

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE EQUAL OPPORTUNITY TRIBUNAL

E.O.T. No. 0006 OF 2017

BETWEEN

CLARISE JUPITER

Complainant

AND

PETROLEUM COMPANY OF TRINIDAD AND TOBAGO LIMITED

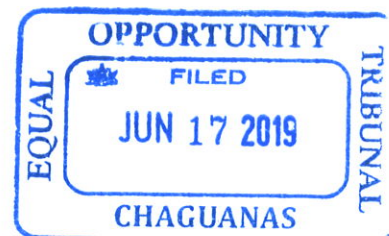
Respondent

DECISION

Coram: H.H. Donna Prowell-Raphael, Chairman/Judge
Mrs. Leela Ramdeen, Lay-Assessor.

Appearances: Ms. Abayomi T. Ajene for the Complainant.
Mrs. Deborah Peake SC, Ravi Heffe-Doon instructed by Ms. Marcelle A. Ferdinand for the Respondent.

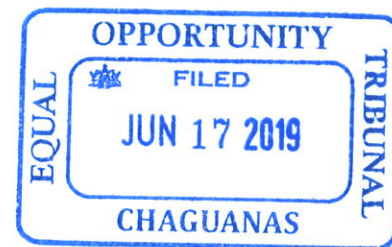
Date: June 14, 2019.



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THE EQUAL OPPORTUNITY TRIBUNAL

1. The Equal Opportunity Tribunal¹ (“the Tribunal”) is an anti-discrimination court established by the Equal Opportunity Act² (“the Act”). The Act permits a person who claims that he has been discriminated against to submit³ “a written complaint ... setting out the details of the alleged act of discrimination” to the Equal Opportunity Commission (“the Commission”). If the 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 Tribunal for judicial determination of the complaint.

THE COMPLAINT

2. The complaint (“the Complaint”) was lodged at the Commission on May 28, 2014⁴. The Complaint was investigated and the Commission found that it could have been resolved by conciliation. Therefore, with the concurrence of the parties, two (2) conciliation sessions were held on November 30, 2015 and March 17, 2016. The matter was not resolved at conciliation. As such and further to section 39(1) of the Act, the Commission prepared its Report dated March 31, 2017 (the Commission’s Report)⁵.
3. The Complaint not having been resolved, proceedings were initiated by referral dated May 25, 2017 for determination by the Tribunal⁶.
4. The parties have satisfied the Trial Time-table fixed by the Tribunal and the Complaint was fixed for trial on October 15, 2018.

¹ *Equal Opportunity Act*, 41: (1) *For the purposes of this Act, there is hereby established an Equal Opportunity Tribunal (hereinafter referred to as “the Tribunal”) which shall be a superior Court of record and shall have in addition to the jurisdiction and powers conferred on it by this Act all the powers inherent in such a Court.*

² Ch. 22:03, *Laws of the Republic of Trinidad and Tobago*.

³ *Equal Opportunity Act*, s30: 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.*

⁴ See Commission’s Report para 4.

⁵ See Commission’s Report para. 29.

⁶ 41(4) *The Tribunal shall have jurisdiction— (a) to hear and determine complaints referred to it by the Commission;*

5. At the trial Mrs. Peake SC (for the respondent) sought leave to take a preliminary point on the jurisdiction of the Tribunal and to adduce the Commission's Report as part of a Supplemental List on which she intended to rely. The Tribunal heard oral submissions on the admissibility of the Commission's Report, reserved its decision and issued directions to the parties to file written submissions on the preliminary point. The Tribunal gave its decision on the preliminary point on February 13, 2019. The Tribunal found that -

"A proper determination of the said application is inextricably linked to the admissibility of the Commission's Report The Tribunal will therefore hear the parties at the Trial as to what parts if any of the Commission's Report is admissible in in these proceedings."

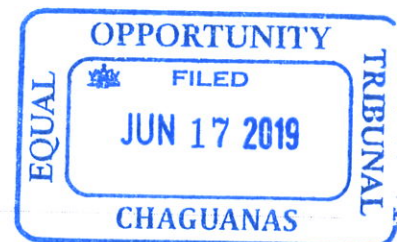
6. The Trial was then fixed to continue on April 11, 2019, but was adjourned to a date to be fixed because of the unavailability of the panel. The parties have advised the court that they do not wish to make any further submission.

SUBMISSIONS OF THE PARTIES

The Respondent

7. Mrs. Peake (for the respondent), submitted that the jurisdiction of the Tribunal was limited by the scope of the Commission's investigation and that the Tribunal could not admit or hear evidence or issues that have not been investigated by the Commission. She relied principally on the decision of the Court of Appeal in *Equal Opportunity Commission v The Attorney General of Trinidad & Tobago and the Director of Personnel Administration*⁷. Counsel stated that the Commission had not disclosed the actual complaint lodged by the complainant at the Commission. She therefore relied on the Commission's Report to extract the subject matter of the Commission's investigation.
8. In response to a question put by the Tribunal, Counsel for the respondent ventured that even if an issue did not form part of the Complaint that had been lodged with the Commission under s30(1) of the Act, but it had been investigated by the Commission, the Tribunal would have the jurisdiction to hear that issue.

⁷ Civil Appeal No.P291 of 2014.



9. Counsel for the respondent further submitted that the scope of the Commission's investigation could be extracted from certain paragraphs of the Commission's Report and that the Tribunal lacked jurisdiction to hear evidence outside of the issues disclosed in these paragraphs. The Commission's Report was therefore relevant to the determination of the jurisdiction of the Tribunal to hear the issues and evidence that were before it and ought to be admitted into evidence.
10. The Tribunal raised with the parties its disquiet as to whether the Commission's Report trespassed on s40⁸ of the Act. Mrs. Peake SC responded that the Report was focused on the Commission's investigation, and not the conciliation process. As such it did not trespass on s40, however she recognised that there may be the need for some redaction.

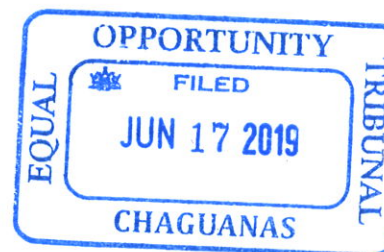
The Complainant

11. Ms. Ajene, Counsel for the complainant, submitted (and Counsel for the respondent agreed) that the Report addressed the core issues of the Complaint. However, Ms. Ajene contended that the Commission's Report contained errors, omissions and inconsistencies that were material to the consideration of the scope of the Commission's investigation. Ms. Ajene submitted further that the Commission's Report did not fully ventilate all the issues that were investigated by the Commission. She contended that the Report requires further ventilation and evidence coming from the Commission to show the full ambit of their investigation. She pointed to specific paragraphs of the Commission's Report as examples of her contention that the ambit of the investigation was not limited to the issues put forward by Mrs. Peake.

ISSUES

12. The following issue is therefore raised for determination:

Whether the report, having regard to the alleged inaccuracies/irregularities, is relevant and if so admissible in evidence before the Tribunal?



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



LAW AND ANALYSIS

The Scope of the Investigation

13. Since the hearing of submissions at the Trial, the Tribunal has considered the admissibility of the Commission's Report in the case of *Baptiste v. UTT*⁹. On the admissibility of issues that had been investigated by the Commission but did not form part of the subject matter of the complaint the Tribunal stated:

*"...18. It is a statutory reality that has been reiterated by the Privy Council in the *Suratt v AG*¹⁰ and also 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 Commission¹¹. 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...*

*(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].*

19. 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 Act¹².

20. The basic tenet of natural justice requires that parties to a dispute must be treated fairly¹³ throughout the process of resolution of that dispute. 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

⁹ No. 0008 of 2017 (December 10, 2018), para 22-24. See also *Moriba Baker v. UTT* No. 0004 of 2016;23 (2007) 71 WIR 391.

¹¹ "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."

¹² 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*.

¹³ *John v. Rees* [1970] Ch 345.

held in the Equal Opportunity Commission v The Attorney General of Trinidad & Tobago and the Director of Personnel Administration, but it is for the same reasons enunciated in that case, unfair for the Commission to direct its investigation to issues (unless the complaint is amended) that do not form part of the details of the complaint lodged with it.

21. To comply with the Tribunal's jurisdictional constraints and the principles of natural justice, a complaint of discrimination¹⁴/victimization¹⁵/offensive behaviour¹⁶ 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 Act¹⁷. It is only that complaint that the Commission is empowered to investigate. Issues that trickle into an investigation of a complaint by the Commission, that are outwit that complaint (but do not form part of an amended or new complaint,) are not within the jurisdiction of the Tribunal and ought not to be admitted into evidence in proceedings before the Tribunal."

14. The foregoing is not to disregard the fact that the ambit of the investigation will also be impacted by the respondent's answer to the complaint lodged at the Commission. The respondent's right to fairness and the right to be heard at any stage of the complaint is a fundamental tenet of natural justice. The respondent's answer joins issue with the complaint. The complaint cannot be fairly investigated without regard to the response. Indeed the subject matter of the complaint must, of necessity, comprise both the actual complaint made and the respondent's answer to it. In this context an issue that may not have been part of the complaint that was originally lodged, ought to be investigated if it is raised on the answer, and would be admissible before the Tribunal.

15. Notably the Court of Appeal, in partially upholding the decision of the High Court in *Equal Opportunity Commission v. The Attorney General of Trinidad & Tobago and the Director of Personnel Administration*¹⁸, did not give the Commission unfettered latitude to investigate *ad infinitum* and without restraint, and or to draw into its investigation extraneous issues that did not form part of the original complaint. The Commission must be constrained to investigate only the subject matter of the complaint that is lodged with it and to report to the Tribunal

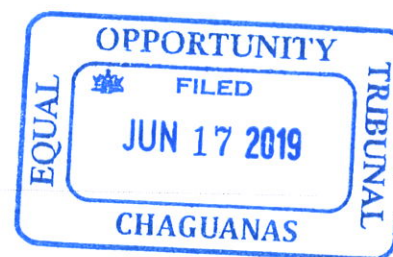
¹⁴ *Equal Opportunity Act*, 5.

¹⁵ *Equal Opportunity Act*, 6.

¹⁶ *Equal Opportunity Act*, 7.

¹⁷ See below, paragraph 23.

¹⁸ Civil Appeal No.P291 of 2014.



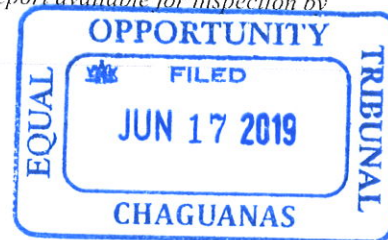
clearly and decisively what issues it has investigated, so that the principles enunciated in *Equal Opportunity Commission v. The Attorney General of Trinidad & Tobago and the Director of Personnel Administration* can be properly applied.

16. Although this must be considered on a case by case basis, as a general rule, as long as the Commission confines its investigation to the scope of the subject matter of the complaint then (subject to compliance with s40 of the Act) the entirety of the investigation is admissible before the Tribunal. Where the Commission frolics outside the subject matter of the complaint, the excessive portion of its investigation is inadmissible before the Tribunal. It is only after having determined the due scope and ambit of the investigation as it relates to the Complaint that was lodged, that the Tribunal can pronounce on the extent of its jurisdiction to hear and determine the evidence and issues before it.

Admissibility of the Commission's Report

17. Although the Court of Appeal in *Equal Opportunity Commission v The Attorney General of Trinidad & Tobago and the Director of Personnel Administration* agreed, as a general principle, the Tribunal's jurisdiction should be limited to the issues investigated by the Commission, it did not expressly consider the issue as to how the Commission should communicate the scope of its investigation to the Tribunal. It was therefore practical and not unreasonable that the default position was to revert to the Commission's Report. The practice has developed of using the Commission's Report as a reference guide and on occasions treating it as being automatically admitted or admissible into evidence before the Tribunal.
18. It should be noted however that the Commission's Report is not prepared as a working document for the Tribunal. It is prepared and published in satisfaction of the statutory obligation of the Commission to do so under sections 39(1)¹⁹ of the Act. The Commission makes a copy of its Report available to the parties and must also make its report available to

¹⁹ 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.



the public²⁰. It is the prerogative of the Commission to prepare its report in the substance and form it considers appropriate. The Tribunal has no remit to stipulate the form or content of the Commission's Report. The use of the Report in the proceedings of the Tribunal is not stipulated or provided for in the Act. The Tribunal by EOT Rule 5(1(b))²¹ requires the Tribunal to submit the Report as part of its referral.

19. In *Burton Baptiste v. University of Trinidad and Tobago*²², the Tribunal observed that where there had been conciliation at the Commission, it may be difficult to discern from the Commission's Report what information should be insulated and or protected by s40 of the Act. In *Moriba Baker v. University of Trinidad and Tobago*²³, the Tribunal further noted that some of content of the Report may encourage perceptions of bias if the Commission's Report is relied on by the Tribunal. The Chairman has therefore waived compliance by the Commission with EOT Rule 5(1(b)) and the Commission's Report is no longer being sent to the Tribunal as part of the referral.
20. The Commission's Report is intended to be a report of the investigation of the Complaint. Therefore, on its face, the Commission's Report is relevant to the Tribunal's inquiry of the issues in its investigations. However the Commission's Report does not contain a definitive statement on what issues were investigated. In paragraph 4 of the Commission's Report it summarises and categorises the Complaint. By paragraph 5 and Appendix I of its Report, the Commission references the documents it requested of the respondent, and the questions it asked in the course of its investigation. As succinct the summary/categorisation of the complaint and or detailed as the documents and questions appear, it remains for the Tribunal

²⁰ *Equal Opportunity Act*, Section 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.

²¹ 5.1 Proceedings are begun/initiated by filing at the Registry the original and two copies of the following documents. (a) A letter from the Equal Opportunity Commission (EOC) in accordance with Section 39 (2) of the Act indicating that the complaint remains unresolved and the EOC has fulfilled the requirements set out in Subsection 1 (a) to (d) of the Act and that the Complainant consents in writing to the matter being referred to the Tribunal. (b) A copy of the published report of the EOC.

²² E.O.T. 0008/2017.

²³ E.O.T. 0004/2016.



to filter through them to compare and or extract the subject matter of the Complaint and or the scope of the investigation.

21. With the greatest deference to the status of the Commission's Report, the Tribunal has already alluded to its general disquiet about the Report's possible overlap with s40 of the Act and its potential to provoke allegations of bias. The Commission's categorisation/restatement of the Complaint and the allegations of the parties, its observations, recommendations and conclusions and the legal opinion so adeptly researched and contained in it, has little probative value or evidential weight before the Tribunal. How can the Tribunal accurately decipher from the Commission's Report the extent of the Commission's investigation that is admissible before it?
22. While the Tribunal empathises with the exigencies that may have constrained Counsel for the respondent to accept as a last recourse a dissection of certain paragraphs of the Commission's Report to circumscribe the scope of the investigation, the Tribunal cannot agree with this approach. These paragraphs may contain hearsay or opinion, they may be inaccurate or incomplete. The Tribunal cannot facilely discount the niggling submission by Counsel for the respondent that the Commission's Report is incomplete and or may contain errors, omissions and or inconsistencies, or that parts of it may contravene s40.
23. To be admissible, evidence must not only be relevant, it must have positive probative value and ought not to be disproportionately burdensome. The overriding principle is that the admission of the evidence must do justice in the particular case. In the House of Lords in *O'Brien v. Chief Constable of South Wales Police*²⁴, Lord Bingham of Cornhill put it this way²⁵:

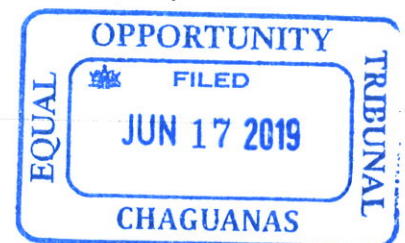
"3. ...Any evidence, to be admissible, must be relevant..."

4. ...Thus in a civil case such as this the question of admissibility turns, and turns only, on whether the evidence which it is sought to adduce, assuming it (provisionally) to be true, is in Lord Simon's sense probative. If so, the evidence is legally admissible. That is the first stage of the enquiry.

5. The second stage of the enquiry requires the case management judge or the trial judge to make what will often be a very difficult and sometimes a finely

²⁴ [2005] UKHL 26.

²⁵ *Ibid*, paras 3-6.



balanced judgment: whether evidence or some of it (and if so which parts of it), which ex hypothesi is legally admissible, should be admitted. For the party seeking admission, the argument will always be that justice requires the evidence to be admitted; if it is excluded, a wrong result may be reached. In some cases, as in the present, the argument will be fortified by reference to wider considerations: the public interest in exposing official misfeasance and protecting the integrity of the criminal trial process; vindication of reputation; the public righting of public wrongs. These are important considerations to which weight must be given. But even without them, the importance of doing justice in the particular case is a factor the judge will always respect. The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole..."

6. While the argument against admitting evidence found to be legally admissible will necessarily depend on the particular case, some objections are likely to recur. First, it is likely to be said that admission of the evidence will distort the trial and distract the attention of the decision-maker by focusing attention on issues collateral to the issue to be decided. ...Secondly, and again particularly when the trial is by jury, it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice: unless the former is judged to outweigh the latter by a considerable margin, the evidence is likely to be excluded. Thirdly, stress will be laid on the burden which admission would lay on the resisting party: the burden in time, cost and personnel resources, very considerable in a case such as this, of giving disclosure; the lengthening of the trial, with the increased cost and stress inevitably involved; the potential prejudice to witnesses called upon to recall matters long closed, or thought to be closed; the loss of documentation; the fading of recollections. ... In deciding whether evidence in a given case should be admitted the judge's overriding purpose will be to promote the ends of justice. But the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties. [Emphasis mine].

24. Counsel for the complainant has raised the issue of the accuracy of the Commission's Report. She contends it is incomplete and or may contain errors, omissions and or inconsistencies. Counsel for the respondent recognised that some redaction may be warranted to bring the Report in line with s40 of the Act. To achieve justice in this case, if the Report is to be admitted, the Tribunal ought to allow Counsel for the complainant to provide evidence of the inaccuracies/irregularities to which she alludes. But even so, it is dubious whether the limited jurisdiction of the Tribunal empowers it to make findings or orders on these alleged inaccuracies/irregularities. Further the Tribunal may have to undertake an exercise as to what should be redacted. To allow the Commission's Report into evidence even on terms or with



conditions, may therefore complicate and lengthen the trial instead of being conclusive or determinative of the issues before us.

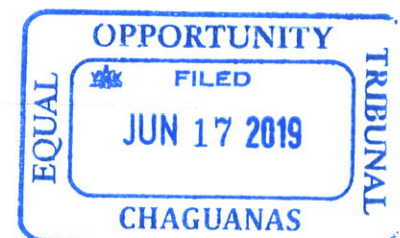
25. The Tribunal therefore finds that: -

- a) To make an order in respect of the alleged irregularities that Counsel for the complainant alleges (on which the Tribunal expressly makes no findings) may exceed the limited jurisdiction of the Tribunal;
- b) To admit the Commission's Report "as-is" may be unfair and will not advance public confidence of a fair and impartial determination of this Complaint or instill in our stakeholders the Tribunal's commitment to transparency and procedural fairness;
- c) Certain portions of the Commission's Report may need to be redacted to bring it in line with s40 of the Act; and
- d) Although the Commission's Report may be deemed to have some partial relevance and or probative value to the scope of investigation, it is inadmissible in its present form in these proceedings.

26. The foregoing does not affect the force of the contention of Counsel for the respondent, that the jurisdiction of the Tribunal is (as a general principle) limited to the issues investigated by the Commission. How then is the proper scope of the investigation to be determined if the Tribunal cannot have recourse to the Commission's Report? In the absence of express guidance from the Act and or the Court of Appeal, good common sense suggests that the Tribunal must go back to basics. The Tribunal must have regard to the best evidence available that would satisfy the conjoint effect of sections 30(1), 32, 39(2) and 41 of the Act against the backdrop of *Equal Opportunity Commission v. The Attorney General of Trinidad & Tobago and the Director of Personnel Administration*.

27. At the very least best evidence ought to include:-

- a) the complaint as formulated by the complainant,
- b) Natural justice requires that the answer as formulated by the respondent (if any) should also be included, and



- c) A clear statement from the Commission directed to the Tribunal of the issues and scope of the investigation on the subject matter of the complaint (including the answer, if any).

These documents should preferably be included in the referral bundle that institutes the proceedings by the Commission before the Tribunal and for transparency disseminated to the parties as they underpin the proceedings.

DECISION

28. The Tribunal therefore directs the Registrar to issue a Summons to compel the Commission to produce the following documents and or evidence²⁶ by filing same at the Registry of the Tribunal on or before July 29, 2019: -

- a) A copy of the Complaint and or any amendments thereto that were lodged with the Commission pursuant to section 30(1) of the Act;
- b) A copy of the respondent's answer to the Complaint (if any) and or any amendments thereto that were lodged with the Commission; and
- c) A statement by the Commission on the issues and scope of the investigation on the subject matter of the complaint (including the answer, if any) having regard to section 40 of the Act.

29. The Tribunal considers these directions and or orders are necessary or expedient for the just hearing and determination of the Complaint and or applications presently before it²⁷.

30. The documents/information will be made available to the parties by the Tribunal after they have been filed by the Commission.

²⁶ 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.

45. (1) The Tribunal, as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on inspection of the property, and other matters necessary or proper for the due exercise of its jurisdiction, shall have all such powers, rights and privileges as are vested in the High Court of Justice on the occasion of an action. (2) ... (3) A summons signed by the Registrar shall be equivalent to any formal process issuable in any action taken in the High Court of Justice for enforcing the attendance of witnesses and compelling the production of documents. (4) The Tribunal may require evidence or argument to be presented in writing and may decide the matters upon which it will hear oral evidence or argument.

²⁷ Section 46 (c) of the Act.

