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### MAGCO LEGAL LESSONS

#### LEGAL TOPIC: DISCRIMINATION IN EMPLOYMENT

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#### PROTECTION UNDER THE EQUAL OPPORTUNITY ACT

Employees are protected from discrimination by their employers under the **Equal Opportunity Act Chapter 22:03** (“the Act”). Sections 8-10 of the Act protects both Applicants for Employment as well as persons who are already employed from discrimination by potential employers or employers:

*“8. An Employer or a prospective employer shall not discriminate against a person-*

- (a) In the arrangements he makes for the purpose of determining who should be offered employment;*
- (b) In the terms or conditions on which employment is offered; or*
- (c) By refusing or deliberately omitting to offer employment.*

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*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;*

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*(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.*

*10. A person shall not discriminate against another person where that other person is seeking or undergoing training for any employment-*

*(a) in the terms or conditions on which that other person is afforded access to any training course or other facilities concerned with such training; or*

*(b) by terminating that other person's training or subjecting that other person to any detriment during the course of training."*

Therefore, the Act protects prospective employees from discrimination by their prospective employers in whether or not they are actually offered employment, the arrangements made for the purpose of determining who should be offered employment, and in the terms or conditions on which the employment is being offered.

Employees are also protected from discrimination under the Act in the terms and conditions of employment afforded to the employee, the way in which the employee is afforded access to opportunities for promotion, transfer or training or to any other benefit, facility or service associated with employment, or from dismissal or being subject to any detriment.

These protections are particularly relevant to many Employees at this time especially as due to the current Covid-19 crisis, some Employers may be looking to reduce salaries and/or reduce staff due to falling sales or declining revenue. In doing so, it must not be used as an avenue for Employers to selectively discriminate against the Employees whom they may either want to punish or dismiss, by using this present crisis as the basis for extracting vengeance. Those Employees can seek protection or recourse under the provisions of the Equal Opportunity Act.

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## **WHAT IS DISCRIMINATION?**

Section 4 of the Act states that the Act applies to discrimination in relation to employment if the alleged discrimination is based on-

- (a) Discrimination on the ground of status as defined in section 5 of the Act; or
- (b) Discrimination by Victimisation as defined in section 6 of the Act;

### **Discrimination on the ground of status:**

Section 5 of the Act states that a person discriminates against another person on the grounds of status if he treats the aggrieved person, in circumstances that are the same or are not materially different, less favourably than the discriminator treats a person of another status based on:

- (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 Act defines “status” as

- (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.

As was stated in, ***EOT No. 0001 of 2016 Michael Mark Archbald and Trinidad and Tobago Defence Force:***

*“Simply put, the Act is saying that if you fall within the employment relationship, and you are of an appropriate status and your employer in circumstances that are the same or are not materially different, treats you less favourably than he treats another person of a different status; then once you can adduce evidence to prove on a balance of probabilities that the above characteristics apply to you, then you would have proven your case that you were discriminated against.”*

The Complainant in that case was a soldier who was not allowed to engage in any form of training activities, was only allowed to do domestic chores, and was even discharged due to his religion. Additionally, the Complainant was subject to demeaning comments in relation to his religion from his employers, which caused him to feel emotionally distraught. In that case it was clear that the Complainant was being discriminated against on the basis of his religion, as he was being treated less favourably than other soldiers of different religions to him, and as such he was found to be entitled to compensation for being discriminated against because of his status.

In another case, **EOT No. 002 of 2012 Derek Salandy and The Petroleum Company of Trinidad and Tobago**, the Complainant alleged discrimination based on his origin, as he was a citizen of Venezuela. In that case he successfully made out a case that he was receiving a significantly lower remuneration package than his comparator, who was another worker in a similar position who was less experienced than the Complainant and yet still receiving more pay than the Complainant. As a result of this, it was found that he was being discriminated against in the terms or conditions of employment afforded to him and as a result, he was entitled to compensation from the Respondent.

### **Discrimination by Victimisation:**

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The discriminator discriminates by victimisation against another person 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 the 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 the Act, or any relevant law;
- (c) Otherwise done anything or by reference to the 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 the Act, or any relevant law.

In making an allegation of discrimination by victimisation, the Complainant must, as stated in ***EOT No. 0004 of 2016 Moriba Baker -v- The University of Trinidad and Tobago :***

*“show that the catalyst for the unfavourable treatment is that he (the complainant) had either initiated action against him (the discriminator) under the Act (or any relevant law) or assisted some person in doing so.”*

Therefore, the Complainant must prove that the basis for the treatment which he is receiving is due to any action which he may have initiated against the Discriminator under the Act, or some relevant law, or assisted some other person in doing so.

### **WHAT IS LESS FAVOURABLE TREATMENT?**

When alleging Discrimination based on status, or by victimisation, the Complainant in both cases has to show that he was being treated less favourably than another similarly circumstanced person, and that the reason for this treatment was either based on his status or due to victimisation.

In *EOT No. 002 of 2014 Kerwin Simmons and Trinidad and Tobago Water and Sewerage Authority* it was stated that there are two requirements needed to ground a claim of discrimination: **the identification of a comparator, and the establishment that there was differential and less favourable treatment.** This case further stated that the approach in determining whether there was in fact discrimination, was to look at the reasons for the differential treatment. In that case the crucial question, once less favourable treatment was established was -: Whether the reason for the less favourable treatment was on the grounds of race or was it for some other reason? In that case, it was found that the Complainant's comparator was of a different race to him and was being treated more favourably than the Complainant with respect to opportunities for accessing promotions. As a result the Complainant was entitled to compensation because it was shown that the Respondent WASA, was discriminating against him because of his race.

Therefore, a person alleging discrimination would have to first establish that there has been less favourable treatment towards him by his employer or potential employer as described in sections 8-10 of the Act, such as an employee not being afforded access to opportunities for promotion as was seen in *Kerwin Simmons and Trinidad and Tobago Water and Sewerage Authority*. The person alleging discrimination must then prove that the reason for this treatment was based, either on his status, or as a result of victimisation as outlined above. Should both of these be established, the aggrieved person may then be able to make a complaint before the Equal Opportunity Commission and then subsequently to have their case heard before the equal Opportunities Tribunal.

## **EXCEPTIONS**

Sections 11 to 14 of the Act further outline certain exceptions where it would be found that the employer or potential employer has not discriminated against the person. Therefore the Anti-Discrimination Provisions do not apply in the following cases:

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(1) On the grounds of sex in a case where being of a particular sex is a genuine occupational qualification for employment, promotion, transfer or training The Act further provided examples of this, while clarifying that this exception is not limited to the examples provided:

**(a)** Where the duties relating to the employment can only be performed by a person having physical attributes (excluding physical strength or stamina) which only a person of a particular sex possesses; ***(Of course there may be lots of Females who would want to challenge or question this section of the Law)***

(b) Where the duties involve participation in a dramatic performance or other entertainment in a capacity for which a person of a particular sex is required for reasons of authenticity; ***(Even this section may eventually be open to challenge in this age of Gender fluidity.)***

**(c)** Where the duties involve participation as an artist's photographic or exhibition model in the production of a work of art, visual image or sequence of visual images for which a person of a particular sex is required for reasons of authenticity; ***(Again, one could see the possibility of either Transgender or Cross-Dressing persons eventually seeking to challenge these provisions)***

(d) Where the duties need to be performed by a person of a particular sex to preserve decency or privacy; ***(It is possible that some Feminist Groups may wish to eventually challenge this section)***

(e) Where the nature of the establishment, or the part of it within which the work is done, requires the employment to be held by a person of a particular sex; or ***(The various Rights Moevements may one day be all over this one with Legal challenges)***

(f) Where the person employed or being trained provides or is to provide persons of a particular sex with personal services concerning their welfare, education or health or similar personal services and those services can most effectively be provided by a person of that particular sex. ***(Again,***

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***the various Rights Moevements may one day be all over this one with Legal challenges)***

**(2)** Where the duties relating to employment or training involve participation of a dramatic performance or other entertainment in a capacity for which a person of a particular race is required for reasons of authenticity, or where it involves participation as an artist's photographic or exhibition model in the production of a work or art, visual image or sequence of visual images for which a person of a particular race is required for reasons of authenticity. ***(This may also eventually be open to challenge, because with appropriate make-up, persons may say they could play the part of an individual of any race. A good example of this would have been in the movie Coming to America, where Eddie Murphy was made up and dressed up quite competently and successfully and he brilliantly played the part of an older white male.)***

**(3)** In respect of discrimination on the ground of religion in a case where being of a particular religion is a necessary qualification for employment in a religious shop. (Again, while one could see the practicality of this requirement, in our highly Litigious society, it is not inconceivable that if someone is thoroughly schooled in the doctrines and tenets of the particular Religion, that they may mount a challenge to being discriminated in this way simply because they are not a Member of the particular religion. A good example of this type of scenario was the late Dr. Morgan Job who was schooled and learned in many of the fundamentals of Hinduism to the point where he appeared more knowledgeable than some who may have been members of the Faith. Again we recall an incident a couple years ago where the late Sat Maharaj took umbrage to a young lady of Muslim Faith being enrolled as a Teacher at the Lakshmi Girls High School on the basis, he argued, that it was a Hindu School.

One can see in the future, these things eventually being challenged in the Court of Law as in the Hijab case of Sumayah Mohammed -v- Moraine and Another in the High Court of Trinidad and Tobago(1995) 49 WIR 37.

This was a matter involving the Constitution of Trinidad and Tobago: Section 4)(a) the right to

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security of the person and enjoyment of property; (b) the right to equality before the law and protection of the law; (c) the right to respect for private and family life; (d) the right to equality of treatment; (f) the right of a parent to provide a school of his own choice for the education of his child or ward; (h) the right to freedom of conscience, religious belief and observance; and section 5(2)(h) the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.

Education Act of Trinidad and Tobago: Section 3 which sets out the responsibility of the Minister of Education for ensuring effective execution of the education policy of Trinidad and Tobago; Section 7 which prohibits discrimination; Section 14 which established Holy Name Convent; and Section 15 which established the board of management.

**Sumayah Mohammed** was a Muslim pupil, who challenged the refusal of Holy Name Convent to allow her to wear her *hijab*, as part of the school uniform, and her subsequent suspension and prevention from attending classes. The principal and board of management of the school had explained that, if an exemption were allowed to her, other parents would also seek exemptions; further, that the standard uniform was a useful tool in administration, was conducive to good discipline, and created a sense of unity and of family.

Sumayah Mohammed, through her parents, instituted proceedings for Judicial Review of the decision to suspend her and she also claimed redress for contravention of her constitutional rights. The Court held that, although the school had the right to insist on compliance with school regulations, its policy was inflexible and it had been unreasonable in the exercise of its powers and had not taken into account the psychological effect on Sumayah Mohammed, of refusing to allow her to conform to the *hijab*. There was no evidence to support the respondents' plea that conforming to the *hijab* would be conducive to indiscipline or would erode the sense of tradition or loyalty to the school, and the decision of Holy Name Convent, had been an unreasonable exercise of their powers conferred by the Education Act and was unsustainable and would be quashed and Sumayah Mohammed was to be allowed back into the school and she was also allowed to wear her Hijab.

We also recall a recent scenario within the Trinidad & Tobago Police Service where a female Officer had to fight for her right to wear her Hijab at work and she was eventually granted full permission so to do. This is similar to the situations in London and Toronto, where Sikhs in the Police Service, are allowed to wear their Turbans to work.

(4) In cases where not more than three persons are employed in domestic or personal services in or in relation to the home of the employer.

(5) In relation to the employment of a person with a disability if-

(a) Taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is

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already employed by the employer, the person's performance as an employee, and all other relevant factors that is reasonable to take into account, the person because of disability-

- i. Would be unable to carry out the inherent requirements of the particular employment; or
- ii. Would, in order to carry out those requirements, require services or facilities that are not required by persons without a disability and the provision of which would impose an unjustifiable hardship on the employer;

(b) Because of the nature of the disability and the environment in which the person works or is to work or the nature of the work performed or to be performed, there is or is likely to be-

- i. A risk that the person will injure others, and it is not reasonable in all the circumstances to take that risk; or
- ii. A substantial risk that the person will injure himself.

### **AVAILABLE RELIEFS:**

The Act establishes the Equal Opportunity Commission a body with the responsibility to, among other things, investigate, and as far as possible, allegations of discrimination.

A person who alleges that some other person has discriminated against him may lodge a written complaint with the Commission setting out details of the alleged act of discrimination. This is to be done within six months from the date of the alleged act of discrimination, however, in exceptional circumstances, the Commission may accept a complaint which is lodged more than six months after the date of the alleged act of discrimination.

Once the alleged act of discrimination has been investigated by the Commission, it may;

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- i. On finding that there is no evidence of discrimination, inform the complainant of this in writing and give its reasons therefor, whereupon no further action shall be taken by the Commission
- ii. On finding that the subject matter of the Complaint may be resolved by conciliation, make all reasonable endeavours to resolve the matter through conciliation.
- iii. Where attempts to resolve the matter through conciliation have been unsuccessful, or where upon investigation the Commission is of the opinion that the subject matter of a complaint cannot be resolved by conciliation, the commission shall
  - (a) Prepare a report relating to the investigation with its recommendations;
  - (b) Send a copy of the report to the parties to the complaint;
  - (c) Publish the report; and
  - (d) Make the report available for inspection by the public.

Once the above steps have been taken, the Commission shall, with the consent and on behalf of the complainant, initiate proceedings before the Equal Opportunity Tribunal.

The Equal Opportunity Tribunal, in accordance with section 41(4) of the Act, then has the powers to hear and determine complaints referred to it by the Commission, to require persons to attend before it for the purpose of giving evidence and producing documents, and **to make such declarations, orders and awards of compensation as it thinks fit.**

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