

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

Civil Appeal No.P291 of 2014  
Claim No. CV 2014-00477

Between

**THE DIRECTOR OF PERSONNEL ADMINISTRATION**

Appellant/Interested Party

And

**EQUAL OPPORTUNITY COMMISSION**

First Respondent/Claimant

And

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

Second Respondent/Defendant

**PANEL: NOLAN BEREAX, J.A.  
JUDITH JONES, J.A.  
PETER A. RAJKUMAR, J.A.**

**APPEARANCES:**

**Mr. Russell Martineau SC, Ms. Anoushka Ramsaran instructed by Mr. Sean Julien for the Appellant.**

**Mr. Haran Ramkaransingh for the First Respondent.**

**Mr. Ivory Sinanan S.C. Mr Kelvin Ramkissoon, Mr. B. James for the Attorney General -Second Respondent.**

**Date Delivered: 9<sup>th</sup> December 2016**

**I have read the judgment of Rajkumar J.A. and I agree with it.**

**Nolan Bereaux  
Justice of Appeal**

**I also agree.**

**Judith Jones  
Justice of Appeal**

## **JUDGMENT**

1. On the 6<sup>th</sup> February 2014 the Equal Opportunity Commission (“the EOC” or “the Commission”) approached the High Court for a determination of the construction of certain sections of the Equal Opportunity Act Chapter 22:03 (the “EOA” or “the Act”).

2. Four questions were asked as follows:-

(1) Whether having regard to:-

- a. sections 8 to 14 inclusive of the Equal Opportunity Act, and
- b. sections 121, 123, and 125 of the Constitution and
- c. regulations made or deemed to be made under section 129 of the Constitution and/or section 85 of the Education Act Chap 39:01,  
the Public Service Commission, Police Service Commission and Teaching Service Commission respectively, (collectively the Service Commissions), should be considered “employers” **for the purposes of the EOA.**

(2) Whether having regard to sections 30 to 40 inclusive of the EOA, the Commission can **resume an investigation after a matter has been referred to conciliation and has not been resolved.**

(3) Whether having regard to sections 30 to 40 inclusive of the EOA, the Commission can **resume an investigation in circumstances where a report has been prepared** and published sent to the parties and made available for public inspection but is thereafter re-titled as an interim report.

(4) Whether having regard to sections 39, 41, 44, and 46 of the EOA, a complainant whose matter has been referred to the Equal Opportunity Tribunal (the Tribunal) can **raise issues before the Tribunal that were not investigated** by the Commission.

3. With respect to the first question the trial judge found that the Service Commissions were “employers”, for the purpose of a complaint against an employer under the EOA,.

4. With respect to the third question the trial judge answered this as follows:-

*Any report published in accordance with section 39 is therefore a final report.*

5. With respect to the fourth question he also answered this in the negative.

6. By Notice of Appeal filed on the 5<sup>th</sup> November 2014 the interested party, the Director of Personnel Administration, (the DPA) appealed against the judge’s findings on the first question, and the EOC appealed on questions 3 and 4. The answer to question 2 was not in issue in this appeal.

### **Issues**

7. The issues raised on this appeal therefore are essentially whether questions 1, 3, and 4 were correctly answered.

8. It was contended, inter alia, that it was necessary for the Service Commissions to be considered “employers” for the purposes of the Act in order to inter alia, to promote the objects of the Act and give effect to it, and that accountability and transparency would be best served by making the Service Commissions directly accountable if they were responsible for discrimination.

### **Conclusion**

9. The authorities are clear that constitutionally the Service Commissions are not employers. They are not parties to any contract of service.

10. It is not necessary to find that the Service Commissions must be construed to be “employers” for the purpose of the EOA.

11. Certain functions are vested in the autonomous and independent Service Commissions, including offering of employment or refusal to offer employment, confirmation of appointment,

promotion, transfer, and dismissal. However even though those functions are vested in the autonomous and independent Service Commissions these are performed on behalf of the employer - the executive arm of the State. The mere fact that those functions are vested in the Service Commissions therefore would not preclude the State, on whose behalf they are performed, from being accountable to the Equal Opportunity Commission for discrimination by the Service Commissions. This conclusion is reinforced by the fact that the Act binds the State which is defined to expressly include the Service Commissions.

12. The Service Commissions :-

- i. are required by section 33 to provide information;
- ii. are required by section 35 of the Act to attend conciliation;
- iii. must respond to summonses from the Tribunal;
- iv. can even be joined as parties to proceedings before the Tribunal.

13. For all practical purposes the Service Commissions are subject to the jurisdiction of the EOC and the Tribunal. Because of the obligations of Service Commissions, namely:-

- a. the obligations of Service Commissions to attend conciliation before the Commission,
- b. the obligations of Service Commissions to provide information evidence and documents to the Commission,
- c. the obligations of Service Commissions to provide information evidence and documents to the Tribunal,
- d. the possibility of being summoned before the Tribunal, or even in
- e. the possibility that Service Commissions can be joined as a party to proceedings before the Tribunal,

deeming a Service Commission (as opposed to the State), to be an employer, serves **no additional practical purpose.**

14. It was contended that a purposive approach to construction of sections 8 and 9 of the Act would require the Service Commissions to be considered employers for the purpose of the Act, and render them directly liable for acts of discrimination performed by them in offering of employment or refusal to offer employment, confirmation of appointment, promotion, transfer, and dismissal.

15. However:

- a. the construction contended for in this regard ignores established jurisprudence to the contrary from the Privy Council.
- b. further, a contract of service or employment or a prospective contract of employment can hardly be said to arise between a Service Commission and an individual employee, or prospective employee.
- c. There is no practical difference between their duties responsibilities and liabilities under the Act if they are not considered to be employers, (but rather the State is) as opposed to if they are so considered.

16. With regard to the third question we agree with the trial Judge that, having regard to sections 30 to 40 inclusive of the EOA, the Commission cannot **resume an investigation in circumstances where a report has been prepared and published, sent to the parties and made available for public inspection**, but is “thereafter re-titled as an interim report”. There is simply no basis for such a procedurally curious approach under its enabling legislation.

17. With regard to the fourth question we agree with the trial Judge that having regard to sections 39, 41, 44, and 46 of the EOA, a complainant whose matter has been referred to the Equal Opportunity Tribunal (the Tribunal) cannot as a general proposition **raise issues before the Tribunal that were not investigated** by the Commission. In the case of victimization alleged as a result of a complaint to the Commission which has already been investigated and referred to the Tribunal that would be a matter for the Tribunal to determine in a factual context on a case by case basis.

18. Also raised on appeal, though not before the judge, was the issue of whether those questions had the potential to trespass on the jurisdiction of the Tribunal, itself a superior court of record, such that the discretion whether to even answer them should have been exercised sparingly.

19. With respect to this issue we are of the view that it would not be fair to make any criticism of the decision to proceed with answering those questions, given that this was not an issue raised

before the trial judge, who at no point was asked to exercise a discretion to refuse to answer any of the questions put forward for determination.

## **Disposition and Orders**

20. In the circumstances:-

i. The appeal of the Appellant/ Interested Party is allowed.

We find that the answer to the question

*“Whether having regard to:-*

*a. sections 8 to 14 inclusive of the Equal Opportunity Act, and*

*b. sections 121, 123, and 125 of the Constitution and*

*c. regulations made or deemed to be made under section 129 of the Constitution and/or section 85 of the Education Act Chap 39:01,*

*the Public Service Commission, Police Service Commission and Teaching Service Commission respectively, (collectively the Service Commissions), should be considered “employers” for the purposes of the EOA ,*

is that they should not be considered employers for the purposes of the EOA, and the decision of the trial judge with respect to that question is varied accordingly.

ii. The cross appeal is dismissed.

## **Analysis and Reasoning**

### **The Statutory Context**

21. **The Act defines employment as follows –**

*“employment” means employment under a **contract of service** or apprenticeship or a contract personally to execute any work or labour and includes the employment of an independent contractor;*

1. *In this Act -*

*“State” includes—*

*(e) Service Commissions; and*

**8. An employer or a prospective employer shall not discriminate against a person—**

- (a) in the **arrangements** he makes for the **purpose of determining who should be offered employment**;
- (b) in the **terms or conditions on which employment is offered**; or
- (c) by **refusing or deliberately omitting to offer employment**.

**9. An employer shall not discriminate** against a person employed by him—

- (a) in the **terms or conditions of employment** that the employer affords the person;
- (b) in the way the employer affords the person **access to opportunities for promotion, transfer or training or to any other benefit, facility or service associated with employment, or by refusing or deliberately omitting to afford the person access to them**; or
- (c) by **dismissing the person or subjecting the person to any other detriment**.

33.

The Commission may by notice in writing –

- (a) require any person to **furnish such information** as may be described in the notice;

35. (2) The Commission may by notice require the following person to **attend the conciliation**:

- (a) the complainant;
- (b) **the person who is alleged to have committed the act of discrimination** which is the subject matter of the complaint;
- (c) **any other person** who –
  - (i) is likely to be able to **provide information** relevant to the proceedings of the conciliation; or
  - (ii) **whose presence at the proceedings is likely to assist in the settlement of the matter**;

And the Commission may in the said notice require any person so invited to produce such **documents** at the conciliation as are specified in the notice.

**39. (1) Where the Commission is of the opinion that the subject matter of a complaint cannot be resolved by conciliation or it has attempted to resolve the matter by conciliation but has not been successful in that attempt, the Commission shall—**

- (a) prepare a report relating to the investigation with its recommendations;
- (b) send a copy of the report to the parties to the complaint;
- (c) publish the report; and

*(d) make the report available for inspection by the public.*

*(2) Where the subject matter referred to in subsection (1) remains unresolved and the Commission has fulfilled the requirements set out in subsection 1(a) to (d), the Commission shall, with the consent and on behalf of the complainant, initiate proceedings before the Tribunal.<sup>1</sup>*

### **Powers of the tribunal**

**46.** *In addition to the powers conferred on it under the foregoing provisions of this Part, the Tribunal may—*

*(a) proceed to hear and determine a matter before it in the absence of any party who has been duly summoned to appear before the Tribunal and has failed to do so;*

*(b) order any person—*

*(i) who in the opinion of the Tribunal may be affected by an order or award; or*

*(ii) who in any other case the Tribunal considers it just to be joined as a party, to be joined as a party to the proceedings under consideration on such terms and conditions as may be prescribed by rules made by the Tribunal;*

*(c) generally give all such directions and do all such things as are necessary or expedient for the expedient and just hearing and determination of the complaint or any other matter before it.*

**57.** *This Act binds the State.*

### **Purpose of the Act**

**22.** *Suratt v The Attorney General [2007] UKPC 55 per Baroness Hale of Richmond at paragraph 43.*

**43** *The problems addressed by the EOA are a case in point. Since the Second World War, it has been common for human rights instruments and Constitutions to protect the citizen against discrimination by the state on grounds such as race or sex. In a separate and more recent development, ordinary statute law has prohibited discrimination on similar grounds by the suppliers of goods, facilities, services, accommodation, education and employment. This was controversial at first, but is now a well accepted way of countering historic*



*prejudice against particular groups or sections of society and helping to achieve greater equality of opportunity and participation in society for all. It is a common feature of such laws that they try to proceed by persuasion and agreement rather than by coercion. They tend therefore to have commissions charged with both general duties to work towards the elimination of discrimination and specific duties to receive and investigate individual complaints. They emphasise the **importance of conciliation rather than adjudication**. But in **the last resort adjudication is available**, often by a specialist body.*

23. The constitutional position of Service Commissions has been considered in various cases as set out hereunder.

### **Constitutional position of Service Commissions**

**Endell Thomas v The Attorney General of Trinidad and Tobago (1981) 32 WIR 375** stated at pages **385 and 386** per Lord Diplock

*If supplementary reasons for rejecting the construction sought to be placed on section 99 (1) by the Attorney-General were needed, their Lordships would point out that the constitutional doctrine of dismissibility of Crown servants at pleasure is, as a matter of legal theory, based upon an implied term in their contracts of employment. True, the implied term has the unique feature that it is treated as overriding even an express term to the contrary, unless the incorporation of such a term by the executive acting on behalf of the Crown, in entering into the contract, has been authorised by the legislature, i.e. the Queen in Parliament. Nevertheless, when the Crown summarily dismisses a Crown servant without needing to show any cause it does so in the exercise of a right conferred upon it as employer under the contract of employment which it has entered into with the servant. **The Police Service Commission does not by section 99 replace the Crown as employer of police officers; the definitions of “public office,” “public officer” and “the public service” in section 105 (1) rule this out. So when the commission “removes” a police officer under section 99 it is exercising a function newly-created by that section: there are not vested in it any contractual rights that it is capable of exercising as a party to the contract of employment of the police officer.***)

24. (Section 99 of the 1962 Constitution dealt with the power vested in the Police Service Commission to hold or act in offices in the Police service, including appointments on promotion and transfer and the confirmation of appointments) and to remove and exercise disciplinary control over persons holding or acting in such offices. It was in that context that Lord Diplock's observations were made).

25. It should be noted that the equivalent provision in the 1976 Constitution was s. 123 (1) which was amended in relation to the Police Service Commission by Act No 6 of 2006 (the 2006 amendment).

26. The Commission's powers under s. 123 (1) (a) and (c) of the Constitution are now limited to the offices of Commissioner and Deputy Commissioner of Police. They do not extend to all persons who hold or act in an office in the Police Service established under the Police Service Act as previously applied.

27. The modifications introduced by the 2006 amendment relate inter alia to:-

a. The eligibility, appointment, and grounds for removal of the members of the PSC.

b. The removal of its jurisdiction in respect of appointment, promotion, and the exercise of disciplinary control over offices other than those of the Commissioner and Deputy Commissioner, as well as jurisdiction over transfers, and

c. The creation of a procedure for the appointment of the Commissioner and Deputy Commissioners of Police.

28. Lord Diplock's observations were not confined to the Police Service Commission, nor to the 1962 Constitution. See for example page 377 h-j, 380g, and 381j loc. cit. Further, nothing in the 2006 amendment alters the observations of Lord Diplock that the Service Commissions in general, and the Police Service Commission in particular, are not employers.

29. He continued at page 386 c:-

*The functions of the Police Service Commission fall into two classes: (1) to appoint officers to the police service, including their transfer and promotion and confirmation in appointments and (2) to remove and exercise disciplinary control over them. **It has no power to lay down terms of service for police officers**; this is for the legislature and, in respect of any matters not dealt with by legislation, whether primary or subordinate, **it is for the executive to deal with in its contract of employment with the individual police officer.***

30. Lord Diplock in **Endell Thomas** stated at pages **381 to 382**:

*“The whole purpose of Chapter VIII of the Constitution which bears the rubric ‘The Public Service’ is to **insulate** members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised upon them directly by the government of the day. **The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service.**”* (all emphasis added )

31. As explained by Lord Diplock, the purpose of the service commissions was to insulate from political influence the members of those various services, the civil service, the teaching service and the police service. It was not to make the service commissions their employers.

32. Lord Walker in **Vinode Jhagroo –v- Teaching Service Commission [2002] UKPC 63** stated at paragraph 5

*“Members of the Teaching Service are therefore (subject to the power of delegation mentioned below) appointed and removed by the TSC, but they are **paid by the Government, which is in the position of their employer.** The constitutional reason for conferring these powers on the TSC (and for conferring similar powers on other service commissions such as the Police Service Commission) was explained by Lord Diplock, giving the judgment of the Board in *Thomas v. Attorney-General of Trinidad and Tobago* [1982] AC 113, 124, as being to insulate members of the civil service, the teaching service and the police service in*

*Trinidad and Tobago from political influence exercised directly on them by the government of the day.*”

33. It is clear therefore that the Service Commissions are not a party to any contract of employment.

### **Jurisdiction over Service Commissions**

34. The argument that the Service Commissions are somehow insulated from the application of the Act, or from responsibility for acts of discrimination, cannot survive an examination of the many practical ways in which the Service Commissions can be made directly responsible and accountable to the EOC and the Tribunal, and subject to the Act for any alleged acts of discrimination.

35. The Act itself makes clear that it binds the State, and that the State, by definition, includes the Service Commissions. Accordingly the Service Commissions cannot ignore the Equal Opportunity Commission or the Tribunal in the exercise of their functions and jurisdiction under the Act.

36. Further, the Act itself confers jurisdiction on the Commission to require **any person** to:

- i. Provide information s. 33 (a)<sup>1</sup>,
- ii. Attend conciliation s. 35<sup>2</sup>
- iii. To produce documents at conciliation s. 35 (See Footnote <sup>2</sup>).
- iv. Orders made for this purpose can be enforced under section 36<sup>3</sup>.

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<sup>1</sup> Section 33. The Commission may by notice in writing –

(a) require **any person to furnish such information** as may be described in the notice;

<sup>2</sup> Section 35. (2) The Commission may by notice require the following person to **attend the conciliation**:

(a) the complainant;

(b) **the person who is alleged to have committed the act of discrimination** which is the subject matter of the complaint;

(c) **any other person** who –

(i) is likely to be able to **provide information** relevant to the proceedings of the conciliation; or

(ii) **whose presence at the proceedings is likely to assist** in the **settlement** of the matter;

And the Commission may in the said notice require any person so invited to produce such **documents** at the conciliation as are specified in the notice.

<sup>3</sup> Section 36. A person who, without reasonable excuse, refuses or fails to comply with any requirement of a notice under sections 33 and 35(2), is liable on summary conviction –

(a) in the case of an individual, to a fine of one thousand dollars;

(b) in the case of a body corporate, to a fine of five thousand dollars,

For every day that the individual or body corporate refuses or fails to comply with any requirement of a notice.

v. Further, the Tribunal can summon any person, and can join any person as a party. Counsel for the DPA accepts that a Service Commission can be joined under s. 46<sup>4</sup> as a party.

37. Many of the matters in respect of which discrimination by an employer is prohibited are not, in the case of the Executive arm of the State, actually within its jurisdiction. Rather they are vested in autonomous Service Commissions (subject of course to any delegation by them), to be exercised on behalf of the State.

38. Notwithstanding that the Service Commissions are not employers they are compellable to attend conciliation, provide information, attend before the Tribunal, and may even be joined as a party to proceedings before the Tribunal.

39. Although the Act prohibits discrimination by an employer or prospective employer any argument that a Service Commission is somehow insulated from allegations of discrimination by it must therefore be considerably weakened as:-

- a. a Service Commission can be required to produce information as requested by the EOC,
- b. a Service Commission can be required to attend a conciliation hearing,
- c. a Service Commission can be required to produce documents at conciliation,
- d. a Service Commission can be required to attend before the Tribunal and,
- e. a Service Commission can if necessary even be joined as a party.

40. In those circumstances, in the context of such extremely wide express powers vested both in the Commission and in the Tribunal, it cannot therefore be contended that it is **also** necessary that a purposive construction be applied to the term “employer” or prospective employer so as to make it clear that the Service Commissions are subject to their jurisdiction.

41. Given that the Service Commissions are in all the practical ways described above subject to the jurisdiction of the Commission and the Tribunal, the concern expressed by the Trial judge at

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<sup>4</sup> Section 46 In addition to the powers conferred on it under the foregoing provisions of this Part, the Tribunal may  
(b) order **any person**—

(i) who in the opinion of the Tribunal may be affected by an order or award; or

(ii) who in any other case the Tribunal **considers it just to be joined as a party**, to be joined as a party to the proceedings under consideration on such terms and conditions as may be prescribed by rules made by the Tribunal;

paragraph 51 of the judgment would not justify an interpretation that the Service Commissions must be deemed to be employers. That concern was as follows:

*To adopt the interpretation the DPA urges would defeat the purposes of the Act and from a plain reading of the Act could not be the intention of Parliament. It would be defeating the purpose of the Act if a complainant who alleges discriminatory treatment in a matter of promotion, for example, is told 'well your complaint is against the State who is your employer, not us' when the Service Commission has made the decision.*

42. However, even if the complaint is against the State as employer the Service Commission would still be subject to the jurisdiction of both the Commission and the Tribunal, and if necessary, would, if required, need to justify any alleged discriminatory decision by production of documents, attendance at conciliation and attendance before the Tribunal. A strained construction of the term employer to include Service Commissions is not therefore necessary to achieve the purpose of the Act. It is not therefore correct that the purpose of the Act is defeated by not interpreting it in that manner.

43. Discrimination by the State as employer **directly**, or through the Service Commissions **indirectly** is clearly prohibited because both are subject to the exercise by the Commission and the Tribunal of the express jurisdictions conferred by the Act. It is not necessary for the effective application of the Act that the Service Commissions also be artificially deemed to be employers, even for the limited purpose of this Act.

44. Whether the State has discriminated indirectly would be a question of fact. The ability to join a Service Commission as a party to proceedings, and in any event compel attendance and production of documents as aforesaid, would permit a full investigation of the facts.

45. To infer that Service Commissions must be deemed to be employers, from the fact that they perform functions, in respect of which functions discrimination, were it to have been conducted by an employer, would be prohibited, is not necessarily accurate. Merely because an employer shall not discriminate in respect of those functions, it does not necessarily follow as a matter of logic that anybody exercising those functions must therefore be an employer.

46. In so far as it may be contended that relief could then be sought directly against the members of an allegedly offending Service Commission it follows from *Jhagroo* that in any event it is the State which would in practice satisfy any award of damages. This could not be an argument to support deeming the Service Commissions to be employers.

47. However, not only is it not necessary that the Service Commissions be deemed to be “employers”, (even if only for the purposes of the Act), but such a construction would involve ignoring the provisions of the Constitution and previous binding decisions of the Privy Council as to the status and role of the Service Commissions in relation to employment of those subject to their oversight.

48. Given that:-

a. the Act binds the State;

b. the State includes the Service Commissions;

the Act therefore envisaged that the employer - the State – which is expressly bound by the Act – could not evade liability in respect of investigation and prohibition against discrimination, in respect of offering of employment or refusal to offer employment, confirmation of appointment, promotion, transfer, or dismissal merely because those functions were vested in the independent Service Commissions, rather than its Executive arm.

49. Although the acts of discrimination prohibited include those that mirror functions vested in the Service Commissions by the Constitution the Act contemplates that this could not suffice to exonerate the State from liability for discrimination in respect of those functions. Therefore indirect discrimination by the employer who receives or adopts or ratifies or acquiesces in the product of discrimination by another body exercising those functions must also be prohibited.

### **Question 3**

50. Question 3 was dealt with by the trial judge at paragraphs 54 to 62 of the judgment as follows:-

**Question Three: Whether the Act allows the EOC to resume an investigation of a concluded matter that has been retitled as an “interim report”.**

*Both the Attorney General and the DPA say further that **once the Report is submitted in accordance with section 39 the EOC cannot re-open an investigation nor can it withdraw and treat that report as an interim report.** They point to the object of dealing with complaints expeditiously and that the investigation process cannot be interminable. Further, fairness applies to both sides.*

*61. The answer to whether the EOC has the power to resume an investigation **after a report has been prepared** is much simpler. As noted above **the EOC’s report comes after the investigatory and conciliatory processes have been completed. This indicates that the matter has been concluded. The Act makes no provision for the re-opening of an investigation where a report is prepared, published, sent to the parties and made available for public inspection in accordance with section 39. Nor does the Act allow for such a report to be withdrawn and treated as an ‘interim report’.** Having submitted its report, the EOC is *functus officio* and its only residual function in relation to the matter is to refer it to the Tribunal with the consent of the complainant if it remains unresolved. Any report published in accordance with section 39 is therefore a final report.*

51. His reasoning and conclusion that ***The Act makes no provision for the re-opening of an investigation where a report is prepared, published, sent to the parties and made available for public inspection in accordance with section 39. Nor does the Act allow for such a report to be withdrawn and treated as an ‘interim report’*** cannot be improved upon and we endorse it. It is unaffected by the issue of whether or not the doctrine of *functus officio* applies. It is therefore not necessary to accede to the invitation to consider that doctrine further.

#### **The fourth question**

52. At paragraphs 63 to 66 of the judgment the judge dealt with the fourth question as follows:-

***“Question Four: Whether the Equal Opportunity Tribunal has jurisdiction/power to consider a fresh complaint that was not investigated by the EOC.***

*63. The claimant made oral submissions on this issue. The Attorney General submitted that for the purposes of the EOA, the jurisdiction of the Tribunal is limited only to entertain matters that have been investigated by the Commission. They rely on the authority of **Suratt v The Attorney General** where the Privy Council held that the Act did not contemplate that*



*the Tribunal should have unlimited or inherent jurisdiction and therefore it is bound to deal with only those matters referred to it by the EOC.*

*64. The Attorney General also submitted, referring to the authority of John v Rees (1969) 2 All ER 275, that it would be contrary to the principles of natural justice to permit the deliberation by the tribunal of issues not canvassed by the EOC since it is well settled that a person must be given full particulars of allegations against him or her to answer the allegations made.*

*65. Mr Martineau SC submitted that the answer lies in the whole scheme of the Act. He noted the Act provides for a procedure where the complaints are lodged with the EOC and not with the Tribunal. This in itself is self-explanatory and it would be an abuse of process if new issues are permitted by the Tribunal as this would defeat the true object of the Act and its prescribed procedure. Thus for the purposes of sections 39, 41, 44 and 46 of the Act, the complainant cannot raise fresh issues before the Tribunal which were not investigated by the EOC.*

*66. I agree with the submissions of the Attorney General and the DPA that the Equal Opportunity Tribunal can only deal with such matters as are referred to it by the EOC. Thus in the hearing of a complaint they may not permit fresh matters not previously investigated and referred by the EOC to be added to the subject of a hearing of a matter previously referred to it by the EOC. To do so would be manifestly unfair.”*

53. The EOC had originally agreed with this position before the trial Judge but had a change of viewpoint by the time of filing the appeal when it considered the specific situation of a complainant later victimized as a result of a complaint which had been investigated. It referred to authorities from Canada in a similar statutory context in relation to victimization, and to, inter alia, the cases of **Carol Cook v Onion Lake First Nation 2002 CanLII 61849 (CHRT)**, **Maurice Bressette, Canadian Human Rights Commission v Kettle and Stony Point First Nation Band Council 2004 CHRT 2 (CanLII)**, **Roger Virk, Canadian Human Rights Commission v Bell Canada (Ontario) 2004 CHRT 10 (CanLII)**, **Aleta Gaucher, Canadian Human Rights Commission v Canadian Armed Forces 2005 CHRT 1 (CanLII)**, **Cam-Linh (Holly) Tran,**

**Canadian Human Rights Commission v Canada Revenue Agency 2010 CHRT 31 (CanLII), and Attorney General of Canada v Alain Parent and The Canadian Human Rights Commission 2006 FC 1313 (CanLII).**

54. Those cases appeared to suggest that the Tribunal could, in the unique circumstance of alleged victimization subsequent to an investigated complaint, consider such allegations if they bore a sufficient connection to the investigated complaint. However they did so in the context of an application for an amendment before the Canadian equivalent to the instant Tribunal under the Act.

55. It was clear therefore that it was for that Tribunal to consider on an application to amend the complaint, whether it was sufficiently connected to the complaint investigated as to permit it to exercise its discretion to amend.

56. The reasoning of the trial judge on the general proposition that was before him, then agreed to among all the parties, is correct. With respect to the exceptional case of alleged victimization subsequent to an investigated complaint it would be a matter for the Tribunal as a superior court of record, to be considered on a case by case basis in relation to specific circumstances and factual contexts. It would not therefore be appropriate on an application for interpretation of the statute to lay down in a vacuum any general principles that may restrict the Tribunal's exercise of any discretion that it may have.

### **Conclusion**

57. The authorities are clear that constitutionally the Service Commissions are not employers. They are not parties to any contract of service.

58. We are of the view that in any event it is not necessary to find that the Service Commissions must be construed to be "employers" in order for them to be subject to the provisions of the Act.

59. Certain functions are vested in the autonomous and independent Service Commissions, including offering of employment or refusal to offer employment, confirmation of appointment,

promotion, transfer, and dismissal. However even though those functions are vested in the autonomous and independent Service Commissions, these are performed on behalf of the employer - the executive arm of the State. The mere fact that those functions are vested in the Service Commissions therefore would not preclude the State, on whose behalf they are performed, from being accountable to the Equal Opportunity Commission for discrimination by the Service Commissions. This conclusion is reinforced by the fact that the Act binds the State which is defined to expressly include the Service Commissions.

60. The Service Commissions:-

- i. are required by section 33 to provide information;
- ii. are required by section 35 of the Act to attend conciliation;
- iii. must respond to summonses from the Tribunal;
- iv. can even be joined as parties to proceedings before the Tribunal.

61. For all practical purposes the Service Commissions are subject to the jurisdiction of the EOC and the Tribunal. Because of the obligations of Service Commissions including :-

- a. the obligations of Service Commissions to attend conciliation before the Commission,
- b. the obligations of Service Commissions to provide information, evidence, and documents to the Commission,
- c. the obligations of Service Commissions to provide information evidence and documents to the Tribunal,
- d. the possibility of being summoned before the Tribunal, or even in
- e. the possibility that Service Commissions can be joined as a party to proceedings before the Tribunal,

deeming a Service Commission (as opposed to the State), to be an employer, serves **no additional practical purpose.**

62. It was contended that a purposive approach to construction of sections 8 and 9 of the Act would require the Service Commissions to be considered employers for the purpose of the Act, and render them directly liable for acts of discrimination performed by them in offering of employment or refusal to offer employment, confirmation of appointment, promotion, transfer, and dismissal.

63. However:

- a. the construction contended for in this regard ignores established jurisprudence to the contrary from the Privy Council.
- b. further, a contract of service or employment, or a prospective contract of employment, can hardly be said to arise between a Service Commission and an individual employee, or prospective employee.
- c. There is no practical difference between their duties, responsibilities, and liabilities under the Act if they are not considered to be employers, (but rather the State is), as opposed to if they are so considered.

64. With regard to the third question, we agree with the trial Judge that, having regard to sections 30 to 40 inclusive of the EOA, the Commission cannot **resume an investigation in circumstances where a report has been prepared and published, sent to the parties and made available for public inspection**, but is “thereafter re-titled as an interim report”. There is simply no basis for such a procedurally curious approach under its enabling legislation.

65. With regard to the fourth question we agree with the learned trial Judge that having regard to sections 39, 41, 44, and 46 of the EOA, a complainant whose matter has been referred to the Equal Opportunity Tribunal (the Tribunal) cannot as a general proposition **raise issues before the Tribunal that were not investigated** by the Commission. In the case of victimization alleged as a result of a complaint to the Commission, which has already been investigated and referred to the Tribunal, that would be a matter for the Tribunal to determine in a factual context on a case by case basis.

66. Also raised on appeal, though not before the learned judge, was the issue of whether those questions had the potential to trespass on the jurisdiction of the Tribunal, itself a superior court of record, such that the discretion whether to even answer them should have been exercised sparingly.

67. With respect to this issue we are of the view that it would not be entirely fair to make any criticism of the decision to proceed with answering those questions, given that this was not an issue

raised before the trial judge, who at no point was asked to exercise a discretion to refuse to answer any of the questions put forward for determination.

### **Disposition and Orders**

**68. In the circumstances:-**

- i. The appeal of the Appellant/ Interested Party is allowed.

We find that the answer to the question -

*“Whether having regard to:-*

*a. sections 8 to 14 inclusive of the Equal Opportunity Act, and*

*b. sections 121, 123, and 125 of the Constitution and*

*c. regulations made or deemed to be made under section 129 of the Constitution and/or section 85 of the Education Act Chap 39:01,*

*the Public Service Commission, Police Service Commission and Teaching Service Commission respectively, (collectively the Service Commissions), should be considered “employers” for the purposes of the EOA ,*

is that they should not be considered employers for the purposes of the EOA, and the decision of the trial judge with respect to that question is varied accordingly.

- i. The cross appeal is dismissed.

**Peter A. Rajkumar**  
**Justice of Appeal**