

## DETERMINATION SUMMARY

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Members of the Tribunal:	Sheridan Brooks-Hurst -	Chairperson
	Karie Bergstrom -	Member
	Shaun Cockle -	Member
	André Ebanks -	Member
	Tammy Ebanks -	Member

### INTRODUCTION

The Gender Equality Tribunal (“**the Tribunal**”) was convened pursuant to the Gender Equality Law, 2011 (“**the Law**”) on 9th September 2013 at the Department of Community Rehabilitation Conference Room, Cayman Centre to conduct a Hearing and make a Determination in relation to Discrimination Complaint GET/1301, which was submitted under the Law and recorded on 6th March 2013 (“**the Complaint**”). This Hearing continued on 10th September, 18th November and 19th November 2013.

Representatives of both parties to the Complaint were legally represented and each provided written representations with supporting evidence, Written Submissions and Closing Submissions to the Tribunal. Both parties attended the Hearing and oral evidence, on oath or affirmation, was also provided on behalf of each party, with nine (9) witnesses called in total.

The Complainant alleged that her former employer (the Respondent) discriminated against her because of her pregnancy on the basis that, prior to knowing that she was pregnant, the Respondent agreed to apply to the Department of Immigration for the Complainant to be designated as a Key Employee of the Respondent, but when the Respondent found out that the Complainant was pregnant, the Respondent refused and/or neglected to do so.

As a preliminary point, the Tribunal found that the employee of the Respondent named in the Complaint should be treated as a “managerial employee” as defined in section 2 of the Law and not as a party to the proceedings. That person is referred to in this Determination Summary as “**the Managerial Employee**”.

### THE FACTS

The Complainant was employed by the Respondent from 1st December 2011 until 21st March 2013.

According to the evidence presented, another employee of the Respondent (referred to in this Determination Summary as “**Employee A**”) approached the Managerial Employee in September/October 2012 to suggest that the Complainant should be designated as a Key Employee. The Managerial Employee responded to Employee A that Employee A should “put it in writing”. The Respondent’s evidence was that this meant that the request should be put in writing and that no decision was made on the request itself.

However, it appeared that Employee A took this response to mean the application would be made and a letter of application should be drafted, communicating this to the Complainant. Employee A drafted a letter of application, which was then reviewed by the Complainant and sent from Employee A to the Managerial Employee via email on 6th November 2012. The Complainant and the Managerial Employee had not had any direct conversations regarding Key Employee prior to this time.

Additional evidence (provided after the Hearing began) clarified certain matters for the Tribunal, though the Tribunal did find it curious that the Respondent was initially unable to locate the draft letter of application and only produced it after the Tribunal indicated its willingness to make an Order under the provisions of section 34(4)(a) of the Law to compel the production of the computer on which it had been alleged that an electronic copy of the letter should be located.

The Complainant informed the Managerial Employee of her pregnancy during the latter part of the first week of December 2012. Neither the Managerial Employee nor Employee A knew the Complainant was pregnant until this time. In fact, Employee A resigned from employment with the Respondent on 28th November 2012, before the Managerial Employee was informed.

It appeared to the Tribunal that the Managerial Employee and Employee A were at cross-purposes in their conversation in September/October 2012 regarding the application for the Complainant to be designated as a Key Employee. It was unclear what, if anything, occurred after the Managerial Employee allegedly agreed to apply for the Complainant to be designated as a Key Employee, or after Employee A left the Respondent's employment. The Tribunal found it noteworthy that there was no evidence that the draft letter of application was ever edited or signed by the Managerial Employee, who did not recall opening or reading the email of 6th November 2012.

In fact, neither Employee A nor the Complainant reminded the Managerial Employee to submit the application or followed up on the alleged agreement until, at the earliest, 24th December 2012. The Complainant alleged that she verbally followed up on the status of the application with the Managerial Employee that day (24th December 2012) and learned that it had never been submitted. However, the Managerial Employee denied having any conversation with the Complainant on that date, regarding the matter of Key Employee or otherwise.

According to the Complainant, she was convinced by what was said to her by Employee A in September/October 2012 that the application for her to be designated as a Key Employee of the Respondent would be made and, because she told the Managerial Employee about her pregnancy in or about the end of the first week in December 2012, it was this information which she alleged caused the Managerial Employee not to make the application.

Further, the Complainant submitted that she was harassed after she told the Managerial Employee of her pregnancy, including being issued with warning letters that she considered unjustified, with the intention of having her employment terminated. The Respondent submitted that the Complainant's behaviour began to deteriorate in December 2012/January 2013, which led to a relationship break-down and the Complainant's eventual dismissal from her employment on 21st March 2013.

It is clear that in December 2012 the Complainant became concerned that the application for her to be designated as a Key Employee had not been made. No doubt as a result, she decided to confront her employer about this matter and record what was said, without the knowledge and/or consent of her employer's representatives, on an audio recording device.

At a meeting on 18th February 2013 – which had been called by her employer's representatives because of the various complaints they had received from other staff members regarding the Complainant's alleged changed behaviour – the Complainant confronted her employer's representatives, including the Managerial Employee, and stated that she felt that she was being discriminated against, in relation to the application for her to be designated as a Key Employee, because of her pregnancy.

In the audio recording of the meeting, the Complainant agreed and admitted that neither of her employer's representatives that were present (including the Managerial Employee) had indicated to her that such an application would be made. The Complainant also did not allege in that audio recording that she had confronted the Managerial Employee on 24th December 2012 regarding the status of the application for her to be designated as a Key Employee of the Respondent, as she alleged at the Hearing.

Subsequently, according to the Respondent there were further problems with the Complainant's behaviour at work and she was issued additional warning letters, which the Complainant regarded as unjustified. The Complainant's employment with the Respondent was terminated on 21st March 2013.

The Managerial Employee also stated that the reason for the silent hiatus between the conversation with Employee A in September/October 2012 regarding applying for the Complainant to be designated as a Key Employee of the Respondent and the confrontation by the Complainant at the meeting on 18th February 2013 was because no agreement had been made to pursue an application for her to be designated as a Key Employee and there was no intention of making any such application. The Tribunal accepted the Managerial Employee's evidence on this point, as no other plausible explanation was provided.

In view of the evidence presented and the findings outlined above, the Tribunal found that there was no cogent, credible evidence that the Managerial Employee actually agreed on behalf of the Respondent to make an application for the Complainant to be designated as a Key Employee, either prior to or during the Complainant's pregnancy.

Consequently, the Tribunal was unable to find, on a factual basis, that the Respondent then refused and/or neglected to make the application when the Managerial Employee was told that the Complainant was pregnant and that the reason for not making the application was that the Complainant was pregnant; or that, in other words, had the Complainant not been pregnant, the Respondent would have made the application.

#### **THE LAW**

Section 35 of the Law provides for findings of the Tribunal. It was the duty of the Tribunal to determine whether, on the evidence before it, viewed objectively and on the balance of probabilities, it was of the view that the Complainant was discriminated against on the grounds of her pregnancy under Part 2 of the Law. For the Complaint to be substantiated under the provisions of section 4(2)(d) of the Law, the Complainant would have to prove, on the balance of probabilities, that the Respondent discriminated against her on the grounds of her pregnancy by denying her access, or limiting her access to opportunities for advancement, promotion, transfer or training, or to any other benefits, facilities or services associated with her employment, and that such discrimination nullified or impaired equality of opportunity or treatment in her employment or occupation.

In view of the findings of the Tribunal that there was in fact no agreement for the Managerial Employee to, on behalf of the Respondent, make an application for the Complainant to be designated as a Key Employee, it was clear to the Tribunal that the Complainant did not meet the requisite burden and standard of proof which is required.

In this regard, the Tribunal also noted that the Complainant, in submissions, invited the Tribunal to reverse the burden of proof and to consider that all that was required of the Complainant was for her to establish a *prima facie* case, after which the legal burden of proof would then shift to the Respondent. The Tribunal found that this was not what was intended by the Legislature, as had the intention been for the burden of proof to be shifted to the Respondent it would have specified this as it does in section 8 of the Law (*Equal remuneration*).

#### **CONCLUSION**

Based on the evidence presented, and having considered all of the factors as outlined above, the Tribunal determined that the Complainant's suspicions were incorrect pursuant to section 35(1)(b) of the Law. Consequently, the Complainant was ordered to pay the cost incurred by the Tribunal and the cost incurred by the Respondent.

This is a summarised version of the 27th December 2013 Determination of the Gender Equality Tribunal in the matter of discrimination complaint GET/1301. This summary has been produced for information and does not identify any parties or person other than the members of the Tribunal.