

Reason for an eoa law employment essay

Law



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This chapter describes discrimination (the corollary of the EOA), while analysing its different forms, grounds and conditions for a discriminatory act to fall under the purview of the EOA.

1. 2Definition

Does discrimination occur when CPE students are awarded star schools on the basis of their results?[1]A just definition of the term discrimination was given in the case of *Matadeen v Pointu*,[2]in which redress was accordingly sought on the ground of discrimination regarding CPE exams, it was held that:" Discriminatory' is defined in section 16(3) to mean the affording of 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."" In this case their Lordships held that there was no discrimination, since the matter " did not fall within any of these descriptions."

1. 2. 1 Reason for an EOA

The Constitution, by virtue of sections 3 and 16, already caters for discrimination;[3]section 17 has further given wide powers to the Supreme Court[4]whereby any person who alleges an infringement of his rights under sections 3 to 16 may apply for redress.[5]Therefore the question arising is: what is the need for an EOA? The Constitutional anti-discriminatory framework, although conceived four decades ago, has its protection limited to only seven grounds, namely: 1. Race2. Caste3. Place of origin4. Political opinion5. Colour6. Creed7. SexMoreover, in the Privy Council case of *Maharaj v AG of Trinidad and Tobago*,[6]Lord Diplock observed that the Constitution of Trinidad and Tobago is only limited to public law and not private law. Its

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Constitution, similar to Mauritius, provided protection against discrimination on narrow grounds. This case was the keystone for the promulgation of an EOA in Trinidad and Tobago in 2001, which may act as a model for Mauritius, since both countries have similar cultural-diversity and legal framework. The case of R. C Diocese of Port-Louis v MOE[7]held that:" Section 16 cannot... be interpreted... to mean that a person acting in a private capacity is... entitled to practice discrimination." Therefore unlike the South African Constitution, [8]which guarantees protection against discrimination in both sectors, section 16 only protects against discrimination by public officials,[9]and does not distinguish between citizens and non-citizens.[10]Hence, the scope needed widening. The legislature accordingly promulgated the EOA to consolidate the self-contained provision of section 16 and backs it up with additional grounds of discrimination. It is thus a type of ' umbrella-legislation' which covers what the Constitution does not.

1. 3Forms of Discrimination

The EOA provides for three types of unlawful discrimination: Direct discrimination[11]arises when a person is treated " less favourably"[12]than another, in a similar situation on the ground of his/her status. The test for determining direct discrimination, was laid-down in the case of R v Birmingham,[13]whereby: There must be a discriminatory act. Had it not been for the victim's status, he/she would not have been treated less favourably. In practice, the discriminatory behaviour is more subtle. This is why the EOA also sanctions indirect discrimination. Indirect discrimination[14]involves the imposition of a condition that apparently makes no differentiation, but has an adverse effect, disadvantaging a person

due to his/her status. For example, in the case of *Mandla v Dowell-Lee*, [15]obliging Sikh bus conductors to wear company caps was considered as indirect discrimination. Such conditions are sometimes tailored in a way to penalise a particular victim. Discrimination by victimization[16]occurs where a person is treated less favourably when he threatens, is suspected to have or has reported any discriminatory acts performed by the discriminator. In the case of *McCammon v Sally*[17]an employee being dismissed due to an accusation of racism against his employer was held to have been victimised on grounds of race. These types of discrimination apply, unlike a widespread belief, not only in employment, but in every sphere, as per sections 5, 6 and 7. As mentioned earlier, the EOA prohibits discrimination on the ground of status, which includes:

1. 4Grounds of discrimination

In order to properly define the grounds of discrimination, case laws and statutes from Mauritius as well as other jurisdictions will be used. This is because the EOA contains no express definition of such grounds. Though, a clear definition of the grounds, as provided by the EOA of Trinidad and Tobago, would have shed light for statutory interpretation.

Age

Age discrimination is an issue perceived mostly by elderly persons.

Sometimes, as soon as the receptionist is aging and is no longer as attractive, she is sent in the 'backroom'. In the Case of *Homer v Chief Constable of West Yorkshire Police*,[18]reserving promotion opportunities only for young workers constituted indirect age discrimination. Unlike the Employment Act 1946 (US), which prohibits age discrimination touching <https://assignbuster.com/reason-for-an-eoa-law-employment-essay/>

people who are 40 years old or older, the EOA provides protections for all individuals, regardless of their age.

Caste

In Mauritius, caste discrimination finds its origin from a feudal structure of India, which has unfortunately been cultivated. It finds its origin from the Spanish word 'casta', meaning lineage, race or breed.[19]

Colour

The word 'colour' here means skin colour. Such discrimination occurs mostly when someone is treated differently due to his/her skin colour, or explicitly referred to as 'black'[20]or even 'white'.[21]

Creed

Creed may be interpreted as 'religious creed'[22]or 'religion'.[23]Section 11 of the Constitution also protects the Freedom of conscience, which includes the terms religion and belief. In the case of Bishop of R. C Diocese of Port-Louis v Tengur[24]it was held that:"...a religious authority running secondary schools was not entitled to reserve 50% of the seats to children belonging to a particular religion."[25]Since Mauritius is a multiracial island, such protection also focuses on religious symbols and dress-codes, unlike in Denmark, Belgium and France.[26]In France face-covering in public places is also prohibited.[27]

Ethnic origin

It involves discriminating against individuals due to their social background. Such classification includes:[28]Common languageCultural traditionsGeographical origin. Unfavourable treatment due to one's surname, <https://assignbuster.com/reason-for-an-eoa-law-employment-essay/>

as expressly provided in the "code du travail" in France,[29] may be included under this ground.[30]

Impairment

This ground mostly concerns persons with physical, mental disorder or disease. This ground will be further elaborated in Chapter 2. 3.

Marital status

The EOA also recognises discrimination based on an individual being single, [31] civilly or religiously married, married but living separately, divorced, widowed and single parent.[32]

Place of origin

Unlike the term 'national origin',[33] 'place of origin' does not only concern Sovereign States,[34] but includes rural or urban areas people come from Mauritius itself. According to the EEOC (US), the term also caters for an individual's or his/her ancestor's place of origin.[35] Therefore, this ground includes nationality, indicative that the EOA also protects citizens, as well as non-citizens. Hence, discriminatory acts against Rodriguans on the basis of their origin will fall under this ground, since Rodriguans were considered to have a 'distinct origin' from Mauritians in the case of *Police v Rose*. [36]

Political opinion

This involves a less favourable treatment based on one's political view or affiliation. In *Redfearn v UK* [37] it was held that being a member of a political party was not a sufficient ground for dismissal. The absence of such protection may be considered contrary to the essence of the ICCPR.[38]

Race

Special importance should be attached to discrimination based on race.

[39]Race is an 'elusive term'[40]in most countries; be it in Mauritius, UK or Australia. Nevertheless, according to the EEOC (US):" Race discrimination involves treating someone (an applicant or employee) unfavourably because he/she is of a certain race or because of personal characteristics[41]associated with race."

Sex

In Archibald v Fife Council HL,[42]it was observed that:" A men and women... are opposite sides of the same coin. Each is to be treated in the same way...

Pregnancy apart, the differences between the genders are generally regarded as irrelevant." Thus, requiring a man to do unpleasant works is unlawful.[43]In Batisha v Say,[44]refusing to employ a woman as cave guide regarding it ' a man's job' was held discriminatory. Mauritius, as a State party to the CEDAW, is under a legal obligation to " respect, protect, promote and fulfil the right to non-discrimination for women." [45]Thus, both sexes share equal rights, whether concerning purchasing, holding and disposing land, inheritance, equal pay,[46]trade[47]or education, where there is also no gender disparity.[48]It was only in 1995 that ' sex' was added to the grounds protected under section 16 of the Constitution. Yet, there are still instances of differential treatment against women. For instance, a legitimate child has to bear the surname of his father and not of his mother.[49]Also, the EOA, unlike the Equality Act (EA) 2010 (UK),[50]is silent regarding discrimination against those whom have undergone gender reassignment. In the case of Chessington World of Adventure v Reed[51]discrimination arising

from an intention to undergo gender reassignment was held unlawful under the SDA. Furthermore, Women are statistically less likely to occupy senior positions and high-level jobs. Neither the EOA nor the Constitution provide for the catering of an equal parliamentary representation of women, who currently occupy only 18.8% of the seats. Therefore, the gender gap in the labour market and in politics is yet to be bridged.

Sexual orientation

The SDA did not provide for sexual orientation, since "sex" and "sexual orientation" are poles apart.[52] It was only in 2008, after Mauritius had supported a resolution of the UNHRC on the rights of homosexuals, that the legislature added protection of homosexuals in the EOA and ERiA. The concept of sexual orientation includes heterosexuality, homosexuality and bisexuality.[53] Even the EOA of Trinidad and Tobago does not provide for such protection. This may be a vital step in acknowledging the rights of the LGBT community in Mauritius. In South Africa same-sex marriage is legal, [54] following the case of *Minister of Home Affairs v Fourie*, [55] where it was ruled that prohibiting same-sex marriage was inconsistent with the constitutional right to equality and dignity. UK [56] and France have recently drafted bills [57] which are currently being voted, aimed at introducing same-sex marriages. However, its introduction may raise controversies in Mauritius, because of the "différentes sensibilités religieuses" in Mauritius. [58]

1.5 Conditions

Does discrimination occur when general election candidates are required to include their religion in their nomination paper, failing which the latter would

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be rendered null and void?[59]To be legally recognised, discrimination must be:[60]1. Based on a criterion prohibited by law2. Within the 'scope' of the Act[61]3. Unreasonable and unjustified[62]These elements are interdependent; it is therefore not sufficient for the complainant to simply allege that he/she was treated less favourably.[63]In *Union of Campement sites v Gouvernement of Mauritius*,[64]Campement Sites Taxes imposed only on sites close to the seashore was not discriminatory, since it is not prohibited under section 16 of the Constitution. Likewise, differentiation on the ground of profession does not amount to discrimination under section 16. [65]In *Ace Consultants Ltd v MRA*[66]reference was made to *AG v Alli*[67]where it was observed that:" Our Parliament is sovereign and may make such laws as it chooses, provided it makes none that the Constitution forbids, for then it would be acting ultra vires." Thus, in the case of *J. Luximon v NTC*,[68]the fact that section 26 of the ERIA does not provide for free transportation for workers residing within a radius of 3km from their workplace was not discriminatory, since " the law itself caters for such provision". Following the reasoning of *AG v Alli*, as long as the law is not " inconsistent with the Constitution",[69]it is valid.

1.6 Exemptions

In some areas, discrimination is unavoidable. In *State v Kanojia*[70]it was observed that:" Persons should be uniformly treated, unless there was some valid reason to treat them differently." According to the Human Rights Committee (HRC), differentiation based on reasonable and objective criteria does not amount to prohibited discrimination.[71]The EOA, therefore, provides for minute exceptions, where individuals may be treated differently:

Employers or prospective employers may discriminate if the nature of the work requires it to be executed by only one sex,[72]for instance female carers assisting female patients. Similarly, schools are permitted to discriminate by reason of sex, age or mental and physical state of students; depending whether it is a single-sex school or there are no special provisions for impaired persons. Unlike men, women are afforded, by virtue of the ERIA; [73]maternity leave for 12 weeks on full pay. This aim is legitimate because of the biological realities of pregnancy and childbirth.[74]Even the EOA provides that less favourable treatment against a pregnant woman is direct sex discrimination.[75]Refusing to recruit a woman on the ground that she is pregnant,[76]or dismissing a woman absent on maternity leave[77]are examples of direct sex discrimination. Exceptions are also provided in sports and other areas, where participation is reserved only for certain sex or age group.

1. 7Reasonable test

Discrimination is permitted when it is justified and pursues a legitimate aim. The EOA provides for a reasonableness test in relation to discrimination[78]Therefore an act that would otherwise constitute discrimination will be exempted if it is justifiable in certain circumstances. [79]Yet, there may be different stands as to what may constitute a reasonable justification. For example: denying female applicants the post of prison-guards was held justifiable in US on the ground that they were more vulnerable of being attacked by male prisoners;[80]while this decision was not followed in UK.[81]It should be noted that if a less favourable treatment is not justifiable, it will therefore be unlawful.

1. 8Meritocracy

Meritocracy is the sign of a truly democratic and equitable society. It ensures that every individual possessing the same prospective will be equally treated and given the opportunity to attain his objectives in various fields of activities of his choice and that no one will be disadvantaged by reason of his status. The purpose of the EOA is not to make every individual equal; in fact, no law can do so. Instead, it provides equal opportunity; a ' level playing field' for all, irrespective of their status. Is it fair to have a race, with an unequal starting line, but an equal finishing line? Therefore, this shows the need for the act to consider such a vital matter. Following Singapore, a country advocating meritocracy at all levels, the EOA seeks to ensure an equalised starting point for all individuals. In this manner, seats will be awarded only to the most deserving candidates.