

The equal opportunities commission law general essay

[Law](#)



This chapter provides an overview of the institutions setup under the EOA in order to enforce its provisions. The EOA establishes under its wings: The Equal Opportunities Commission[1]The Equal Opportunities Tribunal[2]

3. 2 Equal Opportunities Commission

The EOC is a body corporate,[3]established to enforce the provisions of the Act and receive complaints of alleged acts of discrimination and solve them by means of peaceful conflict resolutions. Similar to the HREOC (Australia), the EOC has much Autonomy and independence, allowing it to report directly to the President of the Republic. The main mandate of the Commission is to ensure that no person is treated unfairly by reason of his/her status.

3. 2. 1 Composition

The Commission, already operational, consists of a Chairperson and three members. The Chairperson should either have been a judge, a magistrate or law practitioner with more than 10 years' practice. As for the members, at least one of them must have been a law practitioner for not less than 5 years. Such requirements are very indicative that such members (legal professionals) would be fit to interpret the relevant sections of the EOA, rather than lay persons. The members are appointed by the President of the Republic on the advice of the Prime Minister, after consulting with the Leader of the Opposition.[4]Any member may be removed in the same manner, in case of ineffectiveness. Such powers of appointment and removal may however affect the independence and effectiveness of the body, especially if there are conflicts between the President, Prime Minister and Opposition.

3. 2. 2 Functions

The duty of the EOC, as set out by section 27(3), is to do all within its means to eliminate discrimination and promote equality and good relations between persons of different status. In addition to considering complaints, the Commission, as an expert in discriminatory matters is presumably fit to conduct investigations. On its own motion on matters it considers flagrant (similar to the EA 2010 [UK])[5] or following a complaint. The Commission must also prepare suitable guidelines and codes for employers and the public for the prevention of discrimination and take necessary actions to ensure its compliance. The Commission must also conduct and foster research, educational campaigns and other programmes to promote the concept of equal opportunity and raise awareness, as in UK. Unlike the EEOC (US), the EOC has no adjudication powers. Instead, similar to the HREOC (Australia) and Ontario Commission of Canada, it should attempt to settle differences through conciliation. This concept is highly cheered in UK and New Zealand since it " helps to successfully unclog the arteries of judicial administration, and allows parties... to resolve their disputes at a pace they are comfortable with." [6] However, upon failure of any conciliation or refusal to do so, since conciliation is voluntary, the matter shall be referred to the EOT.

3. 3 Equal Opportunities Tribunal

The EOA has equally set up an EOT, [7] independent from the EOC. It is the first instance jurisdiction in determining whether or not the Act has been breached. The tribunal, not yet operational, will shed light on unresolved

cases, referred by the commission. The Tribunal has jurisdiction like any other lower court and likewise, its decisions are binding.

3. 3. 1 Composition

The Tribunal consists of a President, a law practitioner with more than 10 years' practice, together with 2 members having 5 years' experience in the legal field, human rights, among others. They are all appointed by the Public Service Commission (PSC).[8]

3. 3. 2 Jurisdiction

The Tribunal has jurisdiction to hear and determine complaints referred by the Commission. Regarding urgent matters, it has the prerogative to issue interim injunctions in order to prevent serious and irreparable damage or for the protection of public interest.[9]It may also issue such directives as it considers necessary to ensure compliance with the EOA. It also has the jurisdiction to do what is within its means to reconcile the parties and restore the status quo. This includes ordering compensation, or any other order, such as annulling or changing the terms of a contract, tampered by discrimination; Similar to the Australian discriminatory model.

3. 3. 3 Proceedings

The EOT may sit at any such place and time the president deems fit and shall sit in public, except for a valid reason. The Tribunal may summon witnesses and examine them on oath, like any court of law. Similarly, barristers or attorneys may assist the parties and there are also oral hearings and written submissions as in court.

3. 4Procedure[10]11

It usually starts with a lodged complaint,[12]indicating the ground/grounds of discrimination which has/have allegedly been violated.[13]Particular care must be taken, especially in one-to-one situations.[14]This is why the commission performs a preliminary enquiry to test the genuineness of the complaint. The matter is then investigated[15]to find whether there is sufficient evidence of discrimination to support the case. If no discrimination is found, the parties shall be informed in writing, why the complaint was not considered. This is proof of transparency on the part of the commission. Otherwise, the Commission will summon the parties at the seat of the EOC for a confidential meeting and attempt to resolve the situation through the conciliation procedure provided by the law.[16]It is therefore not an adversarial system. This shows how the law requires the commission to work towards eliminating discrimination, while promoting good relations, at the same time. The agreement reached by the parties may be monetary or otherwise. The resolution takes the form of a written agreement and is registered with the Tribunal for ratification. As from that moment, the agreement becomes legally binding on both parties. However, conciliation does not always work, for example in most sexual harassment cases due of the complexity of the matter. Therefore, if the Commission is of the opinion that conciliation cannot resolve the matter or has been unsuccessful in doing so, it shall send a report, with recommendations, to the parties concerned. If the matter has been resolved within 45 days, the parties must inform the Commission. If no agreement is reached, the complainant has a choice of either the Tribunal or a Court of law to continue his/her proceedings. The

Commission shall only refer the matter to the EOT, with the consent of the complainant. The EOT therefore intervenes if no common ground is found. The parties are then given 14 days' notice of the date of the hearing. The decisions[17]of the Tribunal shall be binding on the parties concerned. Nevertheless, if any party is unsatisfied with the decision reached, he/she has the right to appeal before the Supreme Court, within 21 days from the order of the Tribunal. Such right enables fairness to parties who believe that there were abuses or conflict of interest. The Supreme Court may then: confirm, quash or modify the order or ask the Tribunal for a fresh hearing, where appropriate.

3. 4. 1 Proving Discrimination

As far as evidence is concerned, since discrimination cases are civil cases, "he who avers must prove"[18]and such claim must be proven " on a balance of probabilities." [19]In *Lincoln v Governor General*[20]it was observed that:" Discrimination cannot be presumed, it must be proved, and the proof must consist of facts showing or tending to show, that the different treatment afforded to different persons was attributed wholly or mainly to their respective descriptions." Once a prima facie case has been established, [21]the evidential burden of proof will then shift on the respondent to prove that the act was justifiable.[22]This is contrary to Australia, where the evidential burden never shifts. In UK, a comparator is used to prove direct discrimination.[23]This concept involves comparing a complainant with a comparator[24]to appreciate how less favourably the complainant was treated. For example, for an alleged race discrimination case, the comparator would be one from another racial group. This concept is however

not provided in the EOA, although, it would have greatly assisted the EOT in tackling cases.

3. 4. 1. 1 Motive

Section 16 of the Constitution makes no reference to any discriminatory intention (mens rea).[25]In R v Birmingham City Council[26]it was affirmed that " the intention or motive of the defendant to discriminate is not a necessary condition to liability." In this sense, the case of James v Eastleigh Borough Council[27]provided that in determining discrimination, the motive of the alleged discriminator is irrelevant.[28]Section 8 of the EOA provides same, showing to what extent the act guarantees the protection of potential victims from being discriminated.

3. 5Other Remedies

Taking the example of Sexual Harassment, it is also unlawful under the ERA[29]and the Criminal Code.[30]A complainant may therefore at all times seek remedy through civil or criminal proceedings. The court, however, is not a ' magic wand' for such victims. The taboo surrounding sexual harassment highly discourages victims to report the offence. Moreover, legal proceedings are lengthy, such as the case of Police v Ramphul,[31]where a former magistrate threatened to convict the complainant, had she not agreed to his sexual advance, which lasted three years. As far as the constitution is concerned, an aggrieved party whose constitutional rights have been breached may apply to the Supreme Court for redress by virtue of section 17[32]or 83 of the Constitution. The plaintiff must however exhaust all available remedies[33]and must have a personal interest in the matter for

the Supreme Court to hear the case.[34]This was confirmed in the case of Lincoln, which held that:"...first the petitioner would have to satisfy the court concerning their locus standi with respect to alleged breach of section 16." Also, as per the case of Thakoore v PSC,[35]without the plaintiff's precision of which constitutional provision was breached by the defendant (despite a 'vague' indication by the plaintiff that it was sex discrimination[36]under section 3 to 16), the court cannot statute in favour of the plaintiff. The mechanisms, on the other hand, shall guarantee victims of discrimination a rapid remedy, avoiding lengthy litigation. Moreover, the Commission is an ideal platform for individuals who wish not expose themselves in public. The EOA even provides for sanctions in case of breach of the Act, for instance, section 26 provides for a fine not exceeding Rs. 100, 000 and an imprisonment term not exceeding 5 years for the offence of Sexual Harassment, compared to the ERA which provides for a fine of RS. 75, 000 and a sentence not exceeding two years. It should be noted that a complainant cannot seek redress from a court of law and the Tribunal at the same time. He/she must therefore waive his/her right to initiate civil proceedings before any Court in Mauritius, for the Tribunal to be competent to hear and determine his/her complaint. However, this does not apply when a complainant seeks redress under Section 17 or 83 of the Constitution.

3. 5. 1 Compensation

The Tribunal may require a victim to be compensated, in order to restore the status quo. Financial Compensation is also sought in Canada, Australia and UK. Compensation may include an award for personal injuries, sums for loss of income or other expenses incurred.[37]Compensation may also be in the <https://assignbuster.com/the-equal-opportunities-commission-law-general-essay/>

form of apologies, promotion or any other agreement reached.[38] Past cases have shown how the Supreme Court has been very limitative in granting monetary compensations for fundamental rights breaches.[39] The EOA, also provides for a legal limit not exceeding Rs. 500, 000. This is contrary to UK, which removed its compensation limits, following the ruling of the ECJ in the Marshall Case.[40]

3. Evaluation

The mechanisms provided under the EOA ensure its compliance and any derogation of its provisions render the parties concerned liable for breach of its provisions. They can infallibly challenge decisions of public and private bodies. The question arises whether public bodies include independent bodies set up by the Constitution? The Judicial and Legal Service Commission (JLSC)[41] and PSC[42] are Constitutional bodies and are thus autonomous and by virtue of Section 118(4): "In the exercise of its functions under this Constitution, no such Commission shall be subject to the direction or control of any other person or authority." Therefore no authority can demand accountability to the JLSC or PSC. By virtue of the constitution, only the Public Bodies Appeal Tribunal or the Supreme Court can receive complaints against the civil service. Conversely, the EOC is mandated to reconcile and find solutions to disagreements between parties. Thus inviting parties to reconcile is not considered as "directing or controlling" the PSC or JLSC. In this case, the EOC may be able to work within the framework of its mission of conciliation. However, where the EOT is concerned, its powers are limited by the constitution. If PSC happens to escape the EOA, then the scope of the Act would be reduced and no longer correspond to the purpose of its

creation. Therefore, the Constitution must be amended to allow the mechanisms to work without constraints. It is also a matter of much speculation that the PSC shall be answerable to the EOT where the members themselves are appointed by the PSC.[43] This shows the risk of conflict of interest if the PSC were to be made answerable to the EOT. Furthermore, it is paramount to note that in UK, the EHRC may initiate judicial review against public authorities.[44] In the case of *EOC v Secretary of State for Trade and Industry*[45] challenging the Employment Equality (Sex Discrimination) Regulations 2005 since it was not compatible with the Framework Ruling. The EOC however, does not have such powers. Being a specialist agency, the EOC would have been fit to contest any discriminatory decision or act of parliament.