The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

Civil Appeal No. P407 of 2019
E.O.T. 0001 of 2017

Between

EQUAL OPPORTUNITY COMMISSION

Appellant

And

CASCADIA HOTEL LIMITED
RISHI PERSAD MAHARAJ

Respondents

Civil Appeal No. P408 of 2019
E.O.T. 0001 of 2017

Between

RISHI PERSAD MAHARAJ

Appellant

And

CASCADIA HOTEL LIMITED

Respondent

PANEL:

A. YORKE-SOO HON J.A.
N. BEREAUX J.A.
P. MOOSAI J.A.

Date of delivery: April 14, 2022

APPEARANCES:
Mr. D. Mendes SC and Ms. L. Abdullah, Attorneys-at-Law for Rishi Persad Maharaj
Mr. F. Hosein SC and Ms. A. Rahaman instructed by Mr. S. Julien for the Equal Opportunity Commission
Mr. S. Bidaisee instructed by Ms. R. Jaggernauth for Cascadia Hotel Limited

I have read the judgment of Bereaux J.A. I agree with it and have nothing to add.

Alice Yorke-Soo Hon
Justice of Appeal

JUDGMENT

Delivered by Bereaux J.A.

Introduction

(1) These are two appeals from a decision of the Equal Opportunity Tribunal ("the Tribunal"). The first appeal No. P407 was filed on 17th December, 2019. It is the appeal of the Equal Opportunity Commission ("the Commission") against that part of the Tribunal's decision which held that the Tribunal lacked jurisdiction to consider complaints of sexual harassment. The second appeal No. P408, is that of Rishi Persad Maharaj ("Mr. Maharaj"). It was also filed on 17th December, 2019. His appeal is brought against the entire decision of the Tribunal.

(2) The Commission and the Tribunal are established by sections 26 and 41 respectively of the **Equal Opportunity Act Chap 22:03** ("the Act"). Section 30 enables any person alleging that some other person has discriminated against him or her, or has, in relation to him or her, contravened sections 6 or 7, to lodge a complaint with the Commission, setting out the details of the alleged act of discrimination. The discrimination, in question, is on grounds of sex, race, ethnicity, origin, religion, marital status, or disability which are all subsets of *"status"* as defined by section 3 and established by section 5. Discrimination also includes discrimination by victimisation

established by section 6. The discrimination with which the Act is concerned is in relation to employment, education, the provision of goods and services and the provision of accommodation. The Act also prohibits offensive behaviour (section 7) which is reasonably likely to offend, insult, humiliate or intimidate another person because of their gender, race, ethnicity, origin or religion.

The History

(3) The decision of the Tribunal has its genesis in the termination of Mr. Maharaj's employment at the Banquet and Conference Center Ltd at the Cascadia Hotel ("BCCL"). Although it operates out of the Cascadia Hotel, BCCL is a separate entity. Consequent upon his dismissal, Mr. Maharaj lodged a complaint with the Commission alleging sexual harassment. At or about the same time he complained to the Ministry of Labour, through his trade union, the National Workers Union, in relation to the manner of the termination of his employment. On 8th April 2016 the dispute was settled by a formal written agreement entered between BCCL and the Union pursuant to the provisions of section 58(1) of the **Industrial Relations Act Chap. 88:01**. The terms of settlement provided, inter alia:

> ***"That the Employer, shall pay to the worker RISHI PERSAD MAHARAJ the sum of forty-six thousand dollars ($46,000.00) in full and final settlement of all claims arising out of his termination of employment on October 6 2015 with BANQUET and CONFERENCE CENTRE AT THE CASCADIA HOTEL." (Emphasis added)***

(4) The Commission is empowered by section 27(1)(d) of the Act, inter alia, *"to*

receive, investigate and as far as possible to conciliate allegations of discrimination". By section 39(2) of the Act, the Commission, after having fulfilled the requirements of section 39(1) (a-d) and being satisfied, after investigating the allegation of discrimination that conciliation cannot resolve the complaint, with the complainant's consent may initiate proceedings on his or her behalf before the Tribunal. The Tribunal is a superior court of record which by section 41(4) has the jurisdiction, inter alia, *"to hear and determine complaints referred to it by the Commission."* The Commission investigated the complaint and on 14th July, 2017 referred the matter to the Tribunal. In referring the complaint, the Commission, wrongly named Cascadia Hotel Ltd. as the employer instead of BCCL. Despite this, Cascadia Hotel Ltd. entered a defence.

(5) Before the Tribunal, three preliminary issues arose for consideration:

(i) Whether the complaint ought to be struck out on the grounds that Cascadia was not Mr Maharaj's employer and was therefore the wrong party to the proceedings;

(ii) Whether the proceedings in the Tribunal and at the Ministry of Labour were duplicitous and an abuse of process; and

(iii) Whether the Tribunal had the jurisdiction to hear and determine the issue of sexual harassment raised in the proceedings.

(6) The Tribunal delivered its decision on 6th November, 2019. It held that:

(i) That Cascadia Hotel was the wrong party to the complaint and there was no basis for substituting BCCL as the proper party.

(ii) That the complaint was an abuse of the Tribunal's process because Mr. Maharaj had settled the trade dispute which had been brought by his Union before the Ministry of Labour seeking compensation for his dismissal.

(iii) It did not have jurisdiction to hear a complaint of sexual harassment because such harassment was not a form of sex-based discrimination provided for in the Act.

The Tribunal ordered Mr. Maharaj to pay the costs of the proceedings. This he has also appealed.

Additional facts – *Mr. Maharaj's online complaint*

(7) Mr. Maharaj's complaint to the Commission was made online. He named the BCCL as his employer. With regard to the allegation of discrimination in employment the online form required a response to the following *"where you have been treated differently and/or unfavourably because of one or more of the following reasons (i.e. your status):*

- *My sex*
- *My race*
- *My religion*
- *Some other reason",*

Mr. Maharaj under the heading "some other reason" stated as follows *"SEXUAL HARASSMENT BY THE DIRECTOR OF OPERATIONS MRS. X (NAME EDITED)"*

He added that the incident occurred on 18th June 2015, stating that *"ON THE AFOREMENTIONED DATE MRS. X (NAME EDITED) FOR THE THIRD TIME MADE SEXUAL ADVANCEMENTS AND COMMENTS TO ME."*

I have edited the name of the official in question because not only has the company denied the allegation but it has also raised quite serious questions

as to the credibility of Mr. Maharaj (of which I express no view).

In answer to the question, "*Have you made a complaint about this to another Agency or entity?" (For example: an Attorney-at-Law, a Trade Union, the Ombudsman,) Mr. Maharaj answered: "I HAVE LODGED A COMPLAINT TO MY ATTORNEY-AT-LAW ON THE 5TH OCTOBER 2015. I PREVIOUSLY REPORTED THE MATTER OF SEXUAL HARASSMENT ENCOUNTERED TO THE HUMAN RESOURCES MANAGER OF THE COMPANY. THE ISSUE WAS REPORTED VERBALLY ON THE 2ND JUNE 2015 AND ON THE 5TH OCTOBER 2015. I WAS DISMISSED UNDER THE GUISE OF REDUNDANCY ON THE 5TH OCTOBER 2015, AFTER SUBMITTING THE COMPLAINT TO THE HR DEPARTMENT."* No mention is made of his complaint to the Ministry of Labour.

(8) The allegation that his employment was terminated because of his report of sexual harassment, was in effect a complaint of victimisation under section 6 of the Act. The validity of that complaint turned on the outcome of the jurisdiction question but this complaint has not been pursued.

(9) In his particulars of claim before the Tribunal, Mr. Maharaj set out the details of his complaint of sexual harassment. He alleges that the offensive behaviour occurred on three occasions between March 2015 to September 2015 when the lady manager began using inappropriate language such as *"sexy"*, *"hot"* and *"bae"* towards him. The three occasions were in late May/early June 2015 , June/July 2015 and in or around September 2015. On all three occasions, she pinched or touched him inappropriately. In the May incident, she placed her hand on his buttocks. In the September 2015 incident, she pinched him on the left side of his waist. When he complained, she taunted him with the suggestive comment *"you don't like it"*. After the

May/June and June/July incidents, he complained to the human resources manager. She declined to act because of the manager's close connection to the managing director. Mr. Maharaj ultimately wrote a letter of 5th October, 2015 to the human resources manager about the alleged sexual harassment. This appears to coincide with complaints by management about his performance and about which there were exchanges of correspondence. Those exchanges culminated in another 5th October, 2015 letter from Mr. Maharaj to the human resource manager and in a letter from management also dated 5th October, 2015, terminating his employment. The termination purported to be on the basis of new policies being adopted which made his position as quality control manager redundant. Mr. Maharaj contended that he was never given an opportunity to fill another post within the company nor did the company produce any document relative to its proposed new policies. He claimed special damages of sixty-eight thousand dollars ($68,000.00) being loss of earnings for eight months. He also claimed medical expenses of eight thousand seven hundred dollars ($8,700.00) for resulting medical complaints.

Issues

(10) The issues in the appeal are the same as before the Tribunal although I have worded them somewhat differently:

(i) Should BCCL have been added as a party?

(ii) Were the proceedings before the Tribunal an abuse of its process because Mr. Maharaj had already pursued his claim at the Ministry of Labour and was compensated for his dismissal.

(iii) Does the Tribunal have the jurisdiction to hear and determine a complaint of sexual harassment.

(11) **Summary of decision**

(i) The Tribunal erred in not substituting BCCL in place of Cascadia Hotel Ltd. The error in joining Cascadia Hotel Ltd. was made by the Commission and not Mr. Maharaj who correctly referred to BCCL as his employer in his complaint. The Tribunal had ample powers under section 46 of the Act, the **Equal Opportunity Rules of Practice and Procedure 2016** ("the Tribunal Rules") and **The Civil Proceedings Rules 1998 (as amended)** ("CPR") to make the substitution.

(ii) The sexual harassment claim was not an abuse of the Tribunal's powers. It arose during the course of Mr. Maharaj's employment and subsisted before his employment was terminated. It did not arise out of the termination of his employment and did not fall within the terms of the settlement of the trade dispute.

(iii) The Tribunal does have the jurisdiction to hear Mr. Maharaj's claim of sexual harassment. The Tribunal misdirected itself on the law and took into account considerations which were irrelevant or not within its preserve. The proper questions it should have asked itself were: whether, in relation to section 5, Mr. Maharaj was treated less favourably by Mrs. X than she would have treated a female employee, in circumstances which were the same or not materially different and; in relation to section 9, whether Mrs. X by her conduct (if true) subjected Mr. Maharaj to a detriment.

Analysis

Issue i – Should BCCL have been added as a party?

(12) The Tribunal struck out the claim on the basis that Mr. Maharaj was an employee of BCCL and not Cascadia Hotel Ltd. It reasoned that BCCL was not the complainant before it and had not been named in the referral by the Commission. The Tribunal found that it had no power *"in these circumstances"* to substitute BCCL as it would create a new complaint which had not been investigated by the Commission.

(13) Mr. Mendes submitted that this was an error. No new issue was raised before the Tribunal nor was any new material which could be deemed to be a fresh complaint put forward. Rather, the instances of harassment and discrimination which the appellant wished to pursue before the Tribunal were the same instances of harassment and discrimination which were canvassed before the Commission. Furthermore, the complaint before the Commission named *The Banquet and Conference Centre at The Cascadia Hotel* as the Appellant's employer and indeed BCCL participated in the proceedings before the Commission. Accordingly, the complaint which was referred to the Tribunal for trial concerned the same parties and issues considered by the Commission.

(14) Mr. Mendes submitted that it is the Commission which initiates proceedings before the Tribunal pursuant to section 39 of the Act and the error was the Commission's error and not the appellant's. The appellant should not be penalized, unduly, for the Commission's error and the Tribunal ought to have exercised its discretion to substitute the BCCL for Cascadia Hotel. The Tribunal had such a power under section 46 of the Act and this was bolstered by Rules 1.7 and 16 of the Tribunal Rules and Part 19 of the CPR as enabled by Rule 24.1 of the Tribunal Rules.

(15) In support of the Tribunal's decision, Mr. Bidaisee in his submissions on behalf of Cascadia Hotel Ltd, submitted that BCCL and Cascadia were separate entities. Neither has ever been the servant or agent of the other. Therefore, questions of piercing the corporate veil or of agency did not arise and the Tribunal was correct to refuse to substitute BCCL in place of Cascadia.

(16) The Tribunal held itself bound by the decision of this court in **DPA v. Equal Opportunity Commission & Anor. Civil Appeal No. P291 of 2014**. In that case, Rajkumar JA giving the decision of the Court of Appeal, held at paragraph 65 that a complainant cannot raise fresh issues before the Tribunal if those issues were not investigated by the Commission.

(17) The finding of the Tribunal is wholly misconceived. The particulars of Mr. Maharaj's online complaint are set out at paragraphs 7 – 9 above. He named BCCL as his employer. BCCL participated in the proceedings before the Commission. The Commission investigated and then referred the complaint to the Tribunal. In doing so, however, it wrongly listed his employer as Cascadia Hotel Ltd. In substituting BCCL for Cascadia Hotel Ltd., the Tribunal would have corrected what at worst was a clerical error. Any substitution of BCCL for Cascadia Hotel Ltd. was merely procedural and not substantive. The report of the Commission shows clearly that Mr. Maharaj's complaint was fully considered. The substituting of BCCL in the place of Cascadia does not in any way change the nature of Mr. Maharaj's complaint. His complaint remains that he was sexually harassed by Mrs. X, that he complained about it and as a result of his complaint his employment was terminated. The Commission's error was more than likely because it treated BCCL and Cascadia Hotel Ltd. as one and the same.

(18) The Tribunal held that the onus is on Mr. Maharaj to ensure that the correct respondent is before the Tribunal. But I do not consider that Mr. Maharaj can be faulted so easily. Section 39 provides that the Commission may institute proceedings with the consent of the complainant and on the complainant's behalf. It does not follow, however, that that places an onus on the appellant to ensure the correct respondent is joined. Moreover, in this case BCCL and Cascadia Hotel Ltd. seem to enjoy a symbiotic relationship which, it appears, was confusing even to the professionals at the Commission far more Mr. Maharaj. This relationship is exemplified by the seamless manner in which Cascadia Hotel Ltd was able to put up a defence (in the alternative) which quite clearly accessed Mr. Maharaj's job records at BCCL. Unlike to Mr. Maharaj, there is no prejudice to BCCL or to Cascadia Hotel Ltd. by the substitution or addition of BCCL.

(19) As to the power of the Tribunal to substitute or join BCCL, I also agree with Mr. Mendes that the Tribunal has ample power to do so under section 46 of the Act and Rule 1.7 of the Tribunal Rules. It also is empowered by Part 19 of the CPR read in conjunction with Part 24.1 of the Tribunal Rules. Section 46 of the Act provides:

> ***"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."

(20) In my judgment the Tribunal could have joined the BCCL under section 46(b) or section 46(c). Section 46 is reinforced by Rule 1 .7 of the Tribunal which provides that –

" "party" means (a) the Complainant and or the Respondent in original, interim or appellate proceedings

(b) for the purpose of these Rules, any person whom the Tribunal determines to be a party."

The CPR would also be applicable by virtue of Tribunal Rule 24.1 which provides that *"in any case where the foregoing rules do not expressly provide, the existing rules of the Supreme Court of Trinidad and Tobago shall apply mutatis mutandis"*. The relevant rules under Part 19 read as follows:

"19.1 This Part deals with the addition or substitution of parties after proceedings have been commenced.

19.2 (1) This rule applies where a party is to be added or substituted.

(2) A party may add a new party to proceedings without permission at any time before a case management conference.

(3) The court may add a new party to proceedings if –

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

(4) The court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings.

(5) The court may order a new party to be substituted for an existing one if—

(a) the existing party's interest or liability has passed to the new party; and

(b)the court can resolve the matters in dispute more effectively by substituting the new party for the existing party.

(6) The court may add or substitute a party at a case management conference.

(7) The court may not add a party after a case management conference on the application of an existing party unless that party can satisfy the court that the addition is necessary because of some change in circumstances which became known after the case management conference.

19.3 The general rule is that a claim shall not fail because—

(a) a person was added as a party to the proceedings who should not have been added; or

(b) a person who should have been made a party was not made a party to them." (emphasis added)

Part 19.2(3)(4)(5) and Part 19.3 are all applicable but it is unnecessary to deploy Part 19 here. Section 46 is sufficient. But in the event that I am wrong, the general rule as set out in Part 19(3) applies, having regard to the facts at paragraphs 7 - 9. Mr. Maharaj, having rightly joined BCCL in his complaint to the Commission, should not be punished for what is an error on the Commission's part.

My answer to issue (i) is that BCCL should have been joined as a party. The complaint should not have been struck out and the Tribunal erred in purporting to do so.

Issue ii – Was the pursuit of the sexual harassment claim before the Tribunal an abuse of process?

(21) It was not an abuse of process for Mr. Maharaj to have pursued his claim before the Tribunal. The Tribunal erred in purporting to strike out the claim. The Tribunal's reasoning is set out at paragraphs 80 to 83:

> ***"80. … I note that the Complainant had already compromised and settled the Trade Dispute and has received the agreed settlement. This Trade Dispute arises from contemporaneous proceedings from the same termination in the Complaint. The authorities on abuse of process cited by both the Complainant and the Respondent are to like effect: that is to say that the various forms of redress sought from a single injury ought to be raised in the same action so that a party will not be "twice vexed" in the same dispute...***
>
> ***82. For this reason I do not accept the suggestion that, although matters surrounding the termination were settled, the issues of***

sexual harassment discrimination survived. The issue of sexual harassment is relevant in a Trade Dispute. When the said Trade Dispute was settled all issues arising from the termination were extinguished.

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

(22) It appears from this reasoning that the sexual harassment complaint was found to be an abuse because the Tribunal considered that both complaints of unjustified dismissal and sexual harassment could have been addressed in the same trade dispute at the Ministry of Labour. This raises what is called the **Henderson v. Henderson (1843) 3 Hare 100** abuse of process issue to which I shall come. The Tribunal is of course a superior court of record and like any such court, is entitled to protect its process from abuse.

(23) Mr. Bidaisee submitted that the Tribunal came to the correct decision. He contended that both the Commission and Mr. Maharaj did not seek to appeal the Tribunal's decision on abuse of process. Consequently, neither party ought to be allowed to pursue an appeal in respect thereof. He added that, in any event, the legal effect of the memorandum of agreement between Rishi Persad-Maharaj and the BCCL is that Mr. Maharaj is estopped

from pursuing any further damages arising from the termination of his employment, because he already accepted the settlement under the agreement. The Tribunal was not plainly wrong to have struck out the complaint.

(24) Mr. Mendes submitted, however, that the sexual harassment complaint before the Tribunal was not spent or extinguished by the compromise of the trade dispute. I understood Mr. Mendes' submission to be that there need not necessarily be overlap between the respective claims. An overlap would only have arisen if the true reason for the termination was Mr. Maharaj's complaint of sexual harassment. He added however that even if that were truly the reason for termination, the claim of unfair dismissal could be established before the Industrial Court simply by proving that the allegation of sexual harassment had been made and that it led to his dismissal. Therefore, the settlement of the trade dispute with regard to Mr. Maharaj's termination, did not settle, without more, his claim for sexual harassment and no evidence had been put before the Tribunal to that effect.

(25) I agree. The dispute was settled at the Ministry of Labour. No evidence was led before the Industrial Court by the Union. Therefore, the true nature of Mr. Maharaj's claim was not explored before the Industrial Court. Further, Mr. Maharaj's contention is that he endured such harassment during his employment and that he suffered *"anxiety, embarrassment discomfort, distress and detriment"* consequent upon it (see paragraph 27 of his claim). In my judgment, if the allegations are true, any right of action before the Commission/Tribunal would have arisen immediately upon the occurrence of these acts. On the other hand, the claim for unfair dismissal arose upon his dismissal. It is a separate action. An overlap or duplication may have arisen if the victimisation claim had been pursued. The terms of settlement

of the trade dispute are in respect of all claims arising from his dismissal (emphasis added). They are set out at paragraph 3. The sexual harassment claim was actionable during his employment and even if his employment had not been terminated. It follows that not only was the Tribunal wrong to find abuse of process but also that Mr. Bidaisee's submission as to estoppel cannot succeed.

(26) As to Mr. Bidaisee's contention that there was no appeal of the abuse of process finding, I do not agree. There was no specific prayer in the notice of appeal with regard to the abuse of process. Such a prayer would certainly have been helpful but the Tribunal itself made no specific order of dismissal in relation to abuse of process. At the end of its judgment, under the rubric *"Disposition"*, the Tribunal did the following:

(i) It dismissed the claim of discrimination by sexual harassment.
(ii) Further and in the alternative, it struck out the complaint and dismissed the proceedings.
(iii) Ordered the complainant to pay the respondent's costs.

Nothing in that dispositive order makes any specific reference to abuse of process. It appears to be subsumed in the Tribunal's order in (ii) to strike out the complaint and to dismiss the proceedings. Mr. Maharaj, in his notice of appeal, included all three paragraphs of the Tribunal's dispositive order in the details of his appeal. That is sufficient in my judgment to found an appeal against the abuse of process.

(27) But there remains the question whether both claims ought to have been pursued through the industrial relations process pursuant to the decision in **Henderson v. Henderson (1843) 3 Hare 100**. The decision is founded on the

principle that there should be finality in litigation and that a party should not be twice vexed in the same matter (per **Johnson v. Gore Wood (a firm) [2002] 2 AC 1** at page 31). A party should put forward his entire case and may not be permitted to pursue a case which he should have pursued in earlier litigation. But that principle has been qualified by later cases. **Johnson v. Gore Wood [2002] 2 AC 1** for example, held that whether an action was an abuse of process as offending the public interest in the finality of litigation should be judged broadly on the merits, taking account of all the public and private interests involved and all the facts of the case. The key question is whether the claimant, in all the circumstances, was misusing or abusing the process of the court.

(28) I do not consider that it can be said that Mr. Maharaj is misusing the Tribunal's process. We are here concerned with the process of a specialist tribunal created by Parliament to specifically examine and pronounce upon cases in which discrimination on grounds of sex, race and religion is alleged. Mr. Maharaj has chosen to pursue an allegation of sexual harassment before such a tribunal in his own right and as a separate cause of action. The Tribunal is specially empowered to make findings after a trial of the allegations before it. Mr Maharaj cannot be faulted for seeking to pursue such a claim before such a Tribunal. It is not an abuse of process and the Tribunal erred in so finding.

Issue iii – Does the Tribunal have jurisdiction to hear and determine the issue of sexual harassment

(29) This is the main question in this appeal. The provisions of sections 4, 5 and 9 of the Act are relevant. They provide as follows:

"4. This Act applies to— (a) discrimination in relation to

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

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.

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."

(30) Section 3 is also relevant. It defines *"status"* as follows:

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

Section 3 also provides that ***"sex does not include sexual preference or orientation"***.

(31) Section 4 sets out the specific areas of life in which discrimination as defined in section 5 and 6 are prohibited. The area with which we are concerned in this appeal is employment. Section 5 prohibits discrimination against a person on grounds of *"status"* which is defined to mean on sex, race, ethnicity, origin, religion, marital status or disability. Sexual orientation however is excluded from the definition *"sex"*. It means, therefore, that discrimination because of sexual orientation is not prohibited under the Act and can found no basis of a complaint before the Commission. In this case, we are concerned with discrimination in employment on grounds of gender, having regard to Mr. Maharaj's pleadings. Section 9(c) prohibits an employer from discriminating against an employee by subjecting him to a *"detriment"*. Detriment is not defined by the Act. For the purposes of this question of jurisdiction, the issue comes down to two questions:

(i) Does *"sex"* include *"sexual harassment"* for the purposes of section 5?

(ii) Does *"detriment"* include *"sexual harassment"* for the purposes of section 9?

(32) Before proceeding to consider counsel's submissions on this question, I must address one other issue. There appears to have been some discussion

before the Tribunal about Mr. Maharaj's sexual preference. But Mr. Maharaj's complaint against BCCL is that a senior manager who is female, sexually harassed him. That is his pleading. It is female/male sexual harassment. Consequently, Mr. Maharaj's sexual orientation, whatever it may be, is irrelevant to the issue. The alleged harassment is in respect of heterosexual conduct in so far as it allegedly emanated from a lady manager and it was directed towards him as a male employee.

(33) The Tribunal found that the Act does not provide for complaints to be brought on the ground of sexual harassment. It held that references to discrimination on the ground of sex in the Act are to discrimination premised on biological gender and excludes sexual preference or orientation. It reasoned that because sexual preference is excluded from the definition of sex, any question of sexual harassment must necessarily be in respect of heterosexual conduct. Therefore, to include sexual harassment as a form of sex discrimination would, implicitly, be to discriminate against other persons on the basis of their sexual orientation or preference. This would offend the constitutionally guaranteed rights to equality of treatment and equity. It would also trespass on Trinidad and Tobago's treaty obligations.

Submissions

(34) Mr. Mendes submitted that sexual harassment at work is capable of amounting to discrimination on the basis of the sex of the victim within the meaning of sections 4 and 5 and discrimination in employment within the meaning of section 9 of the Act. Where a discriminator subjects an aggrieved person to the type of unwanted conduct which would typically amount to sexual harassment, that would constitute the type of 'treatment' which is capable under section 5 of amounting to discrimination. Such treatment

would amount to sex discrimination if it were not meted out to other persons who are not of the same sex of the aggrieved person.

(35) He added that in the context of section 9, an employee who is harassed at work, whether such harassment is of a sexual nature or not, is subject to a detriment by the creation of an intimidating, hostile or humiliating working environment for the recipient.

(36) In support of the Commission's appeal against the Tribunal's decision, Mr. Hosein, submitted that since the protection of human rights is vitally important in society, legislation prohibiting discrimination must be construed broadly using a purposive approach. The rights enunciated in the Act should be given a broad and liberal construction and the Court should not search for ways and means to minimize those rights and to enfeeble their impact. There is no need for an overly cautious approach such as that adopted by the Tribunal, merely because of statements made by the Attorney General in Parliament that the Act did not make specific reference to sexual harassment as a ground. Discrimination on the basis of sex is wide enough to include sexual harassment and in fact, harassment on the basis of a person's sex is implicitly included.

(37) He added that while *"detriment"* is not defined in the Act, its scope must be determined by a common sense analysis in fulfilment of the purpose of the Act. Detriment simply means disadvantage. It is undisputable that sexual harassment which affects a person's dignity on the ground of sex will cause a disadvantage or detriment to that person. Sexual harassment is therefore a form of detriment. The fact that there is no specific reference to sexual harassment in the legislation is no bar to it being a form of detriment. It is enough to show that there was some detriment.

(38) In support of the Tribunal's finding, Mr. Bidaisee submitted that the Act only provides for certain types of discrimination. Those not expressly provided for, such as sexual orientation or sexual preferences are excluded. The Act does not expressly provide for sexual harassment and it is not included in the definition of *"status"* in section 3 of the Act. An express provision is required to prohibit acts of sexual harassment and define the parameters for bringing such complaints.

Analysis

(39) In my judgment the proper question in relation to section 5 discrimination is whether Mr. Maharaj was treated less favourably by Mrs. X (and vicariously, by BCCL) than she would have treated a female employee, in circumstances which were the same or not materially different. That is a question which arises from the wording of section 5. Similarly, the question which arises in respect of section 9 is whether, if the allegations are true, Mrs. X by her conduct towards Mr. Maharaj subjected him to a *"detriment"*. The Tribunal asked itself the wrong questions and focussed on matters of policy which are the preserve of the Executive and of Parliament.

(40) Section 5 provides that a person discriminates against another person on grounds of sex, if because of that other person's sex, he treats that other person less favourably than he would treat another person of the opposite sex, in circumstances which are the same or not materially different. Section 5 discrimination (which also applies to section 9) is concerned with *"treatment"* and the question which arises is whether, if the allegations of Mr. Maharaj are true, he was *"treated"* less favourably by Miss X by reason of his sex.

(41) Section 9(c) provides that an employer shall not discriminate against a person *"by dismissing him or subjecting him to any other detriment"*. *"Discriminate"* bears the same definition as in section 5. This means in effect that an employer shall not on grounds of sex, treat an employee less favourably than another employee of the opposite sex, where their circumstances are the same or not materially different, by dismissing him or her or subjecting him or her to any other detriment.

(42) Sections 5 and 9 are thus concerned with *"treatment"* and it is the question of Mr. Maharaj's treatment by Mrs. X which has to be considered in the context of sections 5 and 9. Rather than focusing on the difficulties of treating with a definition of sexual harassment, the question on which the Tribunal should have focused was whether the sexual harassment, as that term is well understood to mean, constituted *"treatment"* which was prohibited by section 5 or a *"detriment"* which is prohibited by section 9. Part of the Tribunal's difficulty was seeking to accommodate the meaning of sexual harassment with the provisions of the Act. It may well be that reference to that term should be eschewed altogether and focus should be on the particulars of Mr. Maharaj's allegations and whether the alleged conduct of Mrs. X amounted to *"treatment"* which offended the provisions of sections 5 and 9.

(43) In my judgment on either approach, Mr. Maharaj's complaint, if true, falls within the provisions of section 5 and 9 and falls to be considered by the Tribunal.

(44) The decision of the Scottish Court of Session in **Strathclyde Regional Council v Porcelli [1986] IRLR 134** is relevant. I read this case conscious of the

guidance of the House of Lords in **McDonald v Advocate General [2004] 1 ALL ER 339,371 [91]-[94]** where Lord Hope explained the necessity of comparison to come within the UK Sex Discrimination Act 1975. In **Strathclyde (supra),** the employee alleged discrimination contrary to section 6(2)(b) of the UK Sex Discrimination Act 1975. She was employed at a school as a science laboratory technician. Two male lab technicians (Coles and Reid) were also employed. She alleged that they sexually harassed her as part of a campaign to force her to leave. One of them repeatedly made suggestive remarks to her and deliberately brushed against her. This led her to applying for and obtaining a transfer to another school. She then complained to an industrial tribunal that her employers had discriminated against her unlawfully contrary to section 6(2)(b) of the Sex Discrimination Act. The operative provision (section 1(1)(a) of the Act) provided as follows:

(i) A person discriminates against a woman in any circumstances relevant for the purpose of any provision of this Act if –

(a) on the ground of her sex, he treats her less favourably than he treats or would treat a man…

(45) Lord Brand in his decision stated at paragraphs 16 and 18:

"The primary question in terms of s.1(1)(a) of the Act is not "Was there sexual harassment?" but "Was the applicant less favourably treated on the ground of her sex than a man would have been treated?". If that question is answered in the affirmative, there was discrimination within the meaning of the Act and it was conceded by counsel for the appellants that, in the present case, if there was discrimination, it was to the detriment of the applicant."

"The purpose of the Act is to regulate treatment. The learned

Dean of Faculty submitted that the test of whether s.1(1)(a) had been complied with depended on what was done and not on motive. I agree with that submission. It follows that, if a form of unfavourable treatment is meted out to a woman to which a man would not be vulnerable, she has been discriminated against within the meaning of s.1(1)(a). That is this case."

(46) It is a similar question here except that, because our section 5 is broader in scope, the allegation is made against a woman and it is made by a man.

(47) The Tribunal concluded that sexual harassment is excluded from the Act because non-heterosexual persons may suffer detriment merely because of their orientation and yet have no protection because sexual orientation is excluded while heterosexuals suffering the same injury may benefit from the protection of the Act. If that is the consequence of the meanings to be ascribed to sections 5 and 9, it is a matter for correction by Parliament. That Parliament in its wisdom chose to exclude sexual orientation/preference, was a matter entirely within its province. The astuteness of that policy is a matter for the wider community and the court of public opinion. It is no concern of this Court or of the Tribunal, both of which, are called upon to interpret the provisions of the Act, having regard to the facts of the case. In this case, Mr. Maharaj's sexual preference (whatever it may be) was not in issue. His complaint was that he was sexually harassed by a female manager because of his sex. Whether non-heterosexuals are excluded from the Act's protection, *vis a vis* sexual harassment, did not fall to be considered in this case.

(48) The Tribunal accepted as *"well explained"*, the following definition in the United Nations Bulletin on the Prohibition of discrimination, harassment

including sexual harassment and abuse of authority:

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

(49) In my judgment, such conduct as defined above is discrimination within the meaning of section 5 of the Act if an employee of the opposite sex would not be subjected to similar treatment. Singling out an employee for treatment as alleged by Mr. Maharaj is an act of discrimination of itself and requires no comparator. However, even though harassment is of and by itself an act of discrimination, it will not be a section 5 act of discrimination in the absence of a comparator. Claimants who are victims of sexual harassment in circumstances which may offer no comparator are barred from accessing the wellspring of civil relief contained in the Act. In this case, the fact that a female employee would not be treated in the same manner as Mr. Maharaj simply brings it within the definition of discrimination under section 5. Mr. Maharaj would have been treated less favourably than a female employee.

(50) I am fortified in my conclusion by the decision in **Strathclyde (supra)**. The Industrial Tribunal in that case had accepted the complainant's account of the sexual harassment to which she was subjected and that the treatment was to her detriment. However, the Industrial Tribunal concluded that it could not find that she had been treated less favourably on the ground of sex than a man would have been treated. It reasoned that she had been a man whom the two male technicians equally disliked, they would have treated him just as unfavourably although the specific nature of the unpleasantness might have been different. Lord Brand, in rejecting that view (and upholding the Appeal Tribunal's reversal of it) stated at paragraph 17:

> ***"It is clear from the findings in this case that the unpleasant campaign to which the claimant was subjected by Coles and Reid included significant elements of a sexual character to which a man would not have been vulnerable. The motive of the campaign was dislike of the claimant. Its purpose was to drive her out of the school. Assuming, as the Industrial Tribunal found, that a man in the claimant's shoes would have been the victim of unpleasant treatment at the hands of Coles and Reid, that treatment, although in all other respects the same as that meted out to the claimant, would not have included the behaviour which was sexually offensive to a woman."***

(51) See also Lord Emslie at paragraph 10 as follows:

> ***"The Industrial Tribunal reached their decision by finding that Coles' and Reid's treatment of an equally disliked male colleague would have been just as unpleasant. Where they***

went wrong, however, was in failing to notice that a material part of the campaign against Mrs Porcelli consisted of 'sexual harassment', a particularly degrading and unacceptable form of treatment which it must be taken to have been the intention of Parliament to restrain. From their reasons it is to be understood that they were satisfied that this form of treatment, sexual harassment in any form would not have figured in a campaign by Coles and Reid directed against a man. In this situation the treatment of Mrs Porcelli fell to be seen as very different in a material respect from that which would have been inflicted on a male colleague, regardless of equality of overall unpleasantness, and that being so it appears to me that upon a proper application of s.l(1)(a) the Industrial Tribunal ought to have asked themselves whether in that respect Mrs Porcelli had been treated by Coles (on the ground of her sex) 'less favourably' than he would have treated a man with whom her position fell to be compared. Had they asked themselves that question it is impossible to believe that they would not have answered it in the affirmative."

(52) The sexual harassment however even when alleged and proven does not require that there be a sex-related motive or objective in order to fall within the definition of *"sex"* for the purposes of section 5. I rely on the dictum of Lord Emslie in **Strathclyde** at paragraph 9 as follows:

"After some initial hesitation which I freely confess, I have come to be of opinion that for the reasons advanced by the learned Dean of Faculty for the respondent the submissions for the appellants fall to be rejected. S.1(1)(a) is concerned with

'treatment' and not with the motive or objective of the person responsible for it. Although in some cases it will be obvious that there is a sex related purpose in the mind of a person who indulges in unwanted and objectionable sexual overtures to a woman or exposes her to offensive sexual jokes or observations that is not this case. But it does not follow that because the campaign pursued against Mrs Porcelli as a whole had no sex related motive or objective, the treatment of Mrs Porcelli by Coles, which was of the nature of 'sexual harassment' is not to be regarded as having been 'on the ground of her sex' within the meaning of s.l(1)(a). In my opinion this particular part of the campaign was plainly adopted against Mrs Porcelli because she was a woman. It was a particular kind of weapon, based upon the sex of the victim, which, as the Industrial Tribunal recognised would not have been used against an equally disliked man."

(53) It follows therefore that the allegations of sexual harassment and the particulars provided by Mr. Maharaj, if proven, amount to (unfavourable) *"treatment"* within the meaning of section 5 of the Act and it is within the jurisdiction of the Tribunal to adjudicate upon. The Tribunal erred in finding that it has no jurisdiction.

(54) As to section 9, I have also concluded that the sexual harassment as commonly understood can amount to a *"detriment"* within the meaning of section 9. Mr. Bidaisee submitted that detriment had to be confined to its context in section 9 as a whole. While I found this submission initially attractive, there is no basis for so limiting it. Detriment is not defined and there is no reason why it should be given so restricted a definition. Indeed,

in **Ministry of Defence v. Jeremiah [1979] 3 ALL ER 833**, Brandon LJ described the phrase *"subjecting to any other detriment"* as meaning no *"more than putting under a disadvantage"* adding that whether such a disadvantage had occurred was a question of fact for the Tribunal. I accept Mr. Hosein's submissions at paragraphs 36 and 37 supra. I add the caveat however that such an approach is simply towards determining the parliamentary intention. The authorities to which I have referred in this judgment have adopted an approach which does not strain the interpretation to be placed on *"sex"*, *"treatment"* or *"detriment"* in sections 5 and 9 of the Act.

(55) In **Reed and Bull Information Systems Ltd v. Stedman [1999] I.R.L.R.299**, the complainant resigned as secretary responsible to the marketing manager on the ground that she found working with him intolerable. She brought a complaint under section 6(2) the UK Sex Discrimination Act 1975. The manager made comments and remarks with a sexual connotation. He made an attempt to look up her skirt and laughed when she angrily left the room. Section 6(2) of the Sex Discrimination Act 1975 provided as follows:

> ***"It is unlawful for a person in the case of a woman employed by him at an establishment in Great Britain to discriminate against her … (b) by dismissing her, or subjecting her to any other detriment."***

(56) In upholding the decision below, the Employment Appeal Tribunal commented:

> ***"Sexual harassment is a shorthand for describing a type of detriment. The word detriment is not further defined and its***

scope is to be defined by the fact-finding tribunal on a common sense basis by reference to the facts of each particular case. The question in each case is whether the alleged victim has been subjected to a detriment and, second, was it on the grounds of sex. Motive and intention of the alleged discriminator is not an essential ingredient, as in any other direct discrimination case, although it will often be a relevant factor to take into account. Lack of intent is not a defence."

(57) The fact of sexual harassment can negatively affect one's dignity and psychological well-being in the course of one's employment. It is demeaning of the dignity of the person and corrosive of an individual's self-esteem. Such a negative impact is a form of detriment and disadvantage to the person to whom it is directed and falls within the provision of section 9. Even if I were to eschew the use of the term *"sexual harassment"* and simply apply the examples of the conduct complained of by Mr. Maharaj, that conduct, if unwanted and unappreciated has the same effect. Mr. Maharaj complained that he suffered *"anxiety, embarrassment, discomfort, distress and detriment"* as a result of the alleged acts of the manager. If true, these feelings certainly were to his detriment within the meaning of section 9 of the Act. As to whether Mr. Maharaj's allegations are true, that is an issue of fact for the Tribunal to consider and decide upon after the hearing whole of the evidence.

Order

(58) The appeals are, therefore, allowed. I shall order as follows:

(i) The orders of the Tribunal are set aside.

(ii) Pursuant to section 46 of the Act, BCCL is added as a party to the proceedings.

(iii) The complaint is remitted to the Tribunal for its consideration and determination.

(iv) The costs order against Mr. Maharaj is discharged.

(59) We will hear the parties on the question of costs of the appeal and the costs before the Tribunal.

Nolan Bereaux
Justice of Appeal

I have also read the judgment of Bereaux J.A. I agree with it and have nothing to add.

Prakash Moosai
Justice of Appeal