

Expression and freedom of association law employment essay

[Law](#)



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INTRODUCTION

Labour law blossomed from the consideration of the workers'/employees' call for better work conditions on the workplace and eventually for a better communication with their respective employers. The foundation floor of most labour legislations in Mauritius has always taken as its cross reference material basic human rights concepts because at the heart of each and every labour legislation drafted should lie an utter respect for the human being which resides in each and every worker/employee. Through the adoption of the fundamental rights and freedom in its Chapter II, the Mauritian Constitution has made clear-cut that this democratic country is a State in which non-respect of human rights would not be tolerated. With the recent adoption of the Employment Rights Act[1](Act 33/2008), the Employment Relations Act[2](Act 32/2008) and the Equal Opportunities Act[3](Act 42/2008), it can be deduced how the Mauritian legislator has repartitioned and adapted the fundamental human rights in the labour context to make sure that both workers and employees enjoy a favourable working environment which has been confectioned in such a way so that no basic human right is curtailed. In addition to Mauritian case law, British, Indian, Australian, South African and American cases have been cited to provide for a global understanding of the protection of human rights of the worker/employee in the workplace. The jurisprudence of the European Court of Human Rights has also been extensively used to provide an aperçu of the protection of the fundamental rights and freedoms of the worker/employee on his workplace on the international plan. The structure of this dissertation is as follows : While considering a human rights approach towards labour law

in Mauritius, Chapter 1 of this dissertation aims at critically explaining the right to freedom of expression and freedom of association guaranteed to the employee/worker and to what extent that right is limited. Chapter 2 will give an aperture towards slavery, forced labour and ill treatment, and how such attitude by employers is prevented by various provisions of the law. Chapter 3 will provide a sneak peek through discrimination, and the newly adopted legislative framework, the Equal Opportunities' Act 2008, which specialises in discrimination at work and finally Chapter 4 will lay much emphasis on the right to a fair trial being extrapolated to labour law as procedural fairness in pre-dismissal cases. A conclusion and bibliography will close this dissertation.

CHAPTER 1: FREEDOM OF EXPRESSION AND FREEDOM OF ASSOCIATION ON THE WORKPLACE

In order to get a good grasp of this chapter, it is important to understand, firstly, the freedom of expression on the workplace in Mauritius (1. 1) and secondly, the freedom of association on the workplace in Mauritius (1. 2).

1. 1 Freedom of expression on the workplace.

Definition of freedom of expression

Freedom of expression, one of the fundamental human rights as provided by section 12[4] of the Constitution, has been "inspired" from Article 10[5] of the ECHR and Article 19 of the ICCPR as it was held in the cases of *Dookhony v La Sentinelle Ltd*[6] and *London Satellite Systems Ltd v State of Mauritius*[7].

Section 12 (1) of the Constitution provides that:

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" Except with his own consent, no person shall be hindered in the enjoyment of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence."

It was held in the case of *Fuentes Bobo v Spain*[8] that the application of Article 10[9] of the ECHR extends to all employer-employee relationships and includes those categorized under public law as well as private law. Basically it goes without saying that a worker/employee[10] enjoys his right to freedom of expression on his/her place of work and his/her employer cannot tamper with it by restricting him/her to hold opinions and interfere with him/her imparting ideas and information. It is a constitutional right conferred to him/her and it should not be tampered with by the adoption of strict rules and regulations putting barriers to his/her right to freedom of expression.

1. 1. 2 Freedom of Expression, a non-absolute right, subject to limitations.

The drafters of the Constitution have taken ample consideration of the two competing interests and concerning the right to freedom of expression on the workplace, it is that of the employer and that of the worker/employee. A balance must be struck between the rights of both parties of competing interests. Section 12 (2)(a)[11] and 12(2)(b)[12] of the Constitution further limit the freedom of expression of the worker/employee in the sense that it is a non absolute right and it should be enjoyed in relation to the respect of the rights of others. This is confirmed in the cases of *DPP v Boodhoo*[13], *Duval v Commissioner of Police*[14], *Cehl Meeah v Commissioner of Police*[15], *Armoogum v La Sentinelle Ltée*[16] and *Police v Murday*[17]. In the

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employment field, the right to freedom of expression becomes limited concerning misconduct on the part of the employee and the law of breach of confidence.

1. 1. 2. 1 Misconduct on the part of the employee

A misconduct is a willful act performed by the worker/employee behind which there is a wrong intention which hinders the maintenance of the worker's/employee's contract of employment. The cases of O'Connor v Palmer and Others[18], Pillai v Messiter[19]and De Leon v Spice Temple Pty Ltd[20]all confirm that to qualify as a misconduct, the act of the employee/worker must be accompanied with a wrong intention. Not all and every misconduct would justify a dismissal and each case should be decided on its own merits as it was held in the case of Chan Man Sing G v Wing Tai Chong Company Limited[21]. While considering the approach of jurisprudence considering misconduct rooted from misuse of the right to freedom of expression on behalf of the worker/employee, both local and international, case law considers that an attempt to dirty the reputation of the enterprise as well as the employer constitutes gross misconduct and hence a justified dismissal. Also such an attempt constitutes a transgression of the limits of the non-absolute freedom of expression right as clearly demonstrated in the case of Société de Beau Vallon v Nilkomol[22]. The same reasoning has been highlighted in the cases of Predota v Austria[23]and Rodica Cârstea and Veronica Greco v Romania[24]where the ECtHR held that an attempt to tarnish the reputation of the employer by openly criticizing him goes against the concept of exercising one's right to freedom of expression in relation to the rights of others. One cannot invoke

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his right to freedom of expression where he/she openly makes critics about his/her employer because it clashes with the employer's right to reputation, which draws the limit line of the employee's right to freedom of expression on the workplace.

1. 1. 2. 2 The law of breach of confidence, as a restrictive aspect of freedom of expression at work.

Among the limitations to the right to freedom of expression posed by Section 12(2)(b)[25] of the Constitution is the disclosure of information received in confidence. Justice P. Balgobin held, in the case of *Eau Soleil Compagnie Limitée v Cernol Services Limited*[26], that the law of breach of confidence being of English inspiration and falling in the domain of equity, English case law is useful as an interpretative tool. In the case of *Seagar v Copydex*[27] the law of breach of confidence is explained as follows:

" It depends upon the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent."

Lord Denning stressed on the right to free speech in the case of *Fraser v Evans*[28] and continued in his judgment by saying that if information is provided to an employee imparting an obligation of confidence with it, then the employee should not divulge such information to the detriment of his employer albeit that he has a right to free speech. It is implied that the law of breach of confidence draws the limit-line for an employee/worker who enjoys his right of freedom of speech either during his employment or afterwards as it was held in the cases of *Alperston Rubber Co. v.*

Manning[29]and Amber Size & Chemical Co. Ltd v Menzel[30]. Whether the obligation of confidence can either be in express or implied terms has been fully discussed by the English Court in the case of Saltman Engineering v Campbell Engineering[31]and the English Court affirmed that it may be both in express and implied terms. The law of breach of confidence certainly limits a worker's/employee's or an ex-worker's/ ex-employee's right to freedom of expression but it gives an impression that the worker/employee may not use what he has acquired as what he has experienced during his period of service. This problem has been solved by the formula provided in the case of FSS Travel and Leisure Systems Ltd v Johnson[32]where it was held that if the information in question constitutes of a separate stock of knowledge of the employer, then there is a duty on the worker/employee not to divulge this information to anyone else. In the case of Mohun v Ilma Co. Ltd[33], the Supreme Court held that an ex-employee may be prevented from soliciting his ex-employer's customers by memorizing their contact details but the court considered that the issue of confidentiality depends on particular circumstances of each case as it was held in the case of Baker v Gibbons[34]. The case of Mohun v Ilma can be contrasted with the case of Robb v Green[35]where it was held that the employee who has bona fide accidentally learned contact details the customers of his employer and makes use of it afterwards does not taint the obligation of confidence derived from the master-servant relationship. In the case of WSP v Sungker K[36], the Supreme Court held that where the ex-employer wanted to prevent the information gathered by his ex-employee as lead engineer on a project for auditing purposes, that information gathered by the defendant

was not a confidential information per se. In the case of *Air Mauritius Limited v A. Thomas*[37], the ruling was based on the case of *Bents Brewery Co. Ltd v L. Hogan*[38] where it was held that terms and conditions of an employee's/worker's employment do not fall under the confidential information umbrella. An analysis of the various case law draws the conclusion that inasmuch as an employee/worker enjoys freedom of expression, the law of breach of confidence limits his freedom of expression by preventing him to impart ideas and information which he has received in confidence from his employer. And this obligation of confidence is maintained even if the master-servant relationship ceases to exist between the two parties when the contract of work is severed between them. The condition being that the owner of the information perceives it as being secret and it is not in the public domain as it was held in the cases of *Crain Limited v Ashton*[39], *Integral Systems Inc. v Peoplesoft Inc*[40], *Delrina Corp. v Triolet Systems Inc.*[41] and *Mustad & Son v S. Allcock*[42].

1. 2 Freedom of association on the workplace.

1. 2. 1 Freedom of assembly and association

The right to form, join and belong to associations is enshrined in section 13 of the Constitution which reads as follows:

" Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and, in particular, to form or to belong to trade unions or other associations for the protection of his interests."

Section 13 of the Constitution is inspired in similar terms as Article 22 of the ICCPR, Article 8 of the ICESCR and Article 11[43]of the ECHR. The right to freely associate is inherent to the worker/employee as a human being and he can freely be a member of a trade union for the protection of his interests (which should be the backbone of joining trade unions) and a failure to do so fuels his vulnerability and provides an abusive gateway in respect of his fundamental rights and principles at work.[44]Sections 32 and 33 of the ERelA[45]further elaborate on the collective voice of workers/employees at work. In the case of National Union of Belgian Police v Belgium[46], the ECtHR held that the right to freedom of association moulds both the right to form and join the trade union of one's choice and the right to be heard and have his/her rights protected. It was highlighted in the case of Schmidt and Dahlström v Sweden[47]that the right to freedom of assembly of workers/employers does not provide " security of any particular treatment" by the State, such as " the right to retroactivity of benefits, for instance salary increases, resulting from a new collective agreement". The same reasoning can be found in the case of Gustafson v Sweden[48]where it was held that each State should be free to legislate on trade unions and to allow trade unions fulfill their objects From this stems the fact that there will be no violation of the right to freedom of association whereby there has been any

particular means by which trade unions could make sure that the rights of their members are being catered for. In light of this criticism, it was held in the leading case of *Wilson and Palmer v UK*[49]that:

" In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade union freedom may be secured."

1. 2. 2 Trade unions

Section 2 of the EReIA defines a trade union as an association of people having as one of its purposes the promotion of industrial relations. It does not matter if it is registered or not as long as it is lubricating the relationship between workers and employers. It is to note that the EReIA uses the term " worker" and not " employee", so basically whether the employee falls under this section is rather doubtful. Section 29 of the EReIA 2008 explicitly provides for the right of a worker/employee to enjoy his right to freedom of association and assembly by " joining or establishing a trade union of his own choice". It is to be noted that for a worker/employee to be able to join a trade union in Mauritius, the latter must be a registered body corporate[50]as it was held in the case of *Sullivan v Union of Artisans of the Sugar Industry*[51]. By contrast in the case of *Transport & Industrial Workers' Union v Fernandes*[52]and *Bonsor v Musicians' Union*[53]it was held that the law of other jurisdictions allow unregistered trade unions to be recognized lawfully. The sole membership of a worker/employee to a trade union does not per se guarantee him an automatic freedom of association on his

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workplace, the trade union must be recognized^[54] within the enterprise. It was held in the cases of *National Union Of Gold, Silver And Allied Trades v Albury Brothers Ltd*^[55], *Transport and General Workers' Union v Andrew Dyer*^[56] and *National Union of Tailors & Garment Workers v Charles Ingram & Co Ltd*^[57] that recognition is a two-way process, that is, the employer should acknowledge the trade union and its purpose and the trade union should take due cognizance of the acceptance of the employer of its purpose. The acceptance needs not necessarily be express; it might as well be tacit as it was held in the cases of *Union of Shop, Distributive and Allied Workers v Sketchley Ltd*^[58] and *National Union of Mineworkers and RJB Mining (UK) Ltd*^[59]. The percentage of worker/employee members of a trade union should not be dependent upon its recognition as it was held in the case of *Happy World Marketing v Industrial Relations Commission & Anor*^[60]. The fact that trade unions are independent entities and should draw up their own rules and regulations concerning their membership^[61] is a consequence of the right to freely associate as it was highlighted in the case of *ASLEF v UK*^[62]. The right to freedom of association is of a reciprocal nature, meaning that it may only be exercised in relation to others' willingness to associate. In the case of *Cheall v United Kingdom*^[63] it was concluded that trade unions may refuse membership or even expel an existing member on strong grounds. The right to freely associate at work henceforth branches and is subordinated to the autonomy of trade unions.

1. 2. 2. 1 Trade unions and protection from discrimination

Section 31 of the EReIA^[64], which is entitled "protection against discrimination and victimization", provides that a worker/employee should

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not be discriminated on the basis of his membership or activities within a trade union. This was confirmed in the cases of *Speciality Care Plc v Pachela & Anor*[65], *Mayan King Limited v Reyes and ors*[66] and *Discount Tobacco and Confectionery Ltd v Armitage*[67]. However, it was held in the case of *City of Birmingham Corp. v. Beyer*[68] that the famous trade union activist was not sacked one-hour after being employed on cognizance of his membership but due to the falsification of his name. In the case of *Jayekurrun v LIC*[69] where the plaintiff averred that the ground of his dismissal was due to his union activities, the Supreme Court considered the welcoming attitude of the employer of the trade union activities of his workers/employees and dismissed the plaintiff. It stems from case law that an employer or a prospective employer should not discriminate a worker/employee or a prospective employee due to his/her engagement in trade union activities which ensures an undisturbed or unhampered enjoyment of freedom of association on the workplace.

1. 2. 2. 2 The bargaining process.

Section 35[70] of the EReIA provides for the promotion of good employment relations to make the employee/worker-employer relationship fluid as it was held in the case of *State Bank of Mauritius v Jagessur*[71]. Collective bargaining involves the acceptance of both the workers/employee and the employer on matters such as work conditions and wages or salaries.

However as it was held in the case of *Federation of Civil Service v State of Mauritius*[72] which quoted the precedent case of *Collymore v AG Trinidad and Tobago*[73], the *raison-d'être* of a trade union is to engage in collective bargaining with the employer on its members but the right to collective

bargaining flows from the right of freedom of associated but both cannot be equated as being the two sides of the same coin. This de facto means that from the right to freedom of association stems the right to collective bargaining but as it was held in the case of *Associated Newspapers v Wilson*, it is commonplace for a union not to provide collective bargaining facilities to its members. This does not imply that being a member of such a union is of no value. While aptly construing the words "in principle" in the case of *Demir v Turkey*[74], the ECtHR shrewdly evaded the question of a union not providing bargaining facilities to its members. The crux of the matter is whether the trade union is protecting the interests of its members using any lawful means available to it. The right to strike is provided to by section 6[75]of the EReIA. Section 2[76]of the EReIA defines a strike as "an action taken by a group of workers to stop their work or to go slow on their work with an intention to inhibit the ongoing process of production". The interpretation section of the EReIA relating to strikes does not at any place mention "employee". In order to cope with this lacuna, Lord Denning's words in the case of *Tram Shipping Corporation v Greenwich Marine Incorporation*[77]can be quoted:

" A strike is a concerted stoppage of work by men, done with a view to improving their wages or conditions of employment, or giving vent to a grievance or making a protest about something or sympathising with other workmen in such endeavor."

The right to strike is definitely the last resort available to workers/employees when negotiations prove futile or end in a deadlock as it was it was held in the case of *Clarrise v Dry Cleaning*[78]. The cases of *Federation of Offshore*
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Workers' Trade Unions and Others v Norway[79]and Unison v UK[80]clearly demonstrate that restrictions posed on the right to strike involves a direct infringement of the right to freedom of association.

1. 2. 2. 3 The " closed-shop" agreement

The right to freedom of association embodies both a positive and a negative right, that is, a right to associate and a right not to associate. A " closed-shop" agreement is an agreement between an employer and a trade union association consisting of accepting to employ people only if they are members of that particular trade union. This being incompatible with the right to not associate is prevented by section 34[81]of the EReIA which states that any closed shop agreement between an employer and a trade union is to be considered void. The cases of Young, James and Webster v UK[82]. And , Sibson v UK[83], Sorensen and Rasmussen v Denmark[84]are all on the same wavelength that where a trade union may refuse membership[85]an individual may as well refuse to become its member.

1. 2. 2. 4 Check-off agreement

By virtue of section 43[86]of the EReIA, a check-off agreement can be considered to be a trade union membership fee which may be deducted from the employee's/worker's salary[87]. The same definition has been given by the Supreme Court in the case of Govt Teachers' Union v Permanent Secretary MoE & Science[88]. The purpose of a check-off agreement is to consolidate a good running of the trade union and its activities through funding as held in the case of Mauritius Free Zone & anor v Mauritian Woollen And Worsted Mills Ltd[89]and for such agreement to be valid, there

must be a document providing for its purpose and how it is to be provided from the wages of the workers/employers. Check-off agreements have been provided by the EReIA by its sections 43, 44 and 45 to enhance the employer-employee's good industrial relations and to provide a more effective tool of securing an effective enjoyment of freedom of association at work. As far as the right to freedom of expression is concerned, it can be deduced that it is appropriately curtailed by some limitations, which, if not present would have led to an abuse of the right to freedom of expression and an imbalance of the rights of the different parties of competing interests. While for the right to freedom of association, the law as it is actually now in Mauritius properly considers the negative right that is associated with it, that is, the right not to associate and has made provisions to prevent any closed-shop agreements.

CHAPTER 2: PROTECTION FROM SLAVERY, FORCED LABOUR AND ILL TREATMENT

Slavery, forced labour and ill-treatment have been a historical worldwide phenomenon whereby human-beings are bought and forced to work against their will and objectified. This chapter will consecrate its first part to protection from slavery and forced labour (2. 1) and its second part to ill treatment on the workplace (2. 2).

2. 1 Protection from slavery and forced labour.

2. 1. 1 Definition and scope of slavery

A slave, by a simple definition, is a human being, against his will, who becomes the property of another human being by a sale " contract"[90]. The dusty pages of the history of Mauritius all consecrate a chapter to the regime of slavery whereby slaves were brought by Dutch and French colonies to work on the island. Their " employment issues"[91]were regulated by the Code Noir 1723 Indo Océanique introduced by Louis XIV in 1723 as a set of rules to regulate the conduct of slaves. When the British took over the island in 1810, they abolished slavery in 1835 since slavery became illegal in the United Kingdom and hence in the British colonies as well. Unlike other jurisdictions like Australia and France, our Criminal Code does not provide for slavery and forced labour upon a person as being an offence but the provision prohibiting slavery and forced labour in Mauritius is enshrined in section 6(1) and section 6(2) respectively of the Constitution 1968. It states that:"(1) No person shall be held in slavery or servitude.(2) No person shall be required to perform forced labour."

2. 1. 1 Slavery and its jurisprudential approach

The Mauritian jurisprudence is very restrictive concerning the issues of slavery since domestic Courts addressed it when it was already abolished. The decisions of the English Courts will be taken into consideration to cater for the minimal amount of Mauritian cases dealing with slavery. It was held in the case of Mamoojee v Goolam Hossen[92]in obiter that the right to freedom is impeached when someone is held in a state of slavery and is subdued to his master. Before the abolition of slavery, the Supreme Court <https://assignbuster.com/expression-and-freedom-of-association-law-employment-essay/>

used to look into matters brought by slaves on matters concerning their freedom. It was held in obiter in the case of *Ghoolet v Gaytree Textiles*[93] that the labour law that we have in force today is characterised by long term slavery and legislative evolution which is a dynamic process to suit the needs of the society. From the Code Noir 1723 Indo Océanique to the ERA[94] and the ERelA[95], the primary concern was to prevent that the employee-employer relationship be governed by the Civil Code. There have been drastic jurisprudential shifts in the approach of English Courts towards slavery since prior decisions have been rejected, later to be restored. In the case of *Somerset v Steward*[96], the incompatibility of slavery with the principles of natural law was highlighted while in the case of *Butts v Penny*[97], a slave was declared to be a " bien meuble", leading to the conclusion that for a slave to be declared a " bien meuble", slavery would be governed by property law. The approach in *Butts v Penny* was rejected in the cases of *Smith v Brown & Cooper*[98], *Smith v Gould*[99] and *Rex v Inhabitants of Thames Ditton*[100] which held that the land of England is a free land and any person to set his feet on this land is a free man, and can never be a slave. The same approach was adopted in the case of *In the case of Pearne v Isle*[101] which highlighted that a slave is a de facto property of his/her master and considered the case of *Smith v Brown & Cooper* as bad in law and *Butts* as the correct one governing slave trade. *Pearne* was rejected in *Shanley v Harvey*[102], which considered the right of a slave to sue his/her owner. In *Forbes v Cochrane & Cockburn*[103], it was held that even though there is no law preventing slavery in the United Kingdom, yet its incompatibility with the common law providing for an " equal distribution of

justice"[104]is obvious. Slavery is now prohibited in the United Kingdom which is signatory to the European Convention of Human Rights[105]whose Article 4 provides for the prohibition of slavery and forced labour. The issue of human trafficking, which is a different issue but closely linked and associated with slaevry, has been analysed in the case of Rantsev v Cyprus and Russia[106]where the ECtHR held that trafficking is analogous to slavery whereby human beings, without discrimination, are priced, sold and objectified. Human beings cannot be treated as objects and it has been the target of anti-slavery laws to banish such inhuman practice which go against the spirit of human rights.

2. 1. 2 Forced labour and its jurisprudential approach

The difference between slavery and forced labour is that in the latter, albeit that there is control over the " person"; he is not the object of any ownership. In the leading case of Siliadin v France[107], the ECtHR drew the line between slavery and forced labour and made it clear that a domestic servant working without remuneration is not the property of his/her master and hence is not a slave, but a domestic under forced labour. The Supreme Court of Mauritius very recently in the case of Cuber Investment v Ballea[108]held that unilateral contracts of work are devoid of any legal value since they presuppose forced labour which is contrary to the spirit of section 6[109]of the Constitution. In the case of C. N & V v France[110], the ECtHR, while laying emphasis on the fact that a State should provide adequate legal framework for the prevention of the practice of forced labour, further stated that a distinction should be made between forced labour and the work provided by orphans for their relatives in exchange of a roof to live

under. However in assessing whether this amounts to forced labour, the type and bulk of activities should be taken in consideration. The case of *C. N v U.K*[111] again stresses upon the obligation of a State to make domestic servitude an offence under its local laws. One cannot claim forced labour for professional services for which remuneration has not been provided, the condition being that such free professional service will further be part and parcel of the person's knowledge in his professional field. In the case of *Van Der Musselle v Belgium*[112], it was held that a barrister who was under pupillage cannot claim redress under the law provision providing for forced labour for providing advice to the client(s) of the lawyer under whose wings he was a pupil due to the fact that this would be an add-on to the profession he is going to embrace later. The same reasoning was applied in the case of *Štefan Bucha v Slovakia*[113] for a lawyer who was not compensated under the legal aid scheme. Detainees and prisoners who work during their penal servitude are not protected under any legal enactment providing for forced labour as they are not even considered as "workers" or "employees". This state of affairs is reflected in strong precedent cases such as *Van Droogenbroeck v. Belgium*[114] and *De Wilde, Ooms and Versyp v. Belgium*[115].

2. 2 Ill-treatment on the workplace

2. 2. 1 Definition and scope of ill-treatment.

Section 7[116] of the Constitution 1968 provides for the protection against inhuman and degrading treatment and reads as follows:

" No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

In the labour law context, the employee/worker-employer relationship must be well founded upon both mutual trust and respect. Therefore, the worker/employee is entitled to a minimum amount of respect on the part of his employer and the employer should refrain from belittling him in front of his colleagues and he should not be verbally abused. This would provide a favourable working environment for the worker/employee whose productivity may in turn be boosted. Lord Denning in the case of *Wadham Stringle Commercials (London) Ltd v Brown*[117]held that:

" Just as a servant must be good and faithful so an employer must be good and considerate."

2. 2. 2 Inhuman or degrading treatment and its jurisprudential approach

What is the trend in Mauritius? Again, precedent cases are of help. For instance, in the case of *Bibi v Law Foon*[118], it was held that if ill-treatment, even though a fundamental human right, is of a daily basis and blends with the gross nature of the employer, it will not be considered as such. The worker/employee being displeased with his superior's conduct does not justify ill-treatment; it should be intolerable such that the worker/employee cannot be productive anymore. In the case of *Jugoo P. v Microwise Computer Mart Ltd*[119], it was held that the mutual respect and trust between a worker/employee are terms which are tacitly echoed between the lines of a contract of work. On top of the alleged abusive language of the employer, the Supreme Court also considered the appellant's conduct which was

termed as "not a model employee". In the case of *New Battery Manufacturers v Ramtohil*[120], the Supreme Court stressed that the mere fact that the worker/employee is subject to verbal abuse is not enough, the words must contribute to the worker's decision of leaving his job, amounting to a constructive dismissal. In the case of *Razafindrabe v Overseas Fashion Ltd*[121], it was held that the worker had not been ill-treated due to lack of proof. The study of various case law leads to the conclusion that the concept of ill-treatment, even though a fundamental human right, is very difficult to prove, and even if it is proved, it needs to be balanced with other conditions that contributed to it.

CHAPTER 3: PROTECTION FROM DISCRIMINATION

The workplace can be both the reason why discrimination is rampant and also the very platform where discrimination can be eradicated to promote a non-discriminatory labour market. This chapter will consider the definition and scope of discrimination (3. 1), the aims of section 20 of the ERA[122], section 38 of the ERA[123]and provisions of the EOA[124](3. 2), the grounds for discrimination (3. 3) and the equal pay and the pay gap (3. 4).

3. 1 Definition and scope

The central word to all non-discriminatory legislations which have been drafted is "equality". In his quest to attain equality in the employment field, to back the section 16[125]of the Constitution, the legislator has drafted the EOA[126]which caters for discrimination arising out of employment issues.

The definition of discrimination provided by Section 16 of the Constitution is

thus:" In this section, " discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour, creed or sex ..." The classic case of *Police v Rose*[127]poses the principle that everybody is equal in the eyes of the law and on none should be inflicted upon discriminatory treatment, implying that everybody should be treated equally.

3. 2 Aims of section 20 of the ERA, section 38 of the ERA and provisions of the EOA.

Both the EOA (section 2)[128]and the ERA (section 4(5)[129]) add sexual orientation, marital status, and impairment to the grounds on which discrimination can occur, indicating that the concept on the grounds of discrimination is very dynamic and may eventually evolve with time. The EOA also caters for situation of sexual harassment at work.[130]The ERA attempts to eradicate discrimination by providing in its section 20[131]for the equal pay for the same type of work and in its section 38[132], providing that a worker's/employee's work agreement if terminated on those grounds be tantamount to a discriminatory treatment. The EOA provides for meager exceptions[133]where different treatment would not amount to discrimination in the case where only a person of particular sex is suitable for the job. This limits the scope of the EOA. In the cases of *Motor General Traders v State of AP*[134]and *Kedar Nath v State of West Bengal*[135], it was held that if equality resides at the heart of a particular classification, then it is not discrimination. In the case of *Hampson v. Dept of Education and Science*[136], the ruling was based on the case of *Ojutiku v Manpower*

Services[137]where it was held that justification should be based that such discriminatory treatment is necessary for the smooth running of his enterprise. A parallel can be made with section 13[138]of the EOA which provides for an exhaustive list of situations where a prospective employer may discriminate on solid grounds. In the case of London Underground Ltd v. Edwards[139]it was held that since the employee was a very good and long term one, the employer should have done his best to adjust his premises. The EOA[140]provides for three types of discrimination namely, direct discrimination (section 5)[141]which occurs when a person by reason of his/her status is treated less favourably, indirect discrimination (section 6) [142], where there is a conditional burden on the discriminated person and not on others due to his/her status and discrimination by victimization (section 7)[143]whereby a different treatment is served upon the aggrieved party when he threatens to denounce any discriminatory treatment on part of the discriminator. To prove discrimination, as considered by English Courts, the concept of comparators has been widely used, meaning that a concrete or abstract person (an in concreto appreciation or an in abstracto appreciation) would be used by the Courts to appreciate how less favourably the person alleging to have been discriminated has been treated compared to the comparator. For example the comparator of female alleging sex discrimination by her employer would be a male working within that same enterprise. In the case of Shamoon v Chief Constable of the RUC[144]the question that should be governing the issue should be " why has a different treatment been provided to the person alleging discrimination?" In the case of Balmoody v UK Central Council for Nursing, Midwifery and Health[145]it

was held that albeit the claimant has free choice of his comparator, the Employment Tribunal may reject it and form its own hypothetical comparator to assist itself in its judgment. In the case of *Tees BC v Aylott*[146] it was held that to construct a good hypothetical comparator, all the factors that led to the claimant's differential treatment should be considered. A rather conflicting approach was used when considering discrimination on the basis of pregnancy. For instance in the case of *Dekker v Stichting Vormingscentrum Voor Jong Volwassenen Plus*[147] it was stated that pregnancy being a natural stage of a woman's life does not require a comparator in cases where it is a ground of discrimination. In addition in the case of *Madarassy v Nomura International Plc*[148], it was held that a comparator might provide assistance to the court. The Mauritian Jurisprudence does not expressly consider the issue of comparators but in the case of *Guyot v Govt of Mauritius*[149], where it was averred that section 4 of the Employment Non Citizen Restriction Act was discriminatory since it gave more rights to the Mauritian male married to a non-Mauritian female than vice versa, the decision tacitly gives the impression that the judge considered a comparator to hit the nail on the head but the law was held non discriminatory since Parliament can legislate on such matters to prevent an influx of illegal immigration. This in turn does not give Parliament the freedom to legislate on matters which would de facto provide for discriminatory treatments by status.

3.3 Grounds for Discrimination.

The Mauritian legislation neither gives proper definitions of the grounds of discrimination nor provides any indication on measures that should be taken

by employers to prevent any unintentional discrimination since employers are more often labeled as the " bad guys" as it was held in the case of *Griggs v Duke Power*[150]. Amendments to the EOA highlighting those issues would assist the Courts in construing the concerned legislations. The grounds provided by the different legislative frameworks governing discrimination cannot be considered as exhaustive since as it was held in the case of *Khedun v PSC*[151], the mere presence of a person on the selective committee amounted to bias and discriminative against the prospective employee. Case law provides a flourishing approach to the different grounds of discrimination provided by the Constitution 1968, the ERA and the EOA. For example, the issue of sex discrimination has been considered in the case of *Thakooree v PSC*[152], where the complainant alleged that the fact of requiring additional qualification(s) for the post of Midwifery for female nurses was discriminatory but did not succeed her claim since her action was time barred. Protection against sex discrimination is also afforded to people who undergo sex re-assignment as it was held in the case of *P v S*[153]whereby an employee was dismissed after having conducted a sex change surgery. The mere intention of a gender-reassignment triggers a protection under the anti-discriminatory laws in force as held in the case of *Chessington v Reed*[154]. The assumption that woman is unfortunately the weaker sex, would take time to be eradicated from the biased mind of the society and anti-discriminatory legislations are here to eradicate such mentality. Discrimination on the basis of HIV/AIDS falls under the impairment umbrella as provided by section 2[155]of the EOA. In the case of *X v Y*[156]it was held that the reason why prospective employees should not be

discriminating against prospective HIV/AIDS infected workers/employees is that medical research has proven that they are aptly able to support the same load of work as a normal person not infected with HIV/AIDS. This tallies with the reasoning that everyone has a right to livelihood. In the case of *Maryse Chung Tze Cheong v The Mauritius Sugar Industry Research Institute*[157], the complainant succeeded in obtaining damages claiming discrimination on the basis of marital status where her employer offered more travelling tickets to married employees than single ones and this constituted a discriminatory treatment against the single employees.

Discrimination on the basis of one's age has been considered in the case of *Hodgson v Greyhound*[158] where a bus line company placed an age limit of 35 years on its drivers, it should justify the age limit in the absence of which this would be discriminatory to those falling in the subset of under 35 years old. Experience and knowledge are potential justifiable reasons for curtailing age discrimination, but there is a loophole in our current law whether these are acceptable or not. Disability is one ground of discrimination which has received ample consideration by the courts, and this may be because disabled persons are susceptible to be stereotyped as incapables. It is good here to have its impact on the workplace, for example in the case of *Rugamer v Sony Music*[159] it was held that disability refers to some physical or mental inaptitude. The cases of *Cruikshank v Vaw Motorcast*[160] and *Law Hospital v Rush*[161] held that in assessing impairment, work conditions should also be taken into consideration. This leads to the thought that a worker/employee should not be discriminated for an inability caused by work conditions. However if the inability caused by

work conditions is affecting his productivity; this situation may not be suitable to assess the impairment. In the case of *Morse v Wiltshire*[162], where the disabled employee could not drive, it was held that if the employer took all the necessary measures to adjust the premises to adapt to the inability of the disabled person, then even though he discriminates and sacks the employee, he will not be liable. In the cases of *Kenny v Hampshire Constabulary*[163]and *Clark v Novacold*[164], it was held that a line needs to be drawn between adjustments and personal care. A novel concept was adopted known as " associative discrimination" in the case of *Coleman v EBR Attridge Law LLP*[165]whereby an employee had been discriminated by virtue of her taking care of her disabled son. Such a concept cannot be extended to our law since it is nowhere provided, neither by the EOA[166]or the ERA[167]. The issue of discrimination on one's sexual orientation is a new concept adopted by the EOA[168]and the ERA[169], because the word " sex" does not extend to " sexual orientation" as it was held in the cases of *White v British Sugar Corporation*[170]and *Smith v Gardner Merchant*[171]. Similarly it is more important to have its impact on the workplace. In the case of *Grant v South West Trains Ltd*[172], the fact that travelling incentives were provided to male spouses of females and not to female partners of females was held to be discriminatory. In the case of *English v. Thomas Sanderson Blinds*[173]it was highlighted that the mere intention of the employer to create a homophobic attitude is enough to amount to harassment and his ignorance of whether any of his employees were homosexuals is no defense to him. The legislator's intention can be guessed uprooting from the protection from discrimination on the basis of religion

that he wanted to make a parallel with the right to freedom of religion. A decision which has been the spotlight of much criticism is the English case of *Ahmad v ILEA*[174] where a Muslim teacher sued his employer unsuccessfully basing his claim on the right to practice his religion for prayers on Friday afternoons whereby the time allocated would be deducted from his salary. The rationale behind this judgment is that if such a situation would arise, then many other people from different religious backgrounds might claim full day pays due to absenteeism based on religious attendance. Sexual harassment is also considered discriminatory since it is a different treatment provided to the victim and is catered for by Section 25[175] of the EOA which provides that sexual harassment should be prevented by any employer or his agent on work premises. In the case of *Driskel v Peninsula Business Services Ltd*[176], the English Court considered that where no definition of "sexual harassment" is provided by statute, its interpretation may lead to confusion and become a subjective one. This situation is curtailed by Section 26[177] of the EOA which even provides a list of situations where sexual harassment might occur. In the case of *Ministry of Labour & Industrial Relations v Marie Lydia Zialor*[178], it was held that a body search constituted sexual harassment if the victim is asked to remove all her clothes for the inspection. In the case of *Chief Constable of Lincolnshire v. Stubbs*[179], it was held that the limit-line of sexual harassment may be elasticized from the premises of the employment to the places where social gatherings linked to the employment are conducted. The EOA does not specify in any of its provisions whether the sexual harassment needs to have taken place on the premises of the employment, so a good assumption, considering the reasoning

behind Chief Constable of Lincolnshire v Stubbs, would be any sexual harassment linked with the employment.

3. 4 Equal pay and the pay gap

It is a global phenomenon that sex discrimination has a major impact on pay equity. The concept of equal pay for the same work is tainted since it is commonplace that men are paid better than women for the same work in the same enterprise and this is definitely in line with sex discrimination occurring on the workplace. The concept of equal pay is highlighted by Section 20[180] of the ERA to solve the problem of wage differential. The condition for claiming equal pay as held in the case of Scullard v Knowles[181] is the same pay claimed for the same job within the same enterprise. In Hayward v Cammell Laird[182], the House of Lords, on construing the meaning provided by the EPA, held that if a man's contract contains more advantageous incentives than a woman's contract for the same job within the same enterprise, then the woman's contract would be considered as impliedly having those terms. In the case of Beneviste v University of Southampton[183] it was held that albeit the woman's wages was lower than her male colleagues, her contract of work was identical to that of her male colleagues and her pay fell within the pay scale to which she agreed. The same rationale was adopted in the case of Barry v Midland Bank Plc[184]. In the case of Clay Cross v Fletcher[185] it was held that if an employer uses personal excuses as a defense, then this would nullify the reasons why the EPA was brought into existence. In the case of Enderby v Frenchay[186] it was held that where different wages for the same kind of job have been the results of a different history and processes of negotiations, this will not be

treated as being discriminatory. This goes to the effect that maybe the legislation provides an illusionary concept of equal pay. The newly adopted EOA[187] is yet to prove its effectiveness and it is quite clear that to promote equality and to protect employees/workers from discrimination which is a right inherent to a human being, the legislator has done its share to cater for discrimination-related issues concerning employment. The EOA was promulgated only very recently in Mauritius and precedent cases are yet to be awaited. Jurisprudence that is yet to embrace this new law will give the verdict whether the goal of this legislation has been attained or not.

CHAPTER 4: THE RIGHT TO A FAIR TRIAL OR PROCEDURAL FAIRNESS PROTECTION FROM DISCRIMINATION

The rapid flair that industrialization has brought about in Mauritius has created a vicious circle concerning the law of dismissal in practice due to its complexity and impreciseness[188]. This chapter will be a profound study of the procedure that is to be followed to dismiss a worker/employee, should it follow strict rules or does it vary on a case to case basis? For the purpose of getting to the roots of procedural fairness, the right to a fair hearing and its extrapolation to labour law will be considered (4. 1) followed by procedural fairness in the concept of employment law(4. 2) and the ratio decidendi of the very recent English case of *Mattu v. University Hospitals Coventry* will be analysed (4. 3).

4. 1 The right to a fair hearing and its extrapolation to labour law

The right to a fair hearing is an inherent human right provided by section 10[189] of the Constitution. In simple terms it means that when a person is charged with a criminal offence, he is to be afforded a fair hearing by an impartial and independent court or tribunal. A parallel can be made with section 38(2) (a) (ii) of the ERA which provides that no employer shall dismiss his worker/employee without giving him/her a chance to explain himself/herself of any alleged misconduct as held in the cases of *Balgobin v Carrimbaccus*[190] and *Panday v The JLS*[191]. The primary purpose of allowing the employee to defend himself is to protect his right to work and discourage the employer from dismissing him as held in the Privy Council Judgment of *Bissonauth v SIFB*[192]. In the case of *Expanda v Ducasse*[193] as well as in the case of *Links v Rose*[194] and *Castleman v Appledore*[195] it was held that a chance given to the worker/employee for rebuttal of complaints against him is a "legal requirement" and should not be taken for granted. As put out by *Janice Payne* and *Jessica Fullerton*[196] the rationale behind the rule of procedural fairness can be broadly categorized under two Latin maxims being "audi alteram partem" ("hear the other side") and "nemo iudex in sua propria causa debet esse" ("no one should be a judge in their own case"). The second Latin maxim seems to be paradox since the eventual judge of the disciplinary hearing would be the employer which implies a serious conflict of interests. The cases of *Liebenber v Brakpan Liquor Licensing Board*[197] and *United Bus Service v Roheeman*[198] made it clear-cut that the rule against bias extends to any person who is going to decide on the rights of others. The logic that follows is <https://assignbuster.com/expression-and-freedom-of-association-law-employment-essay/>

that the employer is also included in the category of such decision-makers. The rule against bias prevents the decision-maker from having an opinion before judging on the rights of the worker/employee as it was held in the cases of *Ntsibande v Union Carriage & Wagon Co Pty Ltd*[199], *Maliwa v Free State Consolidated Gold Mines*[200], *Mineworkers Union v Consolidated Modderfontein Mines*[201]and *Bissessor v Beastores Ltd*[202]. The test to be applied to decipher whether the decision-maker has been biased or not is the "reasonable man" test as it was held in the case of *BTR Industries v MAWU*[203]. The "reasonable man" test means that someone who assists the proceedings should, by the way they have been conducted, be of the firm opinion that the decision-maker is indeed unbiased. It is trite law as it was held in the case of *Hotelicca v Armed Response*[204]that a person with any close association or relationship with the matter is considered as a biased person. In the cases of *Sappi Fine Papers v Yumata*[205]and *Anglo American Farms v Konjwayo*[206], the South African Courts admitted that the approaches of fairness and bias in disciplinary hearings are not on the same wavelength. Unfortunately in practice, on many occasions, the chairman of the disciplinary hearing is the employer, who is judge and party at the same time, putting a question mark on the rule against bias. The readiness to make a legal requirement the duty on the employer to conduct a fair hearing stems from the ILO Recommendation No. 119 as considered in the cases of *Savanne Bus Service v Peerbaccus*[207]and *Happy World Marketing v Agathe*[208]. A non-exhaustive list of the many instances where an employer should allow the worker/employee for explanations for his/her

alleged misconduct has been explained in the case of Pareathumby v Bowman International Sports[209]where it was held that:

" An employer who is, in the best interest of the company, minded to terminate his employee's employment on account of shortcomings, be it in the latter's conduct, attitude at work, dissensions with or contractual relation with other members of staff, must give the employee an opportunity to offer his explanations in the matter and failure to do so amounts to an unjustified dismissal under section 32(2)(a) of the Labour Act".

4. 2 Procedural fairness in the concept of employment law

The procedure to be followed prior to the dismissal of a/an employee/worker alleged of misconduct does not require adherence to any strict formality concerning a particular procedure that needs to be complied with, as in criminal cases under section 10 of the Constitution. In the case of Mungur v Société Usinière du Sud[210]the Supreme Court stated that the rule to hold a disciplinary hearing before dismissing an employee is an obligatory one and even a police enquiry shall not tamper with it. In the cases of Bundhoo v Mauritius Breweries Ltd[211], Sagar Hotels & Resorts Ltd v Sewdin[212], Earl v Slater Wheeler Ltd[213]and Maunick v Undersea Walk[214]the obligatory nature of the holding of disciplinary hearing prior to dismissal was confirmed again. A derogation to the general rule of conducting disciplinary hearings will not be a breach of the right to a fair trial in cases whereby there have been constructive dismissals as it was held in the case of Grewals v Koo Seen Lin[215]and where the person who is the object of the misconduct is the person in charge of human resources within the enterprise as held in the

case of Rolfo v Cathay Printing Ltd[216] or where the employer catches the employee committing the misconduct within the enterprise as it was held in the case of Sewtohul v FSC[217]. Courts and Tribunals guarantee a limited interference with the business of hearings concerning dismissals but have sure set a trend on how these should be conducted. The rules are not codified but may vary according to the different circumstances of each case which should be judged on its own merits. The concept of procedural fairness can vary from a simple explanation as it was held in the case Société Malherbes v Beelur[218] to the holding of a formal disciplinary hearing as it was considered in the case of Gurib v Training & Employment of Disabled Persons Board[219]. It was held in the cases of Tirvengadam v Bata Shoe[220], Mamode v. Doger De Speville[221], Gopaul v Le Meridien[222] and Tranquille v P. R Limited[223] that the conduct of a disciplinary hearing need not follow certain strict procedural rules because its purpose is to find out whether there has been misconduct and to give a chance to the worker/employee of the alleged misconduct to defend himself/herself. . The corollary of a disciplinary hearing resides in fairness as it was held in the cases of United Bus Service v Roheeman[224], Marie v Magasins Populaires[225], Murray v Anderson[226] and MGI v Mungur[227]. The Supreme Court attempted to set a standard on how disciplinary hearings should be conducted in the case of Cie Mauricienne D'hypermarchés v Rengapanaiken[228] by stating that it is well clear that it should not be a formal hearing as in court proceedings but should not be a disciplinary hearing just for the sake of being one, there should be some norms that should be followed starting with the simplest one, that is, asking the

worker/employer to explain himself/herself. Furthermore the duty is on the employer to ask for clarifications from the employee as stressed on in the case of *Knk Marketing Ltd. v Cheenoo*[229]. Similarly, as it was held in the case of *Princes Tuna v Liong Sook Pin*[230]the employee should take all necessary requirements so that the employee is informed about the holding of the disciplinary committee. By contrast to Mauritian law, the legal system in the United Kingdom provides for a Code of Practice on Disciplinary and Grievance procedures[231]but as provided in the case of *Devis v Atkins*[232]and *Polkey v Dayton Services Ltd*[233], the procedures are just guidelines and do not have force of law as such. Failure to stick to such guidelines would not necessarily render a dismissal unfair provided that the employee has been given an opportunity to be heard. The relevance of such a Code of Practice can be put in question if its non-adherence is not sanctioned. Besides the efforts of its drafters to set up norms for procedural fairness in dismissals, there seems to be a reluctance to make it a rule of law and consolidate the right to a fair trial which is a basic human right. What is common in most employment contracts is that employers already include clauses, known as procedural agreements, in employment contracts whereby they indicate what procedures should be followed in the case of a misconduct on the part of the worker/employee. In the cases of *Fraser v Air Mauritius Ltd*[234], *Bezuidenhout v Air Mauritius*[235]and *Air Mauritius Ltd v Captain Louys*[236]it was recognised that the procedural agreement was valid only in the case where the performance of the employee was to be desired or when there has been misconduct. This reflects the employer's keenness to follow procedural rules by inserting in the contract of

employment a clause of procedural agreement which binds both parties. The " accessory" rights that accompany the right to fair trial in section 10 of the Constitution are also implied when considering the issue of procedural fairness[237]. Therefore, the employee has a right to legal representation[238]as it was held in the South African cases of NUM v Kloof Gold Mining Ltd[239]and SAAWU v Steiner Services Ltd[240]. In addition, the employee has a right to appeal to the decision of a disciplinary hearing. The reason for the right to appeal has been given in the case of Clark v Civil Aviation Authority[241]where it was stated that the purpose of an appeal is to remedy all the defective issues which have been canvassed during the hearing. This provides for a consolidated degree of fairness afforded to the worker/employee being alleged of misconduct and further enhances on the importance of a right to a fair trial. It is to be noted that section 38(2)(a)(v) [242]of the ERA provides that dismissal should be effected within 7 days following the holding of the disciplinary hearing. This section, having been reproduced in similar terms as section 32(1)(b)(ii)(c) of the Labour Act 1975 , the case of Sukhoo v Bank of Mauritius[243]can be quoted in which it was held that dismissal should be effected within time limit of 7 days after the conduct of the disciplinary hearing .

4. 3 The implications of the case of Mattu v. University Hospitals Coventry[244]

The case of Mattu is a recent English decision which has further restricted the ambit of the employee to challenge his employer's decision to dismissal by relying on the Article 6[245]of the ECHR. In this case, the Court stressed on the fact that claimants may rely on the right to a fair trial concerning

disciplinary proceeding only if his civil rights are being breached and went further stating that the right to work and engage in a professional career is a civil right and only if the dismissed employee is susceptible to not being employed again then he has a recourse based on the right to a fair trial. A contrast was made with the case of *Kulkarni v Milton Keynes Hospital Foundation*[246] where the right to a fair trial was properly applied since the career of dismissed employee was at stake. This included the civil right to hold a profession. But in the case of *Mattu* it was held that the employer's right to dismiss an employee finds its origin in the contract of employment and that Article 6[247] of the ECHR only caters for civil rights. This reasoning further restricts the situations whereby a worker/employee can claim unfair dismissal basing himself/herself on the right to a fair trial. This very recent reasoning has further limits the ambit of procedural fairness considering dismissals having its inspiration the basic human right of the right to a fair trial.

CONCLUSION

No legal system is perfect and it is through consideration of these lacunae that the Mauritian legislator will consider amending the law to suit the metamorphosing needs of the society at large. The flagrant loophole is that both the ERA and the ERelA give the impression that they cater for the rights of the workers only, not for rights of the employees. By virtue of section 2 of the ERA[248], a worker is defined as a person whose basic wage salary per annum does not exceed Rs. 360, 000. The strong precedent cases *Maxo Products v P. S Ministry of Labour and Industrial Relations*[249] and *Kosseal* <https://assignbuster.com/expression-and-freedom-of-association-law-employment-essay/>

v Dauge^[250] all confirm the definition of a worker. Even though section 2^[251] of the ERA considers workers in the global sense and does not classify them as per their wage earning per year, construing these two pieces of legislations becomes a confusing puzzle, especially that the ERA gives the clear impression that its application is restricted only to workers, not employees. It is rather on a positive note to observe how the Mauritian legislator has catered for both the rights of the worker/employee and employer by restricting the right to freedom of expression of the worker/employee. However, it has been noticed that for guidance considering the law of breach of confidence, eminent judges turn to English case law. It would have been an innovative step if rules concerning the law of breach of confidence were codified and given force of law to suit the Mauritian context. The very recent adoption of the EOA^[252] poses a difficulty in the assessment of its effectiveness because till date there are no precedent cases whereby the issues which are canvassed are based on provisions of the EOA. Furthermore an extension of the grounds under status by adding " language" to it would have been very favourable, particularly in considering the hypothetical example where language teachers in primary schools are deprived of the opportunity to be promoted as Deputy Head Teachers as compared to normal primary teachers. It can be foreseen that time and again the grounds under which discrimination occur which are catered for by the EOA will be extended to suit the needs of an evolving society. Last but not the least, the failure of judges to construe the fairness concept behind the right to a fair trial is very obvious. They even fail to acknowledge the reign of basic human rights in cases where the employer

should decide on the rights of the worker/employee. While assessing whether the worker/employee has been given an opportunity to explain his/her alleged misconduct, they remain very reticent and silent on the fact that in most disciplinary hearings paradoxically the employer being judge and party at the same time, eventually decides on the outcome of the hearing. This state of affairs obviously defeats the purpose of the basic human right of the right to a fair trial. Taking into consideration the violation of this basic human right, the fact that the employer should not chair disciplinary proceedings should be considered by legislation drafters. As the saying goes, "action speaks louder than words", codifying laws is one thing, putting them into practice is another.
