BARBADOS

EMPLOYMENT RIGHTS TRIBUNAL

ERT 2022/001

BETWEEN:

WHYVONNA WIGGINS-HOYTE **CLAIMANT**

AND

RUBIS EASTERN CARIBBEAN SRL **RESPONDENT**

TRIBUNAL:

Kathy-A. Hamblin, SC **Deputy Chairman**
Frederick Forde, GCM **Member**
Deighton Marshall, CMgr. **Member**

APPEARANCES:

Caswell Franklyn, General Secretary, Unity Workers' Union, for the Claimant

Sherica Mohammed-Cumberbatch of Carrington & Sealy, Attorneys-at-Law, for the Respondent

2022: June 28 and November 2.

2023: January 31, July 14, October 11 and 17.

2024: January 25.

DECISION

Discrimination-Medical Condition-COVID-19 PCR testing mandate-the Employment (Prevention of Discrimination) Act, 2020-26, sections 3 (1) (a), 5, 6, 8, 22, 26 and 32(b)-Safety and Health at Work Act, Cap. 356, sections 7(1), 7 (2), and 9-Occupier's Liability Act, Cap. 208- Emergency Management Act, Cap. 160A, sections 28 (A) (4) and (5)-Emergency Management (COVID-19) Order, 2020- Whether COVID-19 is a medical condition within the meaning of section 6 of the Employment (Prevention of Discrimination) Act-Whether an employer's duty to keep his workplace so that the safety of persons in it is not likely to be endangered and to take such precautions as are reasonable in the circumstances to ensure the safety of every person in the work place pursuant to section 7(1)(a) and (b) of the Safety and Health at Work Act empowers the employer to mandate COVID-19 PCR testing-Whether the duty of care owed by an occupier/employer to visitors under the Occupier's Liability Act Cap. 208 contemplates and/or encompasses protecting employees against exposure to COVID-19-Whether disadvantage, detriment or restriction to which the employee was subjected were justified as a proportionate/reasonably necessary means of achieving the legitimate aim of discharging the employer's statutory obligations.

INTRODUCTION

1. On March 17, 2020, it was reported that Barbados had recorded two cases of the novel coronavirus.[1] By Proclamation dated March 28, 2020, then Governor General, Her Excellency Dame Sandra Mason declared that a public health emergency existed "*as a result of the presence of a communicable disease or a notifiable disease.*"[2] On that same date, the Cabinet of Barbados made the Emergency Management (COVID-19) Order, 2020 pursuant to section 28 (A) (4) and (5) of the Emergency Management Act, Cap. 160A of the Laws of Barbados.

2. The object of that Order, which vested wide-ranging powers in the Chief Medical Officer, the Prime Minister, and other authorised persons, was to facilitate and manage the implementation of various measures aimed at containing the spread of the coronavirus. Among those measures were the imposition of restrictions on movement and gatherings, quarantine, detention, isolation, screening of individuals, as well as closure of businesses. Even though subsequent Emergency Management (COVID-19) Orders were made[3] and various directives and protocols were issued pursuant to those Orders, the Government of Barbados did not impose national vaccination or PCR testing mandates.

3. The global impact of the coronavirus is well-documented. According to the Caribbean Public Health Agency ("CARPHA"), on September 13, 2021, there were 224,511,226 confirmed cases of Covid-19 worldwide, of which 313,808 were recorded in CARPHA member states which comprised 25 countries, areas, or territories[4]. The global death toll was 4,627,540 with 6,700 of those deaths having been recorded in CARPHA member states. Official statistics for Barbados as of September 12, 2021, were 5,984 reported cases and 52 deaths. 120,863 Barbadians[5] were among the 3,196,746,045[6] people worldwide having at least one dose of a COVID-19 vaccine.

4. On September 13, 2021, Rubis Caribbean SRL, acting by its CEO, Mauricio Nicholls, issued a set of guidelines to its approximately 75 employees, including the Claimant, which were designed to "*protect [their] employees and reduce the spread of the virus.*" Intituled "Managing Workforces During COVID-19", the policy contained "*different rules for vaccinated and unvaccinated employees.* Partially vaccinated employees were considered to be unvaccinated for the purposes of that policy.

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[1] "*Barbados records first two cases of COVID-19*"- Barbados Today, March 17, 2020.
[2] S.I. 2020 No. 15
[3] Emergency Management (COVID-19) Order, 2021, S.I. 2021 No. 19; Emergency Management (COVID-19 Order, 2022, S.I. 2022 No. 18.
[4] CARPHA Situation Report No. 192, September 13, 2021, Coronavirus Disease (COVID-19) Pandemic.
[5] Barbados COVID-19 Situation Report for the period September 12, 2021.
[6] See CARPHA Report *supra.*

5. The guidelines, all of which were "*obligatory, with no exceptions allowed,*" included the following stipulations:

- *Only fully vaccinated employees shall have the option to work at the office, without requiring approval. Further, fully vaccinated employees are only required to wear masks in common areas (e.g., corridors, meeting rooms, washrooms, kitchens, and dining areas), but will not be required to wear a mask at their workstation.*
- *Vaccinated employees must submit their certificate of vaccination to Human Resources. If the certificate of vaccination is not submitted, the company will treat them as unvaccinated employees.*
- *Between September 15th and November 30th, 2021, all unvaccinated employees must require approval to attend work at their office or work location from its supervisor. The company reserves the right to request a negative COVID test prior to granting such approval. Authorized employees will be required to observe all protocols for unvaccinated employees.*
- *If an unvaccinated employee fails to request approval to work at the office or work location and does not inform their supervisor that he/she is not vaccinated, the employee will be subject to disciplinary action.*
- *Unvaccinated employees must wear a mask (As supplied by the company, N95, KN95 types or multilayer surgical type) at all times while at the office or work location without exception. Unvaccinated employees are not permitted to use meeting rooms, kitchens, and dining rooms except when there is no one else occupying these areas. Unvaccinated employees are not encouraged to have their meals at work.*
- *Commencing December 1st, 2021, unvaccinated employees will be required produce(sic) a negative COVID-19 test result of a sample taken not more than 72 hours before they arrive at work, every Monday, to their supervisor and to Human Resources. The cost of such testing will be borne by the unvaccinated employee.*
- *If an employee cannot be vaccinated due to a medical reason or condition, they should inform the Human Resources department and provide a letter from a medical doctor stating the reason or condition.*

The guidelines also touched on temperature checking, washing and sanitization of hands, so-called "*social distancing*" and the fitting of glass barriers in office spaces. The Respondent also discouraged the use of biometric fingerprint-based or keypad access devices and stated its preference for contactless methods of gaining access to the Respondent's premises.

Those guidelines are at the root of the complaint made by the Claimant to the Tribunal.

THE FACTS

6. The facts are not in dispute. They are captured in several emails and other correspondence between the Respondent and the Claimant.

Following the email from Mr. Nicholls to staff on September 13, 2021, the Chief Labour Officer ("CLO") wrote to the Respondent on October 7, 2021, advising that:

> *"... it is not mandatory for any employee in Barbados to take a COVID-19 vaccine nor for him or her to undergo a test for the continuance of employment. Rather, it is for each employee to determine whether or not he or she wants to be vaccinated. ... Therefore, the Ministry directs that an unvaccinated employee is not to be treated unfairly nor discriminated against by the employer because of his/her vaccination status... The Labour Department of the Ministry of*

Labour and Social Partnership strongly recommends that you immediately withdraw the offending paragraphs of the policy."

7. The Respondent replied to the CLO by letter dated October 18, 2021, informing that "*the Guidelines represent Rubis' best endeavours to manage the risk of contagion at its office and places of work in compliance with its statutory duty under the* [Safety and Health at Work Act, Cap. 356 of the Laws of Barbados] *SHAW Act... We are satisfied that the Guidelines are appropriate to address the prevailing health crisis in Barbados and reflect Rubis' best endeavours to safeguard the health and welfare of its employees.*"

8. There is no record of the Labour Department having responded to the Respondent's rationalization of its policy. The Respondent disregarded the Labour Department's directive and pressed forward with implementation of the guidelines. On December 1, 2021, Mr. Nicholls emailed all staff advising that "*in accordance with the guidelines, to be authorized to perform your duties at a Rubis Work Location you need to be either fully vaccinated (one dose of a one dose vaccine or two doses of a two-dose vaccine) or take a COVID-PCR Test within 72 hours of the start of each work week. All employees are required to either submit their certificate of vaccination to HR or a weekly negative COVID PCR Test Result.*

"Furthermore, commencing January 10th, 2022, all Rubis Employees will be required to perform their duties from their assigned Rubis work location at least three times a week."

9. On January 3, 2022, the Claimant requested and was granted permission to work from home three days a week. Her supervisor reminded her that "*the negative PCR test was required to work from the office the other two (2) days*". In defiance of that directive, the Claimant reported for work at One Rubis Plaza on January 10, 2022. She was emailed some 5½ hours later by her supervisor who requested the Claimant's negative PCR test. After admitting that she had none, the Claimant "*was ordered from the office.*"

10. The Claimant was cautioned that failure to regularise her vaccination/testing status in accordance with the Respondent's policy by January 11, 2022, would result in disciplinary measures being taken against her. On January 11, 2022, the Claimant again reported for work without the required PCR test result. She testified that she was working at her desk when she was again ordered to leave the office.

11. The Respondent issued the Claimant with a warning letter dated January 14, 2022, which stated in part that:

"We reiterate the seriousness of your actions regarding compliance and that failure to adhere to these policies and procedures in the future, and specifically to the requirement to

report for work... will result in further disciplinary action up to and including the possibility of employment termination."

The Claimant made a complaint of discrimination to the CLO on January 17, 2022.

12. On January 20, 2022, the Claimant again reported for work without presenting the required PCR test. She was ordered to leave the office for non-compliance with company policy and was suspended without pay for seven calendar days "*in the first instance*." The Claimant was also warned that she would suffer further suspension without pay should she not report for work in person on Thursday, February 3, 2022. Additionally, she was informed that if her non-compliance continued "*beyond the one week mentioned above, disciplinary action will continue to be taken, up to and including the possibility of employment termination.*"

13. The Claimant stated that her access key and fingerprint were deactivated, preventing her from entering the building when she reported for work from February 3-9, 2022. In emails to HR Manager Delores Batson on February 3 and 4, 2022, the Claimant questioned her inability to access the building. Ms. Batson responded by email dated February 4, 2022, as follows:

> "*As you are keenly aware, you have decided not to comply with Rubis protocols, which require that all employees must be fully vaccinated or if not, vaccinated tested for Covid on a weekly basis to be allowed to work in the office. Your repeated attempts to enter the building without a vaccination or a Covid test are a serious violation of our policies and would put others at serious risk of contracting Covid.*
>
> *"The company reserves all rights to take any disciplinary actions for your willful and reckless violation of our policies."*

The Claimant responded by email of the same date as follows:

> "*You are saying that I would put others at risk of contracting COVID because I am unvaccinated and not doing a PCR test. You are aware that persons who are vaccinated were allowed to work in the office and had to leave to be tested as they were exposed to a known case and they tested positive and were sick, did they not put others at serious risk of contracting COVID?"*
>
> *"PCR Testing cannot identify if you have (sic) virus, and it cannot differentiate if you have SAR-CoV-2 or influenza and it is not for diagnostic testing. It was also developed in 2015, so tell me what it is finding?*
>
> *Finally, if I will be continued to be locked out from entering the office, I am requesting to work from home until this issue is resolved.*"

14. The Claimant contends that a conciliation meeting held on February 11, 2022, with the Labour Department bore no fruit, but that on February 17, 2022, she received an email from the Respondent indicating that she would be allowed to work from home until March 31,

2022. The "*Respondent reserved the right to treat her refusal as a rejection of an essential term of the employment contract.*"

15. According to Ms. Batson, the Claimant returned to work on September 5, 2022, "*and has been allowed to work at her workplace location without any interruption since. Prior to that return, the Claimant continued to work remotely and at all times received her usual remuneration.*"

16. In her oral evidence, the Claimant stated that:

> *"CDC and Canadian Health and even Trinidad Health Authority could not say that COVID-19 existed."*
>
> *"In Barbados we do not have the Freedom of Information Act... so I could not ask my Ministry of Health the question that I wanted to ask: provide the gold standard to show that COVID-19 exists."*
>
> *"It was not reasonable to ask me to swab because no one could prove that there was actually a virus. I do not believe COVID exists. According to me it is not a medical condition. SARS is a flu virus. It manifests itself in different ways. Every year we is got SARS virus. My opinion is that it was a flu virus but one that had a little extra thing in it. It was not the regular flu virus, but it was a flu virus that was treatable. COVID-19 that they were calling SARS CoV-2 no one can produce the evidence that COVID-19 exists. To produce the evidence, you have to have a human being do the gold standard of testing."*

THE COMPLAINT

17. In the Claim Form dated February 24, 2022, the Claimant stated:

> *"The company is insisting that I take a Covid-19 vaccine or failure to do so the unvaccinated must submit to a weekly test in order to come to the office to work which is contrary to section 6 of the Employment (Prevention of Discrimination) Act, 2020-26."*

The Claimant seeks "*a ruling from the Tribunal to say that what the employer did was contrary to law so that in any event of another such occurrence, the employer would not be emboldened to do this again. We are seeking interpretation or guidance of the Tribunal to say to the employer they had no such authority.*"

The Claimant also seeks "*any other remedy the Tribunal deems fit and cost.*"

18. Despite invoking section 6 of the *Employment (Prevention of Discrimination) Act, 2020-26 (*"E(PoD)A"), the Claimant is adamant that COVID-19 is not a medical condition, that it does not exist, and that the PCR test is not a diagnostic test. She tendered no evidence to support her beliefs, which ran counter to the available scientific data as well as to the views of experts in virology and epidemiology. Further, she adduced no evidence of her own qualifications and/or

training in science or medicine, nor did she persuade the Tribunal of the credibility of the sources of her parroted theories.

If the Tribunal had based its decision solely on the Claimant's oral evidence, this complaint would have been unceremoniously dismissed. It is absurd for the Claimant to declare that the PCR test is not a diagnostic test and that the COVID-19 virus neither exists nor is a medical condition, whilst at the same time claiming infringement and seeking the protection of legislation proscribing testing for a medical condition. The complaint survives because the Tribunal is satisfied that there is sufficient data available from which one may infer, contrary to the Claimant's assertions, that COVID-19 exists and that it is a medical condition. It also survives because the Chief Labour Officer determined that this matter was "*of national interest and importance*" and that "*resolution of this dispute could have implications for the settlement of similar matters.*"

INORDINATE DELAY

19. The Chief Labour Officer determined that this matter was urgent. On February 14, 2022, the Tribunal was directed to expedite the hearing of the complaint. Although the case was promptly listed for hearing, the parties, more so the Claimant than the Respondent, failed to proceed with any urgency, resulting in a 16-month delay from referral to hearing. During that period, the state of emergency prompted by the outbreak of the virus was lifted, and all COVID-19 related protocols were abandoned. Consequently, this case is now largely of academic interest only.

THE CLAIMANT'S CASE

20. The Claimant submitted that this is "*a simple case.*" That assessment of the complaint is reflected in the limited assistance offered by the Claimant to the Tribunal throughout the proceedings.

The Claimant raised two arguments. The first is that the Respondent cannot rely on section 8 of the E(PoD)A" which is one of two exceptions to section 6.

Pursuant to section 8, an employer may only request medical testing or enquire into an employee's or prospective employee's medical condition "*where the result of the test is necessary to determine whether the person satisfies, or continues to satisfy, a genuine occupational qualification.*"

The Claimant contended that she was employed by the Respondent since 2012, during which period the Respondent did not require her to produce a medical certificate in accordance with section 8 of the E(PoD)A. Therefore, the Claimant contended that the Respondent's request that she submit a weekly COVID PCR test was not "*essential as a genuine occupational qualification.*"

The Claimant also argued that when Parliament passed the E(PoD)A," *they were aware of [the provisions of the Safety and Health at Work Act, and nonetheless enacted section 6 which would take precedence over any prior legislation.*"

The Claimant cited no authorities and offered no cogent analysis of either the issues or the relevant legislation.

THE RESPONDENT'S CASE

21. The Respondent contended that COVID-19 "*was a recognised workplace hazard during the period March 2020 to December 2022*". Counsel for the Respondent posited that the applicable test is one of proportionality, namely, whether "*any disadvantage or detriment which the Claimant may have been subject to is objectively justified as a proportionate/reasonably necessary means employed by the Respondent in achieving the legitimate aim of discharging its statutory responsibilities under the [Occupier's Liability Act, Cap. 208 ("OLA")] and the SHAW Act.*"

22. The Respondent argued further that "*if the Tribunal finds that the Respondent was in breach of section 6 of the [E(PoD)A] and its guideline was discriminatory, then it must find that in issuing the Respondent's guideline the Respondent was lawfully operating under the legitimate Exception under section 22 of the [Act].*"

23. Counsel referred the Tribunal to *Baczak v. Care UK Community Partnership Limited,* Case No. 4100547/2022, Employment Tribunals (Scotland), by way of a brief reference in a footnote. In issue in *Baczak* were claims of direct race discrimination and direct and indirect religious discrimination by a care home employee. He opposed vaccination, which was made mandatory for care home workers by statute, on the ground that it was "*morally wrong.*" Baczak's discrimination claims were dismissed. That case is of no relevance to the matters in issue in the instant case.

THE ISSUES

24. The foundation of the Claimant's complaint is section 6 of the E(PoD)A, which provides that:

> "*6. Subject to section 8, an employer shall not require a person to answer questions in relation to, or undergo a test for, a medical condition as a precondition to entering into a contract of employment or as a condition for the continuance of employment.*"

There are two principal issues for the Tribunal to determine.

i) First, whether the Respondent's COVID-19 guidelines were discriminatory and in breach of section 6 of the E(PoD)A; and

ii) Secondly, if the said guidelines were in breach of section 6, whether the Claimant suffered any consequential disadvantage, detriment, or restriction.

DISCUSSION

The Law

25. The Claimant argued that the Respondent's demands for a weekly negative COVID-19 PCR Test result was "*a clear violation of section 6 of the E(PoD)A.*" Part IV of the E(PoD)A, which makes provision for enforcement, confers a right of action for discrimination on a person, whether an employee or prospective employee, in specific circumstances.

Section 26, which falls under that Part, provides that:

> "26. A *person who alleges that he has been required to answer questions in relation to, or to undergo a test for, a medical condition as a precondition to entering into a contract of employment or as a condition for the continuance of employment in contravention of section 6, may within 3 months of the date on which the person was required to answer the questions or was informed of the requirement for the test, make a written complaint to the Tribunal.*"

Accordingly, the Claimant must show that:

(i) she was required to answer questions in relation to, or undergo a test for, a medical condition;

(ii) providing answers to those questions or testing for a medical condition were a condition for the continuance of her employment; and

(iii) a written complaint was filed with the Tribunal within 3 months of the date on which she was required to answer the questions or was informed of the requirement for the test.

26. The Tribunal is persuaded that the Claimant has adduced sufficient evidence from which it may be inferred that the Respondent discriminated against the Claimant.

First, readily available expert medical evidence and other empirical data support the view that the COVID-19 virus exists and that it is classified as a recognised medical condition. The Tribunal is satisfied that the Respondent repeatedly requested that the Claimant undergo a weekly PCR test for COVID-19.

Secondly, it is apparent from the warning and suspension letters issued by the Respondent to the Claimant on January 14 and 20, 2022, respectively, that the requirement that the Claimant test for COVID-19 was a condition for the continuance of her employment. The January 14, 2022, letter was clear:

> *"...failure to adhere to these policies and procedures in the future, and specifically to the requirement to report for work...will result in further disciplinary action up to and including the possibility of employment termination."*

The Claimant's ability to report for work in person at Rubis' office was contingent upon her submitting to a COVID-19 test. Failure to do so placed her at real risk of termination of her employment.

Thirdly, the Respondent agreed, and the Tribunal is satisfied, that the Claimant's complaint was filed within the limitation period.

27. The Claimant having satisfied the criteria set out at section 26 of the E(PoD)A, the burden is on the Respondent to show that the testing requirement was not discriminatory in that either there existed a genuine occupational qualification, or, alternatively, that the conduct complained of was done pursuant to an enactment.

Discrimination

28. Discrimination is defined in the E(PoD)A as occurring where:

> *3.(1) (a) the person on a ground specified in subsection (2), directly or indirectly, whether intentionally or not, makes a distinction, creates an exclusion, or shows a preference, the intent or effect of which is to subject the other person to any disadvantage, restriction or other detriment; or*
>
> *(b) the person, directly or indirectly, whether intentionally or not, subjects the other person to any disadvantage, restriction or other detriment in the following circumstances:*
>
> *(i) a ground specified in subsection (2) applies to the other person;*
>
> *(ii) as a consequence of the ground the other person does not comply, or is not able to comply with, a particular requirement of the first-mentioned person;*
>
> *(iii) the nature of the requirement is such that a substantially higher proportion of persons to whom the ground does not apply complies, or is able to comply with the requirement; and*
>
> *(iv) the requirement is not reasonable in the circumstances.*

29. Experts concede that vaccinated and unvaccinated persons are capable of contracting and transmitting and have contracted and transmitted the COVID-19 virus. The Claimant's oral evidence is that *"the disadvantage I suffered was that as an unvaccinated person I was asked to swab, and vaccinated persons were not asked to swab even though they can also bring the virus into the office. The restriction was that if I do not swab, I could not come to work. It is discriminatory to ask me to swab and not the vaccinated persons."*

30. The Tribunal is persuaded that the Respondent directly and intentionally made a distinction between the Claimant and vaccinated employees by requiring her to submit to weekly COVID-19 PCR testing as a condition for her attendance for work at the Respondent's office. The Claimant's unchallenged allegation is that the Respondent's vaccinated employees also contracted

the virus and were forced to take leave from work. If the Respondent had extended the policy to both vaccinated and unvaccinated employees after vaccinated employees contracted the virus, the Claimant would not have had a viable claim for discrimination.

Exceptions

31. Even though the Respondent's testing requirement falls within section 3 (1) (a) of the E(PoD)A, if the Tribunal finds that the demand that the Claimant submit to a PCR test was done pursuant to an enactment in accordance with section 22 or was necessary to determine whether the Claimant satisfied or continued to satisfy a genuine occupational qualification pursuant to section 8, the Tribunal must also find that there was no discrimination.

Section 22 of the E(PoD)A provides that:

> *"22. An act done*
>
> *(a) in compliance with an order of a court; or*
> *(b) pursuant to any enactment.*
>
> *shall not be taken to be discrimination."*

The Respondent sought to persuade the Tribunal that its demand that the Claimant produce a negative weekly PCR test result was an act done in compliance with its statutory obligations pursuant to the OLA and the SHAW Act.

(a) Act done pursuant to the Occupier's Liability Act.

32. The Respondent contended that the implementation of the guidelines was in furtherance of "*a common duty of care to the Claimant in respect of any dangers on the premises.*" Particularly, the Respondent states that "*in considering the circumstances of the pandemic, the infectious nature of the Virus in the workplace, implementing various physical and social restrictions and additional personal protective equipment and staggering schedules, and issuing the Respondent's guidelines to all its employees, the Respondent had discharged its statutory common duty of care under the OLA to all of its employees.*"

33. The Tribunal disagrees with the contention that the OLA is applicable to this case. The long title of this 1965 Act is:

> *"An Act to amend the law relating to the liability of occupiers and others for injury or damage resulting to persons or goods lawfully on any land or other property from dangers due to the state of the property or to things done or omitted to be done there."*

The OLA is intended to protect a visitor who suffers injury caused by reason of want of repair, upkeep, or maintenance of the occupier's premises.

The Tribunal accepts that the OLA could have been in the contemplation of the Legislature when the section 22 exception was crafted. However, we hesitate to conclude that the duty of care owed by an occupier or other person to visitors to their premises under the OLA extends to safeguarding employees against exposure to a viral illness of pandemic proportions.

While it might be expedient for the Respondent to invoke the OLA in an effort to bring itself within section 22 of the E(PoD)A, if the Tribunal had upheld that argument, we would have effectively opened the floodgates of litigation to claims against every occupier to whose property a COVID-19 afflicted individual is able to establish a connection, regardless of how fleeting that connection had been.

Consequently, we conclude that the Respondent cannot avail itself of the OLA in answer to the claim brought by the Claimant under section 6 of the E(PoD)A.

(b) Act done pursuant to the SHAW Act

34. The Respondent argued that in insisting that the Claimant submit to weekly PCR testing, the Respondent was merely discharging its duties to its employees (including the Claimant) in accordance with the provisions of the SHAW Act.

35. On the other hand, Mr. Franklyn submitted that "*when Parliament passed the Employment (Prevention of Discrimination) Act, they were aware of* [the provisions of the SHAW Act] and the common law duty to provide a safe place of work and a safe system of work] *and nonetheless enacted section 6 which would take precedence over any prior legislation.*" Mr. Franklyn appears to be contending that the SHAW Act was repealed by implication by the E(PoD)A. For the latter statute to repeal the former by implication, the two statutes must be so inconsistent with each other that they cannot subsist simultaneously. Mr. Franklyn has not identified any inconsistencies between the two statutes and the Tribunal has found none. Contrary to Mr. Franklyn's argument, the order in which the statutes were enacted is irrelevant. The E(PoD)A, does not, by virtue only of the fact that it is more recent in time, automatically supersede the SHAW Act. The two statutes are on equal footing.

36. Pursuant to section 7 (1) of the SHAW Act an employer has a duty to:

> *"(a) keep his workplace so that the safety of persons in the workplace is not likely to be endangered; and*
>
> *(b) take such precautions as are reasonable in the circumstances to ensure the safety of every person in the workplace."*

Section 7 (4) also provides as follows:

> *"It shall be the duty of every occupier to prepare and as often as may be appropriate, revise a statement of general policy with respect to workplace, safety, health and welfare, and the*

organisation and arrangements for the time being in force for carrying out the policy, and to bring the policy and any revision of it to the notice of all employees.

37. In the Tribunal's opinion, the SHAW Act permits a more liberal interpretation of the employer's duty to his employees than the OLA to the extent that it is dedicated legislation, which not only encompasses a duty to provide for the safety of the employee, but also for his health and welfare. Consequently, failure by an employer to take reasonable measures to mitigate the risk of exposure to COVID-19 is more likely to trigger a sustainable and/or successful claim by an employee against his employer than would a claim for breach of the common duty of care owed by an occupier under the OLA to visitors to his premises.

38. The Tribunal must determine whether the guidelines implemented by the Respondent were:

(i) necessary to discharge its duty under section 7(1) of the SHAW Act;

(ii) reasonable in all the circumstances to ensure the safety of its employees; or,

(iii) disproportionate to the risks which they were aimed at protecting against.

39. Management and containment of the spread of the COVID-19 virus presented an unmatched challenge for governments, businesses, and individuals. Businesses were forced to close their doors outside of State-imposed closures because of COVID-19 outbreaks. Except where required for the purpose of overseas travel, PCR testing was largely being conducted nationally based on known or suspected exposure to the virus. The public was not required or expected to test for COVID-19 at will.

40. The E(PoD)A was proclaimed on August 7, 2020. One day earlier, the Barbados Government Information Service, had reported that the island had recorded a total of 133 COVID-19 cases.[7] Nevertheless, COVID-19 testing was not expressly exempted from the section 6 prohibition, nor was section 7(1) of the SHAW Act suspended with the enactment of the E(PoD)A. If Parliament intended to empower employers to demand COVID-19 testing as a condition for employment or continuance of employment, the E(PoD)A, enacted in the middle of the pandemic, would have reflected Parliament's intent.

41. The Tribunal is satisfied that for the most part, the measures imposed by the Respondent were reasonable, comprehensive and sufficient to discharge its statutory duty under section 7(1) of the SHAW Act. Glass partitions separated employees' cubicles. Specialised masks, hand sanitizing and other hygienic practices such as discontinuance of digital access to the office

[7] Barbados Government Information Covid-19 Situation Report-August 6, 2020

were among the measures implemented. Rostering staff to avoid contact between vaccinated and unvaccinated employees was also a preventative measure employed by the Respondent. Apart from those measures, the Respondent had the option and capability to utilise online platforms to facilitate the conduct of its business where necessary.

42. Additionally, remote work was contemplated and allowed. Indeed, when the Tribunal heard this complaint, the Claimant was working remotely full-time because of an unrelated medical condition. She was permitted to do so for an indefinite period, using the same infrastructure that was in place during the state of emergency. These facts suggest that the Claimant could also have performed her duties at home full time during the pandemic and consequently, the stipulation by the Respondent that she must report to the office in person twice weekly with a negative PCR test, was excessive and unnecessary.

43. The Tribunal also notes that the Claimant is a vendor administrator/buyer in the office of a dealer in petroleum and other consumable products. She is not employed in a high-risk job which brings her into frequent, face-to-face contact with a particularly vulnerable population. However well-intentioned the Respondent's guidelines were, the Tribunal finds that, to the extent that the Respondent insisted on weekly PCR testing of unvaccinated employees at the employees' expense as a condition for the continuance of employment, those guidelines went too far.

44. Absent indicia that the Claimant was at an increased risk by reason of her living arrangements or social engagements of contracting and spreading the virus in the workplace (no evidence was led to that effect), the demand for weekly testing was unreasonable and was not necessary for the Respondent to discharge its duty to its employees under the SHAW Act. It was also disproportionate to the risks which the Respondent sought to protect its employees against.

(c) Genuine occupational qualification

45. The Tribunal finds that the section 8 exception has no bearing on the matters in issue since no question of a genuine occupational qualification arises.

The Emergency Management (COVID-19) Order 2020

46. The Order, made pursuant to section 28 A (4) and (5) of the Emergency Management Act, Cap. 160A of the Laws of Barbados (as amended), has the force of law. It vested in public health officers wide powers to take biological samples from any individual including by way of nasopharyngeal cavity swabbing. However, neither that, nor any subsequent Order, or any of the directives and protocols made pursuant thereto, imposed vaccine or testing mandates, or delegated to any individual or entity, and certainly not to the Respondent, power to mandate weekly or other periodic PCR testing.

The Respondent's PCR testing policy ran counter to national policy and to the October 7, 2021, directive from the Ministry of Labour and Social Partnership and was an overreach by a private

entity with no lawful authority to mandate weekly or other periodic testing of its employees for COVID-19 as a condition of continued employment.

Disadvantage, restriction, and detriment

47. The Respondent argues that the test is one of proportionality, that is, whether the detriment, if any, suffered by the Claimant is *objectively justified as a proportionate/reasonably necessary means employed by the Respondent in achieving the legitimate aim of discharging its statutory responsibilities under the [Occupier's Liability Act, Cap. 208 ("OLA")] and the SHAW Act."*

If, as Counsel argues, the Respondent was acting in furtherance of the SHAW Act, no question of proportionality arises. The E(PoD)A affords an employer an absolute defence to a claim brought under section 6, if the act complained of was done pursuant to an enactment. Such acts do not, in those circumstances, amount to discrimination.

48. Counsel needed to, but did not, or could not show that mandating PCR testing was a requirement of the SHAW Act. Nothing in that Act can be construed as either expressly or impliedly imposing a duty on any employer to demand that an employee be evaluated weekly or at any other interval for any illness, including COVID-19. Any enquiry or testing requirement by the employer is limited by section 6 of the E(PoD)A to determining whether by virtue of a medical condition the employee is fit to perform a particular job. The SHAW Act requires an employer only to "*ensure, so far as is **reasonably practicable**, the health, safety and welfare at work of all his employees.*"[8] (Emphasis supplied). The myriad precautionary measures the Respondent adopted would, on any objective assessment, satisfy the test for reasonable practicability.

49. Notwithstanding the foregoing, the Respondent's testing requirement would in any event have failed the proportionality test if it were relevant. There were several other appropriate measures which the Respondent could have taken and did in fact take to minimise the risk of COVID-19 infection in the workplace. The demand for weekly testing was onerous and far exceeded what was necessary to achieve that objective, especially since testing was not failsafe and was not effective to provide immunity from infection with, or transmission of, the virus.

50. The Tribunal finds pursuant to section 3(1) (a) of the E(PoD)A, that the Respondent directly and intentionally made a distinction between its vaccinated and unvaccinated employees. Further, the Respondent created an exclusion by requiring unvaccinated employees to produce a negative PCR test result to report for work at its office. We are also persuaded that the Respondent's conduct was intended and/ or was effective to subject the Claimant to disadvantage, restriction, or other detriment.

[8] Section 6 (5), Safety and Health at Work Act, Cap. 356.

51. Section 3(1) (a) must be read in conjunction with Section 5 of the E(PoD)A which provides that:

> *5. "An employer shall not discriminate against an employee*
>
> *(a) in the terms or conditions of employment that the employer affords the employee;*
> *(b) in the provision of facilities or services related to or connected with employment;*
> *(c) by the denial or restriction of access to opportunities for promotion, transfer or training or to any other benefits associated with employment;*
> *(d) by disciplinary action or dismissal; or*
> *(e) by subjection to any other detriment.*

52. The Tribunal is satisfied that the Respondent discriminated against the Claimant by making the provision of a negative PCR test a condition of employment, by taking disciplinary action against the Claimant for her failure to provide such test result, and by subjecting the Claimant to other detriment or disadvantage including locking her out of its offices. However, by the time this case was heard, the testing requirement was no longer in force. The seven-day suspension was rescinded, and the Claimant had received her full pay for that period. A mutually acceptable accommodation had been reached between the parties, whereby the Respondent permitted the Claimant to work full-time from her home before returning to the office without restrictions in September 2022. She has not been subjected to any further disciplinary action. The Claimant also confirmed that she has suffered no reduction in emoluments or status and she remains in the employ of the Respondent. In the circumstances the Tribunal is satisfied that the Claimant was made whole.

Employee's duty of care

53. Even though the Tribunal has found that the Respondent's testing requirements went too far, the Tribunal cautions the employee that she too, pursuant to section 9 of the SHAW Act, owes a duty:

> *"(a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and*
>
> *"(b) as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with his employer so far as it is necessary to enable that duty or requirement to be performed or complied with."*

54. The Respondent did not tender any evidence that the Claimant was, by her conduct or for any other reason, at heightened risk of contracting and spreading the COVID-19 virus. However, that is not enough to absolve the Claimant of her own statutory responsibility. She was aware of the Respondent's objective in implementing the guidelines. She was adamant, as is her right, that she would not take a vaccine or PCR test for personal reasons.

Respondent's directive when her own COVID-19 status was unknown was reckless and inconsiderate, had the potential to endanger the health and safety of her co-workers and herself, and could have amounted to a breach of section 9.

DISPOSAL

55. The Tribunal, being satisfied that the complaint of discrimination is well-founded, declares that the Respondent's policy, which required the Claimant to present a COVID-19 vaccination certificate or a weekly negative COVID-19 PCR test result to work at its office, was discriminatory and contrary to section 6 of the E(PoD)A. Counsel for the Respondent informed the Tribunal that the policy is no longer enforced by the Respondent. Nevertheless, the Tribunal warns the Respondent, *ex abundanti cautela* that **in the absence of a mandate from the State, the Respondent shall not reintroduce revive reinstate or otherwise implement or enforce the said policy or any variation of that policy.**

56. The Claimant has not sought compensation or any other remedy permissible under section 32 (b) of the E(PoD)A. Had she done so, it is unlikely that she would have prevailed. Any disadvantage, restriction, or detriment which the Claimant suffered was remedied by the date of hearing.

57. The Claimant alleged that the Respondent insisted on her being vaccinated against COVID-19. That claim is unsubstantiated, and, in fact, the evidence adduced by both parties supports a contrary finding. If the Claimant had argued that the objective of the requirement that she submit to weekly PCR testing with its attendant financial burden was to wear down her resolve and tacitly compel her to be vaccinated, the Tribunal might have accepted her arguments. She did not. Consequently, the Tribunal dismisses that complaint.

58. The Tribunal has no power to award costs. The Claimant's application for an order that the Respondent pay her costs of this action is accordingly dismissed.

59. This decision is unanimous.

Deputy Chairman

Member

Member