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EMERGING DISCRIMINATION CLAIMS UNDER THE EQUAL OPPORTUNITY ACT: WHAT EMPLOYERS NEED TO KNOW

Catherine Ramnarine



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In April 2012, the Equal Opportunity Tribunal began hearing its first case - a claim alleging that a local energy company had discriminated against one of its employees on the basis of race and ethnicity when it employed a foreign national to perform substantially the same work at a much higher salary. The Tribunal's emergence from hibernation almost 12 years after the passage of the Equal Opportunity Act is a significant development for employers. In this article, we highlight what employers should know about the Act and the Tribunal.

The Equal Opportunity Act prohibits discrimination in employment (as well as other specified fields not dealt with in this Article) and establishes a Commission and Tribunal to investigate and determine discrimination complaints.

What constitutes discrimination under the Act?

The Act prohibits discrimination on the grounds of "status", which includes: sex (but not sexual preference or orientation); race; ethnicity; origin, including geographical origin; religion; marital status; disability (including mental or psychological disease or disorder).

Discrimination occurs where an employer treats one employee or prospective employee less favourably than another due to his "status" or a characteristic that appertains or is generally imputed to people of that status.

In particular, discrimination can arise:

- During **recruitment** (i) in the arrangements an employer makes for determining who should be offered employment; (ii) where an employer refuses to offer employment to a person due to his status; or (iii) where an employer offers less favourable terms of employment to a person due to his status.
- During **training** (i) in the way in which access to training and facilities are afforded; or (ii) where an employer terminates a trainee or subjects him to any other detriment as a result of his status.
- During the **course of employment** in the terms and conditions of employment, opportunities for promotion, transfer, training, benefits, facilities or services that are afforded to an employee.
- Where an employer **dismisses** or subjects an employee to any other detriment because of his status.

What constitutes employment under the Act?

The Act applies to employment under a contract of service or apprenticeship or to personally execute any work or labour. Perhaps most notably, it also applies to the employment of

independent contractors. It does not apply to employment for domestic or personal services in an employer's home where three or less employees are employed. Additionally, it permits a family business to employ relatives in preference to non-relatives.

Are there any exceptions?

An exception applies in cases where:

- Being of a particular race or sex is a "genuine occupational qualification" for employment e.g. for reasons of authenticity in a dramatic performance.
- Being of a particular religion is required for employment in a religious shop.
- In the case of disability - the disabled person:
 - would not be able to carry out the inherent requirements of the job;
 - would require special services or facilities in order to perform the job and it would be an "unjustifiable hardship" for the employer to provide them;
 - due to the nature of the person's disability and the work in question, he would pose a substantial risk to himself or an unreasonable risk to others.



TAKING A NEW STAB AT 'PIERCING THE CORPORATE VEIL'

Cherie Gopie

One main impetus for forming a corporation or company is the limited liability it offers its shareholders. By the doctrine of limited liability, a shareholder can lose only what he or she has contributed as shares to the corporate entity and nothing more. Nevertheless, there are certain circumstances in which the court will have to look through the corporation, that is, lift the veil of incorporation, otherwise known as 'piercing the veil', and hold the shareholders of the company directly and personally liable for the obligations of the corporation.

The veil doctrine is invoked when shareholders blur the distinction between the corporation and the shareholders. It is noteworthy that although a separate legal entity, a company or corporation can only act through the human agents that compose it. There are two main ways through which a company becomes liable in company or corporate law to wit: through direct liability (for direct infringement); and through secondary liability (for acts of its human agents acting in the course of their employment).¹

There are general categories such as fraud, agency, sham or façade, unfairness and group enterprises which are believed to be the most popular bases under which the common law courts would pierce the corporate veil. However, these categories are by no means exhaustive. In fact, a consistent policy has not been followed by the courts and it cannot be predicted with any certainty whether or not the courts will lift the veil in any particular case.

Moreover, recent case law has served to remind us that *"...the law is never static; it is always changing, being interpreted or redefined..."* In the ground breaking case of **Chandler v Cape plc [2012] EWCA Civ 525**, the Court of Appeal has ruled that parent companies have a responsibility for the health and safety of their subsidiaries' employees. The judgment comes after a retired factory worker successfully sued his former employer's parent company after contracting asbestosis. Cape, which owned the now-defunct Cape Products, had appealed against the decision, arguing that the two companies should be treated as separate entities. The appeal was rejected with the appellate court saying that it 'emphatically rejects any suggestion that it is in any way concerned with what is usually referred to as piercing the corporate veil' but concluding there was a 'direct duty of care' owed by Cape to the employees of Cape Products.

The Court of Appeal concluded that the evidence demonstrated that the company policy of Cape PLC in relation to its subsidiaries was that there were certain matters in respect of which they were subject to parent company direction with which Cape Products had complied. In these circumstances, and given the superior knowledge of Cape PLC in relation to asbestos matters and its awareness of the potential safety risks, it was appropriate to impose a direct duty of care on Cape PLC to employees of Cape Products.

Cape PLC was in breach of this duty by failing to advise Cape Products on what steps it had to take to provide a safe system of work and to ensure that those steps were taken.

While not strictly an exception to the principle of separate legal personality, a parent company could have incurred liability alongside another member of its group under English law where it too owes a duty of care to the claimant. In essence, where a subsidiary is directly culpable for an act or omission, but harm suffered by a claimant is also the responsibility of the parent rather than caused solely by the subsidiary, then parent company liability may arise. Whilst other cases have considered this potential liability, *Chandler v Cape PLC* is significant as it is the first reported case in which express findings on this issue were made and it sets out certain parameters as to when this type of parent company liability may arise, for example, where:

- the businesses of the parent and subsidiary are in a relevant respect the same;
- the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
- the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and
- the parent knew or ought to have foreseen that the subsidiary or its employees would rely on it using that superior knowledge for the employees' protection.

Some have surmised that this case has signalled that it is no longer possible for parent companies to 'hide behind aged legal principles' that assume parent companies have no responsibility for subsidiaries. As such, the judgment has been hailed a groundbreaking case with far-reaching ramifications for UK and multinational companies with subsidiaries in developing countries where for example, there is greater potential for harm to be caused to employees, others or the environment, due for example to weak regulatory oversight.

EMERGING DISCRIMINATION CLAIMS UNDER THE EQUAL OPPORTUNITY ACT

(cont'd from page 1)

What is the Complaints Procedure under the Act?

The Act creates a two-tiered system for investigating and determining complaints. Complaints are initially made to the Equal Opportunity Commission, which conducts a preliminary investigation. If the Commission determines that there are grounds for complaint (and the matter cannot be resolved by conciliation) it then initiates proceedings before the Tribunal, which hears and determines the dispute.

Some important points to note:

- As a general rule, a complaint must be lodged within six months from the alleged act of discrimination. However, the Commission may accept late claims in “exceptional circumstances”.
- The Commission may, in the conduct of its investigation, require an employer or any other person to provide information, documentation and/or attend before it to give oral evidence.
- Upon investigating a complaint the Commission may:
 - Find that there is no evidence of discrimination, in which case the matter is effectively brought to an end.
 - Refer the parties to conciliation.
 - Where conciliation is unsuccessful or unlikely to be successful, publish a report on its findings and, with the complainant's consent, initiate proceedings before the Tribunal.
- Reports of the Commission are available for public inspection.
- The Tribunal has the status of a superior Court of record, including the power to summon witnesses and punish contempt of court.
- The Tribunal is empowered to award monetary compensation to complainants or to make any other declarations, orders or awards that it thinks fit.
- The Tribunal's findings can be appealed to the Court of Appeal, but only on the basis that it lacked or exceeded its jurisdiction, erred in fact or law or that the proceedings were tainted by fraud or illegality.

Equal Opportunity jurisprudence is still in its infancy. However, it can have a tremendous impact on the way in which employers are required to treat with employees, potential employees and even independent contractors. The case currently before the Tribunal, for example, raises a serious question as to the potential liability of employers who employ foreign nationals.

Other interesting questions also arise. Would re-assigning an injured employee to light duties amount to detrimental treatment due to his disability? How far is an employer required to go to provide special services and facilities for a disabled employee before it amounts to “unjustifiable hardship”? Time will tell how the Tribunal determines such questions. Meanwhile, employers should be alert to decisions and principles emerging from the Equal Opportunity Tribunal.

For further information on Employment and Industrial Relations law, visit our website www.trinidadlaw.com and click on the 'Doing Business in T&T' tab or review past issues of the Hamel-Smith Forum.

Catherine Ramnarine is an Associate in Hamel-Smith's Dispute & Risk Management Department.

TAKING A NEW STAB AT 'PIERCING THE CORPORATE VEIL'

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In addition, where claims are brought against a subsidiary, it may be possible for a contribution claim to be brought by a subsidiary against its parent by relying upon the same principles and tests set out in this case. Claims may arise where the subsidiary has since been divested and is no longer part of the same group at the time the claim is brought. This risk may need to be considered in the context of corporate divestments and acquisitions.

In conclusion, it is obvious that all groups must bear in mind the potential liability risk that may arise when a parent company involves itself in the affairs of a subsidiary, particularly now in relation to environmental and health and safety policy.

¹ The existence of a separate legal personality is at the heart of company law with the doctrine firmly established in the case of *Salomon v Salomon* (1897) AC 22. In this 1897 ruling, the House of Lords recognised that Parliament had permitted the creation of corporations as distinct legal entities separate from individual members. It follows that, in a group of companies, each subsidiary is a separate entity from its parent company and that neither the parent company nor its directors can be held responsible for the acts or liabilities of subsidiaries, even wholly owned subsidiaries, by reason of the corporate relationship alone. Therefore, a corporation is a juristic person that in most circumstances is legally treated as a person, and empowered with the attributes to own its own property, execute contracts, as well as ability to sue and be sued.

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ELECTRONIC TRANSACTIONS - SIGN HERE?

Kevin Nurse

This is the last of a three-part series on the provisions of the new Electronic Transactions Act, 2011 (the “Act”) enacted on April 28, 2011. Parts I, II, III and IV of the Act were proclaimed on January 6, 2012, and Part VII was proclaimed on January 18, 2012. The remaining provisions are yet to be proclaimed.

Recap

In the first installment of this series we explained that the Act seeks to facilitate electronic transactions and to promote confidence in the reliability and authenticity of electronic documents and commerce. The Act proposes to afford legal recognition to electronic transactions once certain specified criteria are satisfied. However, its provisions will not apply to a number of specified documents which remain beyond its purview – such as wills, conveyances of land, powers of attorney and trusts, and immigration documentation.

In the second instalment, we considered certain issues arising from the changing landscape of contract formation which have arisen in part from the use of electronic contracts. As we saw, the provisions of the Act addresses concerns related to the enforceability of online contracts, the use of automated contracts and the timing of the sending and receiving of electronic messages. This final instalment shall consider the provisions of the Act for the use and authentication of electronic signatures.

Definition of an Electronic Signature

Under the Act an electronic signature is information in electronic form affixed to or logically associated with an electronic document which is used to either identify the signatory or indicate the signatory’s approval of the information within that document. At its simplest, an electronic signature is any electronic means that signifies that a person adopts the contents of an electronic message.

Requirements for Electronic Signatures

The Act provides that parties to an electronic transaction may agree to use a particular method or form of electronic signature. However this is not permitted if it is prohibited by any written law. That said, parties are not permitted to decide arbitrarily the form of electronic signature to be used. Firstly, the Act specifies that a minimum standard of reliability and integrity must be met, or the signature must conform to the standard which the parties have agreed to by contract; and secondly, the Act sets out some of the

criteria for determining the reliability and integrity of electronic signatures generally. The requirements listed in the act are as follows:

- (1) the technology used for authenticating the electronic signature must uniquely link it to the user;
- (2) the signature must be capable of identifying the user;
- (3) the signature must be created using a means that can be maintained under the sole control of the user; and
- (4) the signature must be linked to the electronic document in such a way that any subsequent change in the document is detectable.

Further criteria may be prescribed by regulations. Once a document is signed with an electronic signature which meets the prescribed reliability and integrity criteria, the document will be considered unaltered since the time of such signing.

These requirements for reliability and integrity are automatically deemed to be satisfied where the electronic signature is associated with an accredited electronic authentication product. A qualified electronic authentication product may be issued only by a person registered as an accredited Electronic Authentication Service Provider. The Act, which sets out the registration process, makes it an offence for anyone to issue an electronic authentication product to the public unless they have first been registered as an accredited provider. However, the provisions relating to Electronic Authentication Service Providers are not as yet in effect as that part of the Act has not yet been proclaimed. Currently, the only Electronic Authentication Product which can be used to validate an electronic signature is the electronic certificates referred to under the Schedule to the Act.

Conclusion

Over the course of this series we have seen that the Electronic Transactions Act, 2011 now affords official recognition to electronic transactions once certain specified criteria are satisfied. Further, particular issues pertaining to the formation of electronic contracts have been addressed and put on a statutory footing by the Act. Finally, parties are now free to enter into transactions on the basis of electronic signatures as long as such signatures meet the reliability and integrity authentication test prescribed by the Act. It is left to be seen whether the parties to transactions may experience some teething problems associated with this new legislation, and with the official move from the paper-based transaction to the electronic landscape.

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THE VALUE OF TRADEMARK REGISTRATION

Fanta Punch



Anyone who owns a Kindle, iPad or Android-based mobile phone is aware of how much these technologically advanced gadgets are an integral part of our daily business lives.

The advent of this technology has given rise to countless intellectual property disputes, involving some of the world's largest multinational technology corporations. Apple's history of aggressively defending and pursuing litigation claims in the defence of its intellectual property rights such as patent, copyright, trademark, design rights and trade secrets has been well documented. Even in our local context, the recent dispute between Dairy Distributors and Pepsi Cola Trinidad Bottling Limited over the ownership of a trademark Ju-C underscores the importance of trademark registration in the protection of trademark rights.

Benefits of registration

Although it is not a requirement that a trademark be registered before it can be used in the market place, registration does allow a trademark owner to acquire certain rights and legal protection. It can strengthen the trademark owner's position in establishing and cementing goodwill in its goods and services, and prevent or minimize the risk of unauthorized use of the trademark whether by honest concurrent use or infringing actions set to erode goodwill.

Distinguishing goods and services through registration of a trademark remains one of the most effective ways to establish the quality and excellence in a brand. Trademarks function as labels or signs of the commercial goods and services sold under them. The goodwill and reputation which the consumer in the marketplace associates whether visually, phonetically or aurally to any one product or service is indicative of the value created in a brand.

The trademark owner's trademark right in its goods and services is acquired by filing an application to register the trademark which is valid for a ten year period from the date of filing the application, and is renewable indefinitely provided the requisite renewal fees are paid to maintain registration. Some key factors in determining what makes a trademark distinctive include:

Strength of the trademark

A distinctive trademark which immediately conjures up in the mind of the consumer the products associated with that mark and the owner of the mark is indicative of a "strong" trademark. Invented words, for example, *Kodak for film* would be an example of an inherently distinctive mark. A trademark may not be immediately capable of

distinguishing the trademark owner's goods and services because it lacks a distinctive feature, but it is possible to demonstrate that over time and extensive use such a trademark has acquired distinctiveness in the market place and shows a connection to the owner's goods or services.

Similarity to other marks within the same or similar markets

If a trademark is to be distinctive and representative of the owner's goods or services, the trademark owner should avoid selecting a trademark which is similar to any other mark already registered. Whether a trademark is confusingly similar to that of another mark, in form, by goods or services of similar description or other issues such as consumer demographics should be taken into account in determining a trademark. As part of the registration process, it is always prudent to conduct searches for conflicting trademarks in each jurisdiction or market where the goods or services are to be marketed.

Excluded Trademarks

Certain types of trademarks are excluded from protection by law, such as trademarks which closely resemble another mark. This creates confusion or deception as to who is the owner of the mark. A trademark which offends morality, is illegal, or has a scandalous design will not be registered. Other exclusions include official government symbols, such as the national flag. While registration guarantees legislative protection, it is not an absolute. Even where an owner registered its trademark right in its trademark, this is challengeable on the basis of non-use of the mark which could result in the trademark being removed from the register and subsequently made available for use by others.

Conclusion

In view of the enormous value of the goodwill associated with trademarks (and its direct impact on the ability of a business to compete in the market place), it is important to secure maximum legal protection for a trademark as soon as possible. Thus, the trademark owner minimises the risk of attack from possible infringing actions which may unfairly wear down the reputation and goodwill of one's goods and services. Registration must therefore go hand in hand with ongoing protection of the trademark rights.

For more information on registering your trademarks, please email fanta@trinidadlaw.com or visit our website at www.trinidadlaw.com

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