



## TAKE-OVER BIDS

*Melissa Inglefield*

The most recent machinations of a flamboyant (or perhaps bored) billionaire and significant volatility in the airline industry have stirred up once more a buzz around take-overs. With Elon Musk's recent take-over bid for Twitter going on hold and Jet-Blue's for Spirit Airlines going hostile, the outcomes of these bids are yet to be determined.

The Trinidad and Tobago capital market is no stranger to take-over bids. Active participants in the local capital market will no doubt recall bids in the recent past in relation to Guardian Holdings Limited, Trinidad Cement Limited and Readymix (W.I.) Limited. But what is a take-over bid and what procedure must be followed in making a bid? In this Article, we aim to provide a high-level overview of the Securities Industry (Take-Over) By-Laws, 1995, the regulations governing take-over and issuer bids in Trinidad and Tobago.

### **What is a take-over bid?**

A take-over bid is an offer, made by any person (referred to as an 'offeror'), to acquire shares or other securities of a public company (referred to in this Article as a 'target') where such shares are equal to (or more than) 30% of the target's issued shares.

The primary objective of a take-over bid is generally to acquire control over a target. Predictably, such acquisition of and/or change of control would be a matter of concern for existing shareholders of the target. To safeguard the interests of the target's existing shareholders a proposed acquisition of dominance and control triggers certain obligations in the capital market.

Without regulation, it would be possible that the control of a target could be secured by the sale and purchase of shares by a few large shareholders without minority shareholders having any knowledge of the change of control or any opportunity to participate in the same offer price payable by an offeror seeking to acquire control. Some might say that regulation exists to keep the offeror 'honest'.

### **The regulation of take-over bids**

The general focus of regulations applicable to take-over bids is to establish a process for a take-over bid through which:

- information relating to the offer is made available to all interested parties, including existing shareholders and the directors of the company;
- interested parties have a reasonable opportunity to consider and assess the offer; and
- existing shareholders have a reasonable and equal opportunity to participate in an offer.

Trinidad and Tobago's Take-Over By-laws seek to achieve these objectives by:

- requiring an offeror in a take-over bid to issue and circulate an information circular to the target's board of directors and shareholders and prescribing the information to be contained in such information circular, including but not limited to:
  - \* the number and percentage of shares in the target which an offeror is seeking to acquire;

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## MATERNITY PROTECTION IN THE WORKPLACE

Catherine Ramnarine

Pregnancy and motherhood are often viewed as wonderful and exciting times in women's lives. However, for many working women they can also be times of great vulnerability, generating concerns about health, time off, job security and career progression.

There are several laws in Trinidad and Tobago aimed at protecting the rights of mothers and expectant mothers. Chief among them is the Maternity Protection Act ('MPA'). The Labour Inspectorate Unit of the Ministry of Labour is responsible for monitoring workplaces to ensure compliance with the MPA, while the Industrial Court has the exclusive jurisdiction to deal with claims and disputes arising from breaches of the Act. In addition to the MPA, provisions protecting working mothers can also be found in the Occupational Safety and Health Act ('OSHA'), the National Insurance Scheme ('NIS') and the discrimination regime established under the Equal Opportunity Act ('EOA').

### Health, Safety And Welfare:

Under MPA Section 7(4) and (5) a pregnant employee is entitled to paid time off for prenatal medical appointments. However, in order to be eligible for this benefit the employee must, as of the expected date of confinement, have been continuously employed by her employer for a period of at least twelve months.

Under OSHA Section 6(9) an employer is required, where necessary, to adapt the working conditions of a pregnant employee to ensure that she is not involved in the use of, or exposed to, chemicals, substances or anything dangerous to the health of her unborn child or subjected to working conditions dangerous to the health of her unborn child. This may include assigning alternative work where available. This is, however, without prejudice to the employee's right to ultimately return to her original job.

Under OSHA Section 6(11) an employer is prohibited from providing or permitting a pregnant or nursing employee to perform work that is hazardous to her health or the health of her child. Where necessary, an employer is obligated to provide suitable alternative work for a period of up to six months after birth, provided that the costs of same are not prohibitive.

At present, there are no laws expressly governing breastfeeding in the workplace.

### Maternity Leave:

Under MPA Section 9, a pregnant employee is entitled to fourteen weeks paid maternity leave at one full month's pay and the balance at half pay. In order to be eligible for this benefit the employee must have been continuously employed by her employer for at least twelve months.

The employee is also entitled to claim a maternity benefit through NIS. This benefit is intended to cover the period of time during which the employer is only obliged to pay the employee at half pay, so that altogether the employee's pay would remain whole. If there is any shortfall in the NIS maternity benefit, the employer is required to make up the difference.

An employee is entitled to extend her absence from work for:

a period no more than twelve weeks on medical grounds. In this case, the employer is obliged to pay the employee half-pay for the first six weeks and no-pay for the next six weeks.

a period of no more than four weeks for any non-medical reason. The employer is not obliged to pay the employee during this period.

### Job Security:

Under MPA Section 7(c) a pregnant employee is entitled to resume work after maternity leave on terms no less favourable than those she enjoyed immediately prior to her leave.

The Industrial Court has held that the right to return to work is an unfettered one. This means that an employee cannot be terminated during her maternity leave, even for reasons unrelated to her pregnancy.

The right to return to work may extend even beyond the end of maternity leave. In the case of *RSBD NO. 16 of 2013 OWTU and Kimberly-Clark (Trinidad) Limited*, an employer conducted a restructuring exercise while the employee was on maternity leave, as a result of which her position was eliminated. She was retrenched six weeks after returning from maternity leave. The Industrial Court found that the employer's restructuring exercise was genuine. However, although noting that the protection enshrined in MPA Section 7(c) was not intended to last in perpetuity, it held that termination after only six weeks could not be reasonable or within the intention of the architects of the MPA.

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- \* the price which the offeror is offering to pay for the target's shares;
  - \* the period of time within which the target's shareholders may accept the offer, which is subject to a minimum timeframe of 35 days as prescribed in the By-Laws;
  - \* information relating to the offeror and the target, including the offeror's objective in making the offer and any plans or strategies which the offeror proposes to implement should the offer be successful;
  - \* any conditions applicable to the offer (such as regulatory approvals or a minimum threshold of shares being acquired by the offeror during the offer).
- requiring the target's board of directors to consider and assess an offer made by an offeror and make a recommendation to the target's shareholders to accept or reject the offer, or in circumstances where a board determines that it is unable to make a recommendation one way or another, the reasons for not making a recommendation; and
  - regulating the manner in which an offeror may acquire shares from shareholders who accept the offer to ensure that shares are acquired on an equal basis among the shareholders (such that no shareholder is preferred over another), including requirements as to the minimum price of an offer where an offeror purchased shares in the target from any other person within a prescribed period of time prior to the launch of a take-over bid.

In addition to regulating take-over bids, the By-Laws also require offerors to make certain public disclosures outside of the occurrence of a take-over bid. For example, where a person acquires a minority position of 10% or more of a target's shareholding (whether in one or more transactions), it is required to issue a press release giving notice to the public of such acquisition. The By-Laws establish certain requirements which must be included in such press release, including any intention to subsequently acquire control over the target.

### ***In short...***

The Take-Over By-Laws even the playing field and ensure that shareholders are well informed in deciding on whether to accept an offer and realise their investment in the target's shares. It creates fairness in the market by reducing the circumstances in which only a few

substantial shareholders reap the benefits of an offeror's bid to secure control of a target.

However, a take-over bid involves careful preparation and extensive disclosures by an offeror in order to meet the requirements of the By-Laws. The By-Laws are designed in a manner to capture transactions in which a person seeks to achieve control in any manner, even if not through the direct purchase of the target's shares. Unintentionally triggering a take-over bid can have very expensive and unintended consequences. Failure to meet the requirements of the By-Laws can result in hefty fines being imposed by the securities regulator under the Securities Act. Indeed, a take-over bid is not made on the whim of a purchaser or via tweets... usually.

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On the other hand, as with the other MPA benefits discussed in this Article, an employee must have been employed by her current employer for at least twelve months in order to access the protection of MPA Section 7 (c). Thus, in *GSD 533 of 2017 CWU and Corpus Christi College of Occupational Education and Training*, the Industrial Court noted that a pregnant employee terminated only three months into her employment had “*absolutely no protection under the Maternity Protection Act*”.

### **Career Progression and Discrimination:**

MPA Section 20 provides that an employee on maternity leave shall not be deprived of an opportunity to be considered for any promotion for which she is eligible, and which may arise during her period of leave.

The EOA prohibits discrimination in employment – including with respect to the terms and conditions of employment such as salary and the way the employer affords access to opportunities for promotion, transfer or training or other benefits – on the basis of certain protected categories, namely sex, race, ethnicity, origin, religion, marital status and disability. Pregnancy is not a protected category under the EOA. However, discrimination on the basis of pregnancy may be subsumed under the protected category of ‘sex’. This approach is not without its challenges, as it may be difficult to establish discrimination in cases where policies apply equally to both men and women, but put working mothers or expectant mothers at a disadvantage. For example, in the case of *E.O.T. No. 0002 OF 2017 Williams v Ministry of Rural Development and Local Government*, a pregnant employee employed on a three month contract challenged her employer’s decision not to renew her contract while she proceeded on maternity leave. The Equal Opportunity noted that since the employer’s policy was that neither men nor women were entitled to any type of leave during the tenure of three month contracts, no issue of discrimination arose with respect to the grant of leave per se.

While the MPA and the EOA may provide some protection in very clear cut cases, the reality is that discrimination against working mothers can be more insidious. Employers and supervisors may suffer from unconscious biases, grounded in stereotypes and gender expectations, about the competence, availability and

career ambitions of working mothers, a phenomenon known as ‘maternal wall bias’. The effect of these unconscious biases has been felt keenly during the pandemic, with many working mothers expected to assume a greater share of unpaid childcare and household responsibilities than their partners. While the laws of Trinidad and Tobago do offer some protections to working mothers, particularly in the areas of maternity leave and the right to return to work, cultural changes may also be needed to ensure equity in the workplace.

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