They emphasise the importance of conciliation rather than adjudication. But in the last resort adjudication is available, often by a specialist body ...”

23. Both judges approaching the issue from opposing flanks seemed agreed that the underlying core and intent of the Act was to provide protection from discrimination to citizens in similar manner as the Constitution did for the State, by entities other than the State, in the areas set out in the Act. This was so notwithstanding that Parliament opted to enact ordinary statutes and or the process for accessing the relief was modified.
24. More recently, the principles governing the approach to a finding of discrimination under section 4³⁰ of the Constitution were explained and enunciated in *Annissa Webster and others v. The Attorney General of Trinidad*³¹. Having compared section 4 of the Constitution of Trinidad and Tobago³² to similar provisions of international treaties, Baroness Hale, delivering the unanimous decision of the Board surmised that justification for differences in treatment in seemingly like situations cannot be excluded. She postulated that discrimination is not prohibited if it is based on reasonable and objective criteria even where justification may not have been expressly stated in the originating statute. Having considered the relevant articles of the European Convention on Human Rights Baroness Hale concluded: -

³⁰ 4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely: (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law; (b) the right of the individual to equality before the law and the protection of the law; Recognition and declaration of rights and freedoms. LAWS OF TRINIDAD AND TOBAGO 18 The Constitution (c) the right of the individual to respect for his private and family life; (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions; (e) the right to join political parties and to express political views; (f) the right of a parent or guardian to provide a school of his own choice for the education of his child or ward; (g) freedom of movement; (h) freedom of conscience and religious belief and observance; (i) freedom of thought and expression; (j) freedom of association and assembly; and (k) freedom of the press.

³¹ [2015] UKPC 10.

³² “By section 4 of the Constitution of Trinidad and Tobago it is recognised and declared that “there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely: ... (b) the right of the individual to equality before the law and the protection of the law; ... (d) the right of the individual to equality of treatment from any public authority in the exercise of its functions” Ibid para 10.

“...Neither article mentions justification, but very early on the European Court of Human Rights realised that a test of “sameness” is inadequate to secure real equality of treatment. It is almost always possible to find some difference between people who have been treated differently. The Court held that “discrimination” entails an unjustified difference in treatment. Justification is divided into two questions: does the difference in treatment have a legitimate aim and are the means chosen both suitable to achieve that aim and a proportionate way of doing so?” [Emphasis mine].

25. The Act sets out the conditions in which discrimination can occur. Section 5 of the Act, states –

“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.

26. Section 6³³ of the Act, which treats with discrimination by victimisation, is similar. Like section 5 it describes the conditions in which discrimination by victimisation can occur for the purposes of the Act.
27. The approach of the drafters of the Act to defining discrimination in it may encourage persons to overlook the fact that the justification for treatment that may appear on its face to be dissimilar in like circumstances, determines whether it is discriminatory or not. A

³³ 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, 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.

(2) Subsection (1) does not apply to treatment of a person by reason of any allegation made by him, if the allegation was false and not made in good faith.

reasonable, objective, legitimate aim in carrying out the apparent less favourable act may negate any discriminatory inferences it may have drawn.

28. Baroness Hale put it this way in the *Anissa* case –

“Sameness” and justification are not rigidly discrete issues. They can merge into one another, as Lord Nicholls helpfully explained in R (Carson) v Secretary of State for Work and Pensions [2006] AC 173, para 3:

“[T]he essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.”

20. The position is much the same in the law of the European Union. The principle was summarised by the Court of Justice in Eman v College van burgemeester en wethouders van Den Haag (Case C-300/04) [2006] ECR I8055:

“ ... the principle of equal treatment or non-discrimination, which is one of the general principles of Community law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.” (para 57).

29. Baroness Hale, after considering a plethora of relevant international authorities, postulated what I would call the ‘justification test’. She stated -

“The current approach to section 4(d) of the Constitution of Trinidad and Tobago may therefore be summarised as follows:

(1) The situations must be comparable, analogous, or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment.

(2) Once such broad comparability is shown, it is for the public authority to explain and justify the difference in treatment.

(3) To be justified, the difference in treatment must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(4) Weighty reasons will be required to justify differences in treatment based upon the personal characteristics mentioned at the outset of section 4: race, origin, colour, religion or sex.

(5) It is not necessary to prove mala fides on the part of the public authority in question (unless of course this is specifically alleged).

25. 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 is material will to some extent at least depend upon whether it is sufficient to explain and justify the difference in treatment.” [Emphasis added].

30. Section 4(d) of the Constitution is intended to repel discrimination by the State against citizens. Sections 5 and 6 of the Act are intended to repel discrimination by virtue of the several status heads enumerated in section 3 by any entity (including the State) against citizens. The Act applies to discrimination by the State and by other entities in the circumstances set out in section 4³⁴ of the Act. There is nothing in the Act to suggest that discriminatory action under Act must be distinguished from discriminatory action under the Constitution.

³⁴ 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; 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. 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.

31. Indeed in the much quoted case of *Suratt v. AG*³⁵ Baroness Hale while recognising “*that the rights and obligations laid down in the EOA are much more specific and clearly defined than those in the Constitution*” and “*that there was a clear definition of discrimination in (ss 4 and 5) and of the circumstances in which an employer, an educational establishment, or a provider of goods facilities and services or accommodation shall not discriminate, along with some defined exceptions and exclusions (Pts III, IV and V)*”, concluded “*that the body of law which the tribunal will be administering may on occasions overlap with s 4 of the Constitution but in most cases it will not.*”
32. It would therefore be enigmatic, in the absence of any clear defining language to that effect in the Act, for different approaches to be taken in determining discrimination in the High Court under the Constitution from discrimination under the Act. I therefore see no reason why the Tribunal should not accept that the principles for establishing discriminatory conduct under the Act ought not to differ from those under the Constitution. I therefore propose to use the approach enunciated by Baroness Hale quoted above in the *Anissa* case *mutatis mutandis* to assist in isolating and identifying discriminatory actions and conduct under sections 5 and 6 of the Act.
33. Limb 1 of the justification test sets out –
- (1) The situations must be comparable, analogous, or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment.*
34. The conjoint effect of sections 5 and 8 of the Act (and the jurisprudence that ensued from it) is that the Complainant must point to comparators (actual or hypothetical) who received or were likely, in comparable, analogous, or broadly similar situations to receive more favourable treatment than she did. In assimilating these principles to the facts in this case, there can be little argument that the Respondent, by the terms of its short term contract, did not intend to grant leave of any kind to the workers who accepted the contract. In this situation the grant of maternity leave is inextricably connected to the renewal of the Complainant’s short term contract. It may be reasonably inferred from the evidence of Ms. Lakhani that the fact that the short term contract did not provide for any kind of leave

³⁵ (2007) 71 WIR 391.

principally informed the Respondent's decision that the Complainant was ineligible for the renewal.

35. The first juncture of any consideration as to whether the situations were comparable, analogous, or broadly similar is the issue of the grant of leave and in particular maternity leave. To be successful the Complainant would need first of all to point to comparators or at least situations and or circumstances in which likely comparators would or could have been granted leave and in particular maternity leave. This would elevate her to the platform from which she may persuasively submit that the Respondent's omission and or refusal to renew her short term contract may have been discriminatory.
36. The Complainant has pointed to several persons as possible comparators. While these persons were employed in similar positions to her and were granted renewals of their respective short term contracts, none of these persons were actually granted leave (maternity or otherwise) or were likely to have been granted such leave for the duration of their short term contract renewals or any part thereof. They are therefore not appropriate comparators to illustrate that the Complainant was treated less favourably than they were. *A fortiori* she was treated in the same way as any of the comparators were, or any hypothetical comparator similarly circumstanced was likely to be treated.
37. The Complainant has failed to show that there was any difference, or that there was likely to be any difference in treatment, to her comparators (actual or hypothetical) in comparable or analogous circumstances. I therefore hold that the Complainant has failed to show that she was treated less favourably than similarly circumstanced co-workers as set out in sections 5 and 8 of the Act.
38. Even if she were treated less favourably and or material differences in treatment could be identified, the issue would then arise under limb 2 of the justification test –

(2) Once such broad comparability is shown, it is for the public authority to explain and justify the difference in treatment.

as to whether the Respondent has justified or explained the difference in treatment. The Respondent has put forward the explanation which is, in substance, that the terms of the short term contract, would not have permitted the Respondent to approve for the

Complainant paid maternity or any kind of leave for the duration of the term. It therefore treated the application for maternity leave under the short term contract as no-pay leave, and considered the Complainant ineligible for further paid employment until the period of her proposed maternity leave that overlapped the proposed renewal had expired.

39. Moving to limb 3 -

To be justified, the difference in treatment must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

40. Maternity leave however is treated differently to other leave both by the Act³⁶, and by the Maternity Protection Act³⁷. The Act recognises that women may be given special privileges during pregnancy and childbirth without contravening the Act³⁸. The Maternity Protection Act gives women special privileges to paid leave during pregnancy and childbirth. In the instant case the outcome sought and the aim of the Respondent was not to grant and or pay the Complainant for maternity leave.

41. To determine the justification of the explanation provided by the Respondent it is necessary to determine first of all whether the aim of the Respondent was legitimate. In order to do so it would be incumbent on me to make findings as to whether the short term contractual arrangements that sought to exclude the protection (if any) afforded by the Maternity Protection Act in the peculiar circumstances of this Complaint were legitimate and or in compliance with that statute. Conjoined sections 12³⁹ and 17⁴⁰ of the Maternity Protection Act dictate that the Industrial Court has the exclusive jurisdiction to adjudicate compliance with the provisions of the Maternity Protection Act. I therefore lack the jurisdiction to make

³⁶ 20. It is not a contravention of this Act for a person to grant to a woman rights or privileges in connection with pregnancy or childbirth.

³⁷ Chap 45:57.

³⁸ Section 20.

³⁹ "12. (1) Where an employee or employer alleges noncompliance with the provisions of this Act, or an employee's employment is terminated on the ground of pregnancy or on any ground relating to pregnancy, or there is a difference of opinion as to the reasonableness or otherwise of any action taken or not taken by an employer or employee, the employee, trade union or the employer may report the matter to the Minister and the matter shall be deemed to be a trade dispute and shall be dealt with as such under the Industrial Relations Act."

⁴⁰ "17. All proceedings for the obtaining of an Order against an employer or other person in respect of any action taken under this Act shall be instituted by an application to the Industrial Court by the recognised majority union or, where there is no such union, by any union of which the employee is a member, or by the employee."

a pronouncement that may impact the Industrial Court in its adjudication of matters that fall within its remit under the Maternity Protection Act. Had I found that there was comparability under limb 1 of the justification test, I would have been stymied in proceeding with a consideration as to whether the justification provided by the Respondent was a legitimate aim that met the test of reasonable proportionality of “*the means employed and the aim sought to be realised*” in limb 3.

42. A material difference in treatment not having been identified in limb 1 of the justification test, a consideration of limb 4 [restated to bring it within the Act]-

(4) Weighty reasons will be required to justify differences in treatment based upon status mentioned in sections 3 and 5⁴¹ 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

at this stage would be premature and lack force in the absence of a clear answer. Had a material difference been identified in limb 1 it would then be necessary to consider whether the justification provided, albeit it may be legitimate and or objective, was sufficiently weighty. However, having regard to the finding on limb 1 that there was no difference in treatment, the issue therefore of whether the Complainant was treated less favourably or that there were material differences in treatment on account of her sex does not arise for determination.

43. With respect to limb 5 -

(5) It is not necessary to prove mala fides on the part of the public authority in question (unless of course this is specifically alleged).

there is no specific allegation that the Respondent acted maliciously.

44. The circumstances of this case are indeed peculiar. The public policy considerations are serious and real for workers who depend on their income and find themselves in limbo when infirmed or during childbirth. The courts of this country, especially courts such as this Tribunal play, an important role in providing certainty and lawful relief to citizens.

⁴¹ “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;

Adjudicators ought not to be timid to engage the continuum of judicial resources to pioneer novel approaches to decision-making within the spectrum of the law.

45. Superior Courts, such as the Tribunal, have an inherent jurisdiction and discretion which gives them the power to regulate their own procedures and grant reliefs, provided that the exercise of this power is not inconsistent with statute or statutory rules. Halsbury's Laws of England Fifth Edition. Volume 12 2015- Civil Procedure, summarised the principle thus:

“inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of the law, to prevent vexation or oppression, to do justice between the parties..”

46. The Tribunal has power under section 46⁴² of the Act to -

“...generally give all such directions and do all such things as are necessary or expedient for the expedient and just hearing and determination of the complaint or any other matter before it.” .

47. The Complainant has among the relief sought –

“...Such further and or other relief as the Honourable Tribunal deem just.”

48. The Tribunal therefore proposes to hear the parties as to whether, in the exercise of these powers and or pursuant to the broad head of relief claimed by the Complainant, the Tribunal ought to refer the issue of the applicability and entitlement of the Complainant under the Maternity Protection Act to the Industrial Court for its consideration.

⁴² 46. In addition to the powers conferred on it under the foregoing provisions of this Part, the Tribunal may— (a) proceed to hear and determine a matter before it in the absence of any party who has been duly summoned to appear before the Tribunal and has failed to do so; (b) order any person— (i) who in the opinion of the Tribunal may be affected by an order or award; or (ii) who in any other case the Tribunal considers it just to be joined as a party, to be joined as a party to the proceedings under consideration on such terms and conditions as may be prescribed by rules made by the Tribunal; (c) generally give all such directions and do all such things as are necessary or expedient for the expedient and just hearing and determination of the complaint or any other matter before it

DISPOSITION

49. I therefore make the following orders -

- (i) The Complainant's claims for declaratory relief for breaches of sections 5 and 8 of the Act are dismissed;
- (ii) The parties shall advise the Tribunal in writing no later than Friday February 7, 2020 whether the issues concerning the Respondent's compliance with the provisions of the Maternity Protection Act should be referred to the Industrial Court; and
- (iii) No order as to costs.

50. This decision is made and delivered by the Chairman pursuant to section 44(7)⁴³ of the Act. An appeal lies from the Tribunal to the Court of Appeal, whether as of right or with leave, on grounds specified in s 50(2)⁴⁴ 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))⁴⁵.

H. H. Donna Prowell-Raphael,
Judge/Chairman.

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

⁴⁴50. (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..

⁴⁵ See *Suratt and others v. Attorney General of Trinidad and Tobago* [2007] UKPC 55, para 6.