

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE EQUAL OPPORTUNITY TRIBUNAL

(Referred pursuant to S. 39(2) of the Equal Opportunity Act 2000 as amended by Act No.5 of 2001)

E.O.T. No. 0008 of 2017

BETWEEN

BURTON BAPTISTE

Complainant

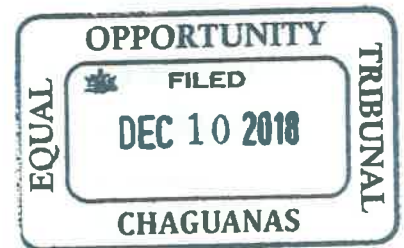
AND

THE UNIVERSITY OF TRINIDAD AND TOBAGO

Respondent

DECISION

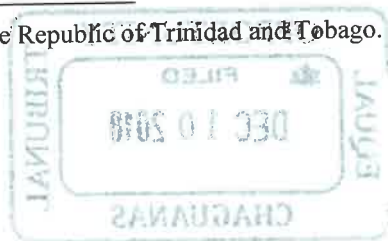
1. The Equal Opportunity Act¹ ('the Act') permits a person who claims that he has been discriminated against to submit² "*a written complaint ... setting out the details of the alleged act of discrimination*" to the Equal Opportunity Commission ('the Commission'). Where that complaint after investigation cannot, or is not resolved, through conciliation by the Commission, the Commission is mandated with the consent and on behalf of the complainant, to institute proceedings before the Equal Opportunity Tribunal ('the Tribunal')³ for judicial adjudication.



¹ Ch. 22:03, Laws of the Republic of Trinidad and Tobago.

² Ibid, 30.

³ Ibid, 39(2).



- The adjunct complaint ('the said complaint'), was lodged at the Commission on January 25, 2013⁴. This complaint was brought under section 9 of the Act, and framed under section 9(b) thereof, to wit discrimination by the respondent⁵:

"... as his employers in the way it has afforded him (or rather omitted) him access to opportunities for promotion, transfers, training or any other benefit, services or facility associated with his employment..."

- Attempts at conciliation were unsuccessful⁶. The instant proceedings were instituted before the Tribunal on behalf of the complainant by the Commission on June 22, 2017.
- By Claim Form and Particulars of Complaint dated March 7, 2018 and filed on the same day, the complainant claims inter alia, and seeks damages emanating from:

"... A Declaration that the complainant was discriminated against by the agents/servants of the Respondent in treating the complainant less favourably than in those circumstances the agent/agents treats or would treat other persons, and did so by reason that the complainant's race, contrary to Section 8 and 9 of the Equal Opportunity Act, Chap 22:03 of the Equal Opportunity Act Chap 22:03 (hereinafter referred to as the "Act").

i) This is premised on the fact that the complainant was treated less favourably in the awarding of the duration of his contract, as well as a disparity in his salary as compared to another worker who was hired for the same position at the same time."

- The Respondent by his List of Issues filed on November 20, 2017 has identified as a Preliminary Issue:

"Whether the issues relating to the disparity in salary and contract duration between the complainant and Ms. Azeena Ali can be heard and determined by the Tribunal, having regard to the fact that those issues did not form part of the Complaint lodged by the complainant with the Equal Opportunity Commission in January, 2013".

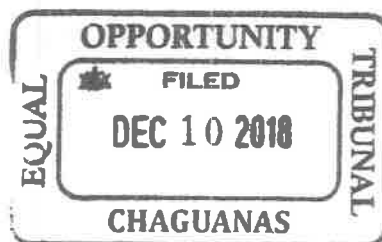
- Pursuant to the Order of the Tribunal of June 13, 2018, the Respondent filed submissions in support of the Preliminary Issue on July 31, 2018, and the complainant responded by submissions filed on September 21, 2018.

It is common ground that both the complainant and the comparator (for this allegation) Ms Azeena Ali (the comparator'), were employed on February 1, 2007 by the Respondent as

⁴ See Appendix II of the Commission's Report.

⁵ Letter to the respondent dated July 30, 2013.

⁶ Ibid, Para 36 p 13 of the Commission's Report.



Research Associates with comparable but distinct portfolios. At that time the complainant was offered a 1-year contract at a monthly salary of \$15,000.00. The comparator was offered a 3-year contract at a monthly salary of \$18,000.00⁷. These particulars of the comparator's initial salary and contract duration ('initial salary and contract duration') were not part of the details alleged in the complaint. It was disclosed by the respondent in response to information requested by the Commission and thereafter became part of the discourse of its proceedings.

8. The crux of the respondent's submission is that the disparity in the initial salary and contract duration of the respondent and the comparator were not included in the complaint and therefore the complainant ought not to be permitted to raise this ground of complaint before the Tribunal.

RESPONDENT'S SUBMISSIONS

9. In support of his submissions, Counsel for the respondent relied on both the High Court Judgment of Boodoosingh J.⁸ and the Court of Appeal's decision delivered by Rajkumar J.A.⁹ in *Equal Opportunity Commission v The Attorney General of Trinidad & Tobago and the Director of Personnel Administration (DPA)*. The respondent submitted that Boodoosingh J held that the Tribunal can only deal with such matters as are referred to it by the Commission¹⁰ and that Rajkumar J.A. in agreeing with that general proposition, reinforced that "a complainant cannot raise issues before the Tribunal that was not investigated by the Commission"¹¹. The respondent further submitted that the phrase which involved the word "issues" used by the Court of Appeal must be confined to the subject matter of the complaint. Raising issues that were not part of the subject matter of the complaint introduces a fresh complaint.

COMPLAINANT'S SUBMISSIONS

10. The Counsel for the complainant by submission filed on September 31, 2018 argued that the complainant's claim of discrimination based on the disparity in the respective salary and contract duration of the complainant and the comparator, was not a fresh complaint. The claim for discrimination on this basis was subsumed in the broad claim for discrimination

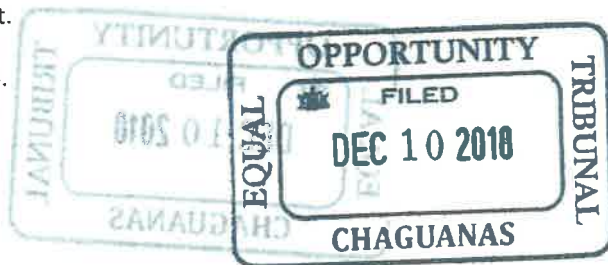
⁷ Page 7 para 37(ii) of the Report.

⁸ No. CV 2014-00477.

⁹ Civil Appeal No. P291 of 2014.

¹⁰ No. CV 2014-00477, para 66.

¹¹ *Ibid*, para 65



investigated by the Commission, notwithstanding that the disparity in the initial salary and contract duration did not form part of the complaint. It is therefore not a fresh complaint and is properly admissible. Counsel for the complainant relies on the respective judgments at first instance and the Court of Appeal in *Equal Opportunity Commission v The Attorney General of Trinidad & Tobago and the Director of Personnel Administration*, to support her submission that the issue having been investigated, it could properly be brought into the proceedings at the Tribunal.

LAW

11. The critical issue for determination before the Tribunal at this stage, therefore, is the jurisdiction/power of the Tribunal to hear 'issues' that did not form part of the subject matter complaint initially lodged. Neither the Court of Appeal nor the High Court dealt specifically with this issue in *Equal Opportunity Commission v The Attorney General of Trinidad & Tobago and the Director of Personnel Administration*. Both courts confined their views to the related, but different question posed – *jurisdiction/power of the Tribunal to hear a fresh matter complaint that were not investigated by the Commission but raised at the Tribunal*. The similarity of the issues makes the principles of law they invoked applicable to both the jurisdiction to consider issues that were not part of the subject matter of the complaint, as well as to the jurisdiction to consider issues that were not investigated.
12. Boodoosingh J. at first instance and Rajkumar JA. at the Court of Appeal, considered as decisive that the jurisdiction of the Tribunal was limited both by the Act and by the principles of natural justice.

Rajkumar J.A., in agreeing with Boodoosingh J, stated¹²:

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



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.”

13. Rajkumar J.A., went on to modify the broad statement of Boodoosingh J, by concluding¹³ :-

“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.”[Emphasis mine].

14. It is a statutory reality that has been reiterated by the Privy Council in *Suratt v AG*¹⁴ and as it was in *Equal Opportunity Commission v The Attorney General of Trinidad & Tobago and the Director of Personnel Administration* that the jurisdiction of the Tribunal is limited to complaints referred to it by the Commission¹⁵. However, the Act does not define “complaint”. Section 39 of the Act provides, however, that –

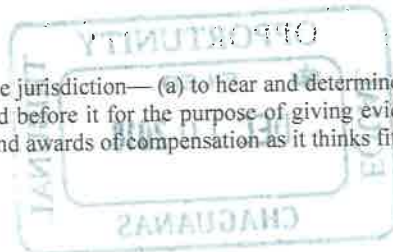
39. (1) Where the Commission is of the opinion that the **subject matter** of a complaint cannot be resolved by conciliation or it has attempted to resolve the matter by conciliation but has not been successful in that attempt...

¹³ Para. 56, p.18.

¹⁴ (2007) 71 WIR 391.

¹⁵ “41...

(4) The Tribunal shall have jurisdiction— (a) to hear and determine complaints referred to it by the Commission; (b) to require persons to attend before it for the purpose of giving evidence and producing documents; and (c) to make such declarations, orders and awards of compensation as it thinks fit.”



(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. [Emphasis mine].

15. The jurisdiction conferred by the Act is to adjudicate on the unresolved subject matter of the complaint. Viewed in this way, the subject matter of the complaint must be gleaned from the written complaint and the details thereof that the Commission received pursuant to section 30(1) of the Act¹⁶.
16. The basic tenet of natural justice requires that parties to a dispute must be treated fairly throughout the process of resolution of that dispute¹⁷. In the Tribunal's view this means that not only is it unfair for the Tribunal to allow matters to be added to a complaint that have not been investigated as has been held in the *Equal Opportunity Commission v The Attorney General of Trinidad & Tobago and the Director of Personnel Administration*, but it is for the like reasons to those enunciated in that case, unfair for the Tribunal to broaden the proceedings to include issues that do not form part of the details or subject matter of the complaint lodged with the Commission..
17. To comply with the Tribunal's jurisdictional constraints and the principles of natural justice, a complaint of discrimination¹⁸/victimisation¹⁹/offensive behaviour²⁰ as the case may be, should be a statement of alleged wrongdoing complained of, together with the written details that support it, provided by the complainant pursuant to section 30(1) of the Act. Even then the complaint must meet a minimum threshold of compliance with the Act²¹. New issues that trickle into an investigation of a complaint by the Commission, that were not included in the details of the subject matter of the complaint lodged, in the absence of some special overarching circumstance, not be included in the subject matter of the complaint for adjudication by the Tribunal.

¹⁶ 30. (1) A person who alleges that some other person has discriminated against him or has contravened section 6 or 7 in relation to him may lodge a written complaint with the Commission setting out the details of the alleged act of discrimination. See also *Suratt v. AG: (2007) 71 WIR 391*.

¹⁷ *John v. Rees* [1970] Ch 345.

¹⁸ EOA, 5

¹⁹ EOA, 6

²⁰ EOA, 7

²¹ See below, paragraph 23.



18. Even where an issue is properly before the Tribunal, section 40 of the Act raises another evidential hurdle. Section 40 states:

40. Evidence of anything said or done in the course of conciliation proceedings under this Part is not admissible in proceedings before the Tribunal.

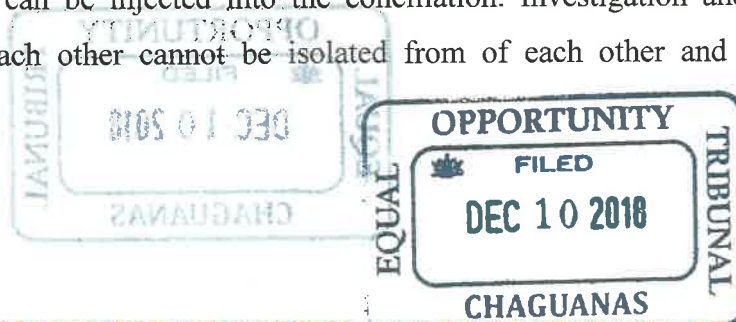
19. The Commission is empowered to investigate and conciliate complaints made to it. Even though statutory, conciliation proceedings cannot dispense with its core character of being neutral, non-adjudicative, without prejudice and confidential. The role of the conciliator in the resolution of disputes is to provide impartial support to facilitate parties in the arriving at an agreed and consensual position. The efficacy of conciliation depends on the parties being able to have open, forthright discussions and honest disclosure without the stricture and/or apprehension of self-incrimination, exposure or censure.

20. By Section 40 of the Act, the Parliament clothes the Commission's conciliation proceedings with the sanctity of a blanket of confidentiality and immunity that allows the Commission to facilitate candid, honest and open discussions in conciliation, consonant with its core character. The clear intent of the Parliament, in section 40, is that what is disclosed during conciliation is not to be disclosed or used as evidence by either party before the Tribunal.

21. The investigation process begins when a complaint is lodged and ends when the Commission issues its Report on it. Boodoosingh J. in *Equal Opportunity Commission v The Attorney General of Trinidad & Tobago and the Director of Personnel Administration* expressed the view that—

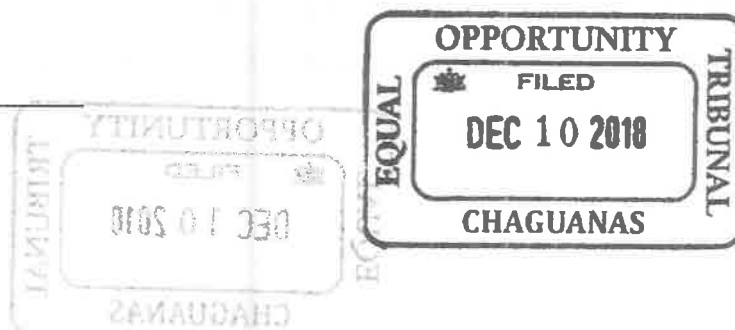
“... the EOC's investigatory role may continue up to and during the conciliation stage. Nothing in the Act suggests that the EOC's investigatory role ends when a matter is referred to conciliation. The language of section 35(1) merely refers to the EOC forming an opinion regarding conciliation based on the 'subject matter' of the complaint, not on the result of an investigation...”

22. The investigation permits the gathering of information by the Commission to assist it in assessing whether a viable complaint exists and fuels the conciliation that may ensue.. If the complaint moves to the conciliation stage the investigation can continue and any information, it uncovers can be injected into the conciliation. Investigation and conciliation therefore crisscross each other cannot be isolated from of each other and cannot be individually quarantined.



23. There may therefore be evidence of significant and/or material issues that were investigated but has found its way into the conciliation as the processes crisscrossed that, because of section 40 of the Act, the Tribunal cannot admit into evidence in the proceedings that come before it. Where this is not clearly set out in the Commission's Report on its investigation, the Tribunal's challenge is to filter and insulate the facts and/or issues that may have been uncovered in the Commission's investigation that acquired evidential immunity of Section 40, in proceedings before the Tribunal. This process is a practical cul-de-sac because what is said and done in conciliation ought to be confidential and is not open to the scrutiny of the Tribunal.
24. In the absence of guidance from the Commission, the only reasonable inference that the Tribunal can draw is that the Commission's investigation straddles and/or merges into any ensuing or contemporaneous conciliation proceedings. Hence, as a general proposition, whenever a complaint moves to conciliation anything said or done therein that straddles the investigation of a complaint, must be deemed to have acquired the evidential immunity of section 40 which renders it inadmissible in proceedings before the Tribunal.
25. When the guidance of the Court of Appeal with respect to the jurisdiction of the Tribunal and the role of natural justice, in its deliberations, is aligned with section 40 and the scheme of the Act, it is difficult, if not impossible, to set stringent principles that all complaints must meet. While the nature and degree of scrutiny of the Tribunal will depend on the circumstances of the matter and may vary from matter to matter, to invoke the jurisdiction of the Tribunal, all proceedings must meet a minimum threshold of compliance with the Act, including:
- i) The description of the complaint lodged must fall within section 4 of the Act;
 - ii) The details and/or subject matter of that complaint should not include -
 - a. issues, facts or matters extraneous to the subject of the complaint, and or
 - b. anything said or done in conciliation, including anything said or done therein, that straddles or merges with the Commission's investigation²²;

²² Ibid, Section 40.



- iii) The complaint was lodged within 6 months from the date of the cause of action accruing, unless the Commission certifies that there were exceptional circumstances that warranted a later acceptance of the complaint of discrimination²³; and
- iv) The Commission certifies that the proceedings comply with section 39(2) of the Act.

REASONING

26. In the instant proceedings, the respondent, under peril of criminal proceedings²⁴, disclosed the initial salary and contract duration of the Comparator to the Commission. Counsel for the respondent has not responded to further questions of the Commission on the reason for the disparity in the initial salary and contract duration.

27. Counsel for the complainant contends that the disparity in the initial salary and contract duration is not the subject of a fresh complaint. A claim premised on the disparity in the initial salary and contract duration, could not have been within the respondent's contemplation at the time the said complaint was lodged, because by admission the respondent did not know about the underlying facts at that time.

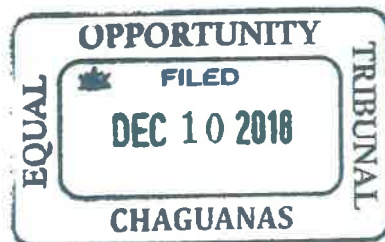
28. The Commission in its letter of July 30, 2013, informing the respondent of the said complaint, provided extensive subject matter of the details of the said complaint that was made by the complainant. The Commission stated that it had received a complaint from the complainant that the respondent had discriminated against him –

“... as his employers in the way it has afforded him (or rather omitted) him access to opportunities for promotion, transfers, training or any other benefit, services or facility associated with his employment...”

29. The Commission then listed in brief, the subject matter of the allegations it had received from the complainant. This list does not include the disparity in the initial salary and contract duration that were offered to the complainant. This Tribunal does not agree with the respondent that the said disparity is within the contemplation of the general terms of section 9, or that they could be treated merely as 'issues' coming out of the investigation. Not only are these allegations materially different from the allegations framed under section 9(b), but section 8

²³ Sections 30 (2) & (3) of the Act.

²⁴ See letter to the Respondent of July 30, 2013.



(b) of the Act²⁵ is intended to cover allegations arising from the disparity in contract terms offered to a worker. The Tribunal is of the view that the disparity in the respective salary terms of the complainant and the comparator is the subject matter of a fresh complaint.

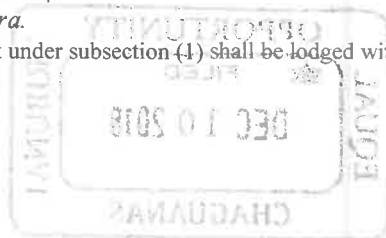
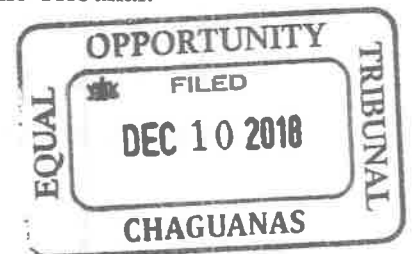
30. There is no definitive indication in the Report as to if, and if so, to what extent, the disparity in the salary and contract duration offered to the complainant formed part of the conciliation. The Tribunal notes however that it was encapsulated in (i) of the complainant's allegation at paragraph 11 of the Commission's Report. In the absence of guidance, on how this was treated in conciliation, having regard to the general importance the Commission has placed on the disparities in salaries and contract terms of the respondent's employees²⁶, it is a reasonable inference, that the issue of the disparity in the initial salary and contract duration must have featured in the failed attempt at conciliation of this matter.
31. Would it then be within the jurisdiction of the Tribunal, in keeping with the principles of natural justice for the Tribunal and/or within section 40 of the Act, or right or fair to hear the issue of the disparity in the initial salary and contract duration in these proceedings? Natural Justice encompasses not only the right to be heard but also but the right to fair play²⁷. The Tribunal is mindful that the purport of section 40 is *inter alia* to protect a party from self-incrimination in matters before the Tribunal should the matter if proceedings ensue there. In this instance, the information disclosed by the respondent is now being used to premise and/or buttress a new alleged wrongdoing.
32. If indeed the disparity in the initial salary and contract duration were the subject of a fresh or even an amended complaint of discrimination when the disparity was disclosed by the complainant, it could not ground a fresh complaint as more than 6 months, indeed several years, would have elapsed since the cause of action accrued²⁸. In all the circumstances of this case the Tribunal is of the view, it would not be fair or within the terms of the Act to permit the complainant to raise this new complaint or recover damages before the Tribunal.

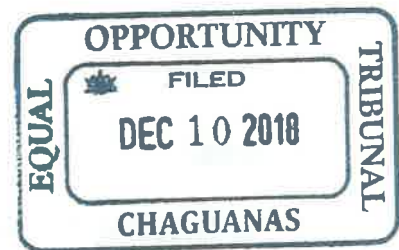
²⁵ 8. An employer or a prospective employer shall not discriminate against a person—
(b) in the terms or conditions on which employment is offered; ...

²⁶ See paragraph 49 et seq.

²⁷ *John v. Rees supra.*

²⁸ 30 (2) A complaint under subsection (1) shall be lodged with the Commission within six months from the date of the alleged act of discrimination.





DECISION

33. The Tribunal therefore finds: -

i) The disparity in the salary and contract duration of the complainant and the comparator is not within the details or subject matter of the complaint lodged by the complainant under s30(1) of the Act.

ii) The disparity in the complainant's and comparator's initial salary and contract duration raises a new claim that cannot overcome the minimum threshold of compliance to invoke the jurisdiction of the Tribunal, because it was not lodged with the Commission in a timely manner or at all.

iii) Further and/or alternatively, notwithstanding that the investigation into the disparity salaries and contractual terms at the Commission, may have been stymied by the respondent's failure to provide the information requested thereon, the evidence of the disparity in the initial salary and contract duration straddled the investigation and conciliation processes, and evidence of it is would therefore not admissible in these proceedings before the Tribunal.

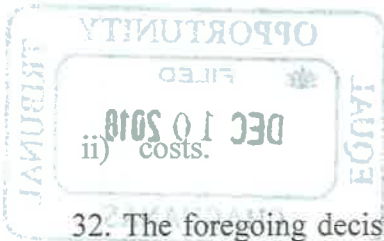
34. The Tribunal notes that there is a limited right to appeal under section 50(2)²⁹ of the Act. In the event there is an appeal the Tribunal reserves its position to add to and/or further clarify its reasons herein.

35. The Tribunal will hear the parties on -

i) the portions, if any, of the pleadings and/or Witness Statements that ought to be struck out; and

²⁹ 50. (1) Subject to subsection (2), the hearing and determination of any proceedings before the Tribunal, and an order or award or any finding or decision of the Tribunal in any matter (including an order or award) — (a) shall not be challenged, appealed against, reviewed, quashed or called in question in any Court on any account whatever; (b) shall not be subject to prohibition, mandamus or injunction in any Tribunal on any account whatever.

(2) Subject to this Act, any party to a matter before the Tribunal is entitled as of right to appeal to the Court of Appeal on any of the following grounds, but no other: (a) that the Tribunal has no jurisdiction in the matter, but it shall not be competent for the Court of Appeal to entertain such grounds of appeal, unless objection to the jurisdiction of the Tribunal has been formally taken at some time during the progress of the matter before the making of the order or award; (b) that the Tribunal has exceeded its jurisdiction in the matter; (c) that the order or award has been obtained by fraud; (d) that any finding or decision of the Tribunal in any matter is erroneous in point of law; (e) that the Tribunal has erred on a question of fact saved that no appeal shall lie except by leave of the Court of Appeal sitting in full Court; or (f) that some other specific illegality not mentioned above, and substantially affecting the merits of the matter, has been committed in the course of the proceedings.

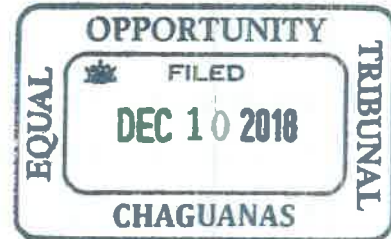


32. The foregoing decision is made and delivered by the Judge/Chairman of the Tribunal in accordance with Section 44 (7) of the Act.³⁰

Dated the 10th day of December 2018.

Her Honour Madam Justice Mrs. Donna Prowell-Raphael
Judge/Chairman

Chairman
Equal Opportunity Tribunal



³⁰ 44(7) The decision of the tribunal in any proceedings shall be made by the Chairman and shall be delivered by him.