



2015 ANNUAL REPORT



Human
Rights
Commission
Bermuda



2015 ANNUAL REPORT

**HUMAN RIGHTS COMMISSION
BERMUDA**

Milner Place, Ground Floor
32 Victoria Street, Hamilton HM 12
Bermuda

Call (441) 295-5859
Email: humanrights@gov.bm
Website: www.hrc.bm

ACCESSIBLE FORMATS

This document is available for download from our website at www.hrc.bm in electronic text formats (Word and PDF). Please contact the Human Rights Commission at 295-5859 should you wish to request other accessible formats such as audio, large print, etc.

TABLE OF CONTENTS

Letter of Transmittal.....	4
Message from the Chair.....	5
Message from the Executive Officer	6
Members of the Human Rights Commission	7
Vision, Mission and Mandate	11
The Human Rights Act, 1981	12
Education and Awareness	15
Intakes, Preliminary Inquiries and Investigations	19
Human Rights Tribunals	25
Annex 1: How to Lodge a Complaint	36
Annex 2: Complaint Handling Process	37
Annex 3: Tribunal Process	38
Annex 4: Boards of Inquiry	39
Annex 5: Other Human Rights Landmark Court Victories	40
Annex 6: 2015 Perception Study Results.....	50
Annex 7: Salaries and Board Fees	51
Our Visual Identity.....	52

LETTER OF TRANSMITTAL

The Hon. Michael H. Dunkley JP, MP
Premier of Bermuda
The Cabinet Office
Innovation House
46 Reid Street
Hamilton HM 12
Bermuda

DEAR PREMIER,

It is my pleasure to submit the Annual Report of the Bermuda Human Rights Commission for the reporting period January 1, 2015 to December 31, 2015 which was under the leadership of Chairperson, Mr. Michael Hanson.

We submit this report to you for presentation to the Legislature in accordance with Section 30A of the Human Rights Act, 1981.

Respectfully,



Tawana Tannock
Human Rights Commission, CHAIR



MESSAGE FROM THE CHAIR

It is my honour to provide this 2015 Annual Report to the Legislature and to the residents of Bermuda. This is my third and final Annual Report as Chairperson and, as per tradition, it has been another busy year for the Human Rights Commission.

Firstly, after over 35 years of neglect, we are pleased to report that mental health protection will now finally be introduced to the Human Rights Act, 1981 ("the Act"). This has come as a result of the hard work of the Commission employees, the Commissioners and all our partners in the community and Government. It is difficult to over-emphasise how the lack of such protection was a gaping hole in Bermuda's human rights history, so we very grateful that these issues are now starting to be addressed. This amendment will start the difficult process of attacking the stigma surrounding those who suffer from mental health challenges and provide them protection under law from discrimination. We are pleased that our efforts have resulted in this change and the Commission looks forward to seeing the changes implemented. We would also urge all that this is the first step in a long road, and as change is almost always related to pressure, please keep the pressure up!

Additionally, it was extremely important to increase the independence of the Commission to enable it to perform its functions as effectively as possible. The Throne Speech announcement, which included the promise that the Commission would obtain greater autonomy, was very welcome news and the Commission moving away from being a part of a Ministry is a leap, rather than a small step, to the Commission catching up with our international peers.

I would also like to reiterate our call to the Government to consider the other recommendations made by the Commission that have not yet been implemented, in particular those issues addressed in the correspondence dated November 3, 2014. We must continue to increase the credibility of the Commission and the judicial governance of the Act, which is still not adequate.

Whilst we are all very satisfied with the positive steps taken this year, on a personal note, it is with sincere regret that we report the passing of Commissioner Darcy Gimás. Darcy's expertise, experiences and commitment was truly exemplary. Darcy will be sorely missed both as the wonderful individual she was and as an advocate who truly cared for those less fortunate than her.

Finally, it was a privilege to have to been given the opportunity to serve on the Human Rights Commission Board as its Chairman. I am very grateful for the work done by the Commissioners and the Officers of the Commission and their contributions in improving human rights and equality for all residents of Bermuda should not be understated. Clearly, there are still challenges that need urgent addressing, but I am confident that the new members of the Commission Board will meet these challenges head on.

Good luck to you all.

Sincerely,



Michael Hanson
Human Rights Commission, CHAIR



MESSAGE FROM THE EXECUTIVE OFFICER

“The beauty of standing up for your rights is others will see you standing and stand up as well.” ~Cassandra Duffy, AUTHOR

The Human Rights Commission works to eliminate discrimination, to strengthen inter-group relationships and to foster greater understanding, inclusion and justice for those who live in Bermuda. The job of ensuring human rights are protected is primarily the Commission's work, but is the responsibility of all of us. This report demonstrates how such collective work can make a difference.

As regards complaint-handling, this year we experienced a (25%) decrease in the number of complaints lodged when compared with 2014. In 2015, five complaints were approved for investigation and seven investigations were carried over from the previous year. Discrimination in the area of employment remained the largest basis for complaints made to the Commission.

The Commission continued to develop our education initiatives by raising awareness and understanding of human rights principles and equal opportunity. Our work in education and awareness this year has continued to involve a number of partnerships as we seek to strengthen relationships with the private sector and Government departments in order to foster awareness of issues and to improve access to services.



We were pleased to hear of the Government's initiatives outlined in the 2015 Throne Speech which indicated the expansion of human rights protections to include mental health and other needed amendments to the Human Rights Act, 1981. On another note, we were saddened by the passing of Commissioner Darcy Gimas who brought valuable experience in the field of mental health and she will be greatly missed.

The Commission will welcome a new Board of Commissioners at the start of 2016, and the officers look forward to the fresh perspectives and ideas that those new members will bring.

I want to thank our outgoing Chair, Michael Hanson, Deputy Chair, Kim Simmons and the other Commissioners for their outstanding service to the Board. The Commission has successfully transitioned through a number of organizational changes during the past three years. We thank each of the Commissioners for their contributions to the Commission's achievements.

I wish to conclude by expressing my sincere appreciation to the Officers of the Commission for their daily contributions. The past several years have been challenging as we worked our way through change and transition. The commitment, passion, expertise and skills of the staff have not waived. It has been an inspiring year and the forthcoming year promises even more opportunities to advance human rights in Bermuda.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lisa M. Reed'.

Lisa M. Reed

Human Rights Commission, EXECUTIVE OFFICER

Members of the
Human Rights
Commission



THE COMMISSIONERS

The Human Rights Commissioners are responsible for adjudicating complaints of discrimination by serving on Tribunals and serving as educators and advocates in the promotion and protection of human rights.

CHAIR Michael Hanson

DEPUTY CHAIR Kim Simmons

COMMISSIONERS	Donna Daniels	Kai Musson
	Pamela Fowkes	Naomi Schroter
	Darcy Gimas (<i>until February 2015</i>)	Louis Somner
	Richard Horseman	Tawana Tannock
	Jens Juul	Millard Thompson



THE OFFICERS

The Officers are responsible for the day-to-day operations of the organisation, and they work to fulfill the goals and objectives of the Commission, including investigating complaints of discrimination, delivering public education to address discriminatory practices, and to administer the Human Rights Tribunals.

EXECUTIVE OFFICER Lisa Reed

EDUCATION OFFICER Sara Clifford

INVESTIGATIONS OFFICER Darnell Harvey

**RELIEF ADMINISTRATIVE
INTAKE OFFICER** Erlene Postlethwaite

INVESTIGATIONS OFFICER Treadwell Tucker

PROJECT OFFICER Kim Williams



REMEMBERING FORMER COMMISSIONER

Darcy Gimás

The Commissioners and Officers were deeply saddened to learn of the death of Darcy Gimás who passed away on February 27, 2015. Darcy was appointed as a Human Rights Commissioner in January 2013.

Darcy made many contributions aimed at improving the lives and well-being of persons with mental disabilities and was an important voice in the urgent call for the extension of protections in the Human Rights Act, 1981 to include persons with cognitive and mental disabilities. During her term as Commissioner, Darcy lent her expertise by serving as the Human Rights Commission's representative on the Mental Health Act Review Committee and contributing her insight to the Commission's internal review of the Mental Health Act.

Darcy's commitment to mental health services and societal understanding was sincere and deeply felt. She gave generously of her time and talents to make Bermuda a better place for many people. Darcy submitted her resignation from the Board, due to her illness, just a few weeks before her passing. She was a valuable member of the Human Rights Commission and will be greatly missed.

SELECTION AND APPOINTMENT COMMITTEE

THE COMMISSIONER'S TERMS OF SERVICE COMES TO AN END

The Human Rights Act, 1981 was amended in 2012, to provide for, among other changes, an independent Selection and Appointment Committee to recruit, interview and appoint Human Rights Commissioners. The first appointments under this important new process were made in January 2013.

The current Commissioner's three year term will expire in December 2015 and a recruitment process commenced in late 2015 to make appointments for the next term. The Selection and Appointment Committee received a total of sixty-six (66) applicants and the Board will be announced to the public in early 2016.

Selection and
Appointment
Committee



L-R: Maryanne Scott, Toni Daniels, Tim Marshall (Head), Loren Wilson, and Terry Hassell

OUR VISION, MISSION AND MANDATE



The Human Rights Commission consists of a Board of Commissioners of up to twelve members and the Officers of the Commission.

VISION

The Human Rights Commission envisions a community that honours and protects human rights for all.

MISSION

As the national public authority of human rights in Bermuda, our mission is to eliminate discrimination through advocacy, education and enforcement.

MANDATE

The statutory functions of the Commission are twofold and are aimed at eliminating any form of discrimination in Bermuda. The Commission's mandate is first to educate and promote the concept of equality of all members of the community and, as well, to investigate and endeavour to settle allegations of discrimination.

Under Section 14 of the Act, the Human Rights Commission is responsible for administration of the Act and shall:

- Encourage an understanding of the fundamental rights and freedoms of the individual guaranteed by the Constitution and the principle that all members of the community are of equal dignity, have equal rights and have an obligation to respect the dignity and rights of each other;
- Promote an understanding of, acceptance of, and compliance with the Act;
- Develop, conduct research and arrange educational programmes designed to eliminate discriminatory practices;
- Encourage organisations within the community and individual persons to carry out activities which will attract all members of the community whomsoever;
- Encourage and coordinate activities which seek to forward the principle that every member of the community is of equal dignity and has equal rights; and
- Promote the conciliation and settlement of any complaints or grievances arising out of acts of unlawful discrimination and, where in its opinion such good offices are inappropriate, institute prosecution for contraventions of the Act.

The Commission is both a watchdog for human rights and also works to promote equality and harmony in the community by working with organizations, schools, businesses and individuals. To that end, the Commission delivers educational programmes and workshops; organises public forums; prepares brochures and guidelines; and reviews legislation and policies to ensure compliance with the Act. Additionally, the Commission makes recommendations to the Government and proposes amendments to ensure consistency with international standards.



THE HUMAN RIGHTS ACT, 1981

The Human Rights Act 1981 (the “Act”) was passed in June 1981 by the Legislature which resulted in the repeal of the Race Relations Act 1969 and the Race Council Act 1970. The Human Rights Act became operational in May 1982 and the Human Rights Commission was established to administer human rights legislation and policy in Bermuda.

Grounds of Protection:

Race, Place of Origin, Colour, Ethnic or National Origins	Family Status
Sex or Sexual Orientation	Religion or Beliefs or Political Opinions
Marital Status	Criminal Record
Disability	*Age (except in the area of employment)

Areas of Protection:

- **Section 3: Notices** – No one is allowed to display, publish or post any discriminatory sign, symbol or notice against any person or persons based on the protected grounds.
- **Section 4: Disposal of Premises** – Protection for persons seeking to rent accommodation, acquire land or other premises – whether as a renter or as an owner. Persons cannot discriminate because of your race, place of origin etc.
- **Section 5: Goods, Services and Facilities** – Where a person is seeking to obtain goods, facilities or services, whether on payment or not, persons are protected from discrimination by others that would be a violation of any of the grounds set out in Section 2(2).
- **Section 6: Employment, Special Programmes & Harassment** – Protection against discrimination in Employment. Employers are barred from discriminating in hiring, training, promoting, dismissing or demoting any person because of his race, etc. Employers and employment agencies are barred from discriminatory advertising.
- **Section 6B: Harassment** – Employees are protected against harassment from their employers. Harassment is persistent, vexatious and the employer should know or ought to know that it is not welcome by the employee.
- **Section 7: Organisation** – Protection against discrimination in clubs and other organizations, whether a member or not.
- **Section 8: Proceedings under the Act** – Persons are barred from treating someone differently, who made a complaint under the Act. For example, where an employer fires an employee, or punishes him/her, or intimidates such employee, because she/he made a complaint under the Act.
- **Section 8A: Racial Material & Harassment** – Persons are not allowed to publish racial material to incite or promote ill will against any part of the community because of

their race or colour. No person should incite a breach of the peace against any part of the community, because of race, etc.

- **Section 9: Sexual Harassment** – Protection from sexual harassment from employers, agents of employers, other employees, and landlords. The employer must protect against sexual harassment in the workplace.
- **Section 10: Discriminatory Covenants** – Where there is a legal instrument passing property, such as a Deed, if it is drafted in a discriminatory way so as to contravene the grounds as stated in Section 2(2) of the Act, the instrument would be deemed null and void. It would have no legal effect.

LEGISLATIVE UPDATES:

PROTECTION FROM DISCRIMINATION BASED ON MENTAL HEALTH

Part of our role as the Human Rights Commission is to call for the evolution of the Human Rights Act, 1981 to ensure that it is reflective of the needs of our community and is in line with international standards in support of human rights. The Commission has been actively advocating for appropriate protection to be put in place with the aim of seeing Government's stated commitment to the principle of non-discrimination extended to the area of mental health. As part of the Commission's ongoing lobbying efforts, the Commission submitted a definition of mental health to the Government to expand protection by including intellectual, developmental and psychological impairments.

The Commission was encouraged to hear the 2015 Speech from the Throne, announcing Government's commitment to addressing discrimination experienced by people suffering from a mental disability or impairment. Government has pledged to introduce an amendment to add mental disability as a protected ground under the Human Rights Act, 1981 in the areas of employment, accommodation and the procurement of goods and services.

In discussing this issue with politicians and residents there is a small perception that amending the Act will impact businesses as they will have to hire people with mental illness. Notwithstanding the fact that such an argument is not relevant in a world where almost every single one of the jurisdictions we deal with have mental health protection, employee productivity dealt with by the Unreasonable Hardship provisions in the Act.

For the purposes of updating the legislation to bring it into alignment with the world standard, the Commission proposed amending the definition and under our Act to encompass mental health by adopting and starting with the Equality Act 2010 (UK) definition:

“A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day to day activities”.

The Commission had hoped to see this amendment pass in 2015, but now expects to see it pass quickly in 2016.

FURTHER AMENDMENTS TO EXPAND PROTECTION

Further amendments to the Human Rights Act, 1981 were proposed in the 2015 Throne Speech, which include:

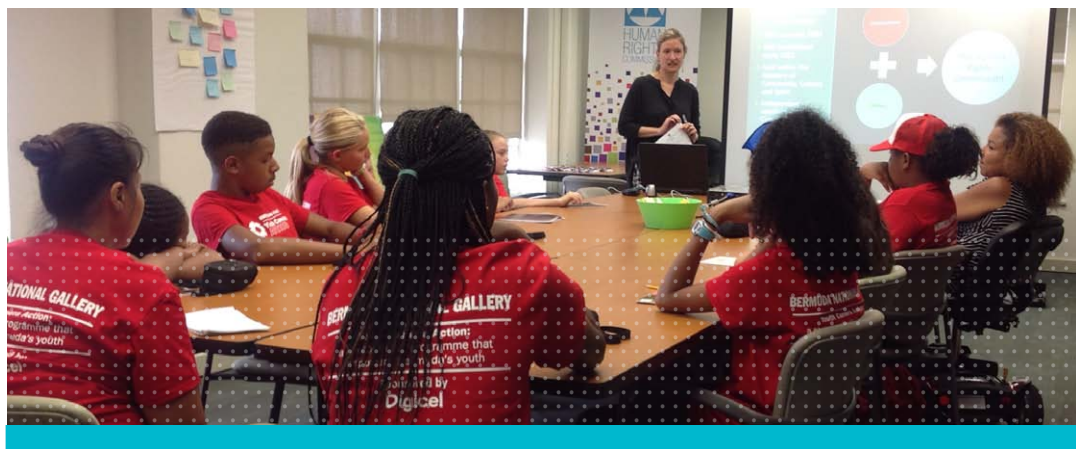
- An amendment to outlaw discrimination based on the printed word. This amendment was proposed due to a 2015 Human Rights Tribunal which concluded that online conversations and comments could not be allowed as evidence of discrimination because written material did not fall within the meaning of “notice, sign, symbol, emblem or representation” under the Human Rights Act, 1981. The amendment will expand the definition to include written content such as words, articles and statements.
- An amendment to prohibit the publication of racist material and racial incitement by expanding the Human Rights Act’s definition of “publish or display” to include recorded telephone discussions, internet, emails recorded in print or recorded on the internet, radio, television or any other electronic medium of communication.
- An amendment to clarify and expand the definition of a public place. In cases where threatening, abusive or insulting words are used to promote or incite hostility against a member of the public distinguished by factors like colour, race, ethnicity or national origin, the definition of a public place would refer to both indoor and outdoor public places.

ORGANIZATIONAL RESTRUCTURE

An additional Throne Speech initiative included the announcement from the Government that the Commission would transition to Non-Ministry Departments. Following proposals submitted by the Human Rights Commission and a formal review of the structure of the Department of Human Affairs it was apparent to the Government that it needed to reframe the way in which the Commission was positioned in relationship to the Government. Government will therefore implement its Throne Speech commitment, providing the Human Rights Commission with a level of independence in keeping with other National Human Rights Institutions. The Commission will transition from being an arm of the Department of Human Affairs to a non-ministry entity with a greater degree of autonomy in order to fulfil its explicit mandate which is to protect and promote human rights.

The next Board will be tasked with the development of the appropriate ethical, governance, and accountability policies to support the Commission’s independence from Government in keeping with standards for National Human Rights Institutions.

Education and Awareness Presentation



EDUCATION AND AWARENESS

Education in support of human rights remains an integral function of the Human Rights Commission. In addition to providing a host of interactive educational sessions with a variety of stakeholders across the island, 2015 saw the forging of important relationships to support the advancement of rights awareness and protection. The work of the education team is necessarily diverse, and includes hosting roundtable sessions, research and policy analysis, legislative review and associated advocacy, consultations and public and private engagements to address the broad spectrum of social justice and human rights issues.



Some highlights of 2015:

- The Commission was honoured to participate in the innovative curriculum of the Seniors Learning Centre, under the direction of Dr. Janet Ferguson, presenting on the topic of 'Learning for Social Justice' as part of their 'Education in Bermuda in the 21st Century Lecture Series'.
- The Commission partnered with Mid-Atlantic Wellness Institute (MWI) for Mental Health Awareness Week 2015. We presented to service users at Mid-Atlantic Wellness Institute on the Act and held discussions addressing concerns about discrimination based on mental health; film viewing and discussion regarding mental health to school children.
- The HRC joined the Bermuda Mental Health Foundation (BMHF) for their 'Transforming Stigma into Strength' series, including a panel discussions and facilitated dialogues.
- An exciting feature this year was hosting an accredited course facilitated by CURB (Citizens Uprooting Racism in Bermuda). The course entitled, 'Social Justice, Diversity & Inclusion' was successfully piloted for 10 weeks with the intention of scaling up the course across the island.
- The Bermuda National Library has been a social justice ally and they partnered with the Commission on several initiatives including Human Rights Day and honouring National Library Week.



Filipino
Independence Day
Celebration



- The Bermuda Society for the Blind extended an invitation to the Commission to participate in one of their monthly Vision Talk Information and Sharing Sessions. A presentation was given on the rights of persons with vision loss in Bermuda.
- The Commission was honoured to be invited to join in the Philippine Independence Day Celebrations. It was a welcome chance to participate in the cultural celebrations and reinforce the significance of celebrating our diverse and culturally rich community in Bermuda.
- The Commission assisted the Ministry of Community, Culture and Sports with their town hall information sessions to invite public dialogue on the issue of marriage equality in Bermuda.
- In honour of the International Day for Persons with Disabilities the Commission joined Windreach and partners and other organizations for a march through Hamilton to draw attention to the theme: 'Inclusion Matters: Access and Empowerment for People of All Abilities'. This followed discussions earlier in the year with the Corporation to work towards making Hamilton more accessible for all and related advocacy in support of ensuring reasonable accommodation.



Aging and Disabilities
Services Walk

LOBBYING FOR MENTAL HEALTH AS A PROTECTED GROUND

In 2015 the Commission continued its lobbying efforts for the inclusion of mental health as a protected ground in the Human Rights Act. The Commission partnered with mental health agencies and advocates across the island, working together to reinforce the urgency of this long overdue protection to be put in place. Government and Opposition leaders were invited for consultation and briefing. The Commission engaged in an extensive consultation process with mental health experts, businesses and human resource leaders and, uniformed services (Bermuda Police Service, Bermuda Fire and Rescue Service and Department of Corrections) and other Government agencies to reinforce duties under Schedule 1 of the Human Rights Act with respect to reasonable accommodations as well as expanding considerations for understanding and addressing the reality of mental health issues in the workplace.

The Commission's strategy was designed to complement the Bermuda Mental Health Foundation's 'ReThink Mental Health' campaign, seeking to shift the way we understand and view mental health generally in Bermuda. Ensuring there is basic legislated protection from discrimination is a critical first-step to enabling more honest and open discussion around the realities of mental health disabilities in all spheres of life in Bermuda.

The Commission's goal is to see the Government's commitment to the principle of non-discrimination extended to the ground of mental health, which includes intellectual, developmental and psychological impairments.

As the Clinical Manager at Mid-Atlantic Wellness Institute shared with us, "As long as there is no protection under the Human Rights Act for persons with mental health issues, then the stigma will remain very much a part of the Bermuda society."

We must create an environment in Bermuda that is conducive to appropriately addressing these issues, but it is impossible to increase awareness and advocate for open and honest dialogue when there remains a fear of being discriminated against for revealing one's mental health status.

COMMUNITY ENGAGEMENT



IN THE MEDIA

The Commissioner's media efforts in 2015 addressed myriad issues through press statements, social media postings and interviews. The following are summaries of two of the several statements made during the year.

Position on Marriage Equality

The Commission responded to a request from the Royal Gazette for comment on a petition which called for the legalisation of same sex marriage in Bermuda. The statement from the Chair clarified the Commission's position on marriage equality in that the law should not restrict the rights that are afforded with the legality of marriage should people wish to take advantage of it.

“As long as there is no protection under the Human Rights Act for persons with mental health issues, then the stigma will remain very much a part of the Bermuda society.”

~Clinical Manager, MWI

Mental Health Presentation



Expanding Protection from Discrimination to Include Mental Health

As part of the Commission’s commitment to progressing an amendment to the Act to include the ground of mental health, the Chair issued a statement to reconfirm its commitment and to recognize the Commission’s work having partnered with the Bermuda Mental Health Foundation, the National Accessibility Advisory Council, the Mid-Atlantic Wellness Institute, the Mental Health Court and others who were all actively working to improve the lives of people with a mental illness.

INTAKES, PRELIMINARY INQUIRIES AND INVESTIGATIONS

The office reviews and screens every complaint received to determine whether the Act has jurisdiction to consider the complaint (see Annex 2, Complaint Handling Process). Complaints that do not fall within the Commission's jurisdiction are referred to other agencies for assistance wherever possible. Complaints that appear to have contravened the provisions of the Act must be made within six months after the alleged incident of discrimination (or up to two years if there is a good reason for the delay).



The Commission encourages the parties to a complaint to try to resolve their disputes informally and at the earliest possible opportunity through either mediation or conciliation—two alternative dispute resolution methods, which the Commission facilitates. In the event that no agreement is reached, the Commission may conduct an investigation. Following an investigation, if the complaint is deemed meritorious, the Executive Officer refers the complaint to the Chair of the Commission to empanel a Tribunal to adjudicate the matter.

COMPLAINT STATISTICS IN 2015

156

NEW INTAKES WERE LODGED.

109

of these intakes were actual complaints. The remaining 42 intakes were queries.

12

INTAKES WERE CARRIED OVER INTO 2015 FROM THE PREVIOUS YEAR.

5

complaints were determined to fall within the jurisdiction of the Act and referred for investigation.

37

intakes were withdrawn by Complainants who decided that they did not wish their matter to continue.

12

intakes were closed following a determination that the Act had no jurisdiction.

47

complaints that did not appear to be genuine under the provisions of the Act were closed and referred to other agencies or organisations for assistance.

19

intakes were deemed abandoned based on the Complainant's inaction and lack of response to the office.

7

queries were addressed by the Commission directly and closed.

12

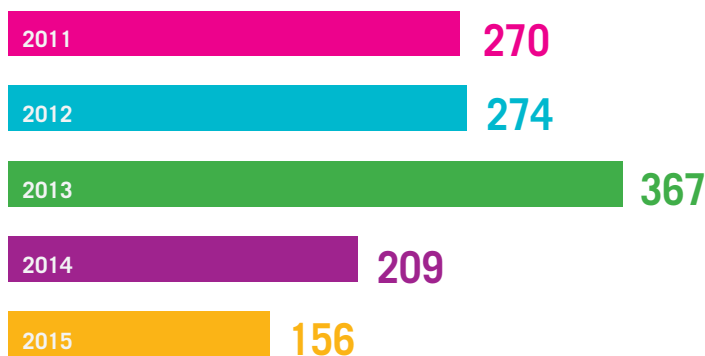
queries were referred to other agencies or organisations for assistance.

29

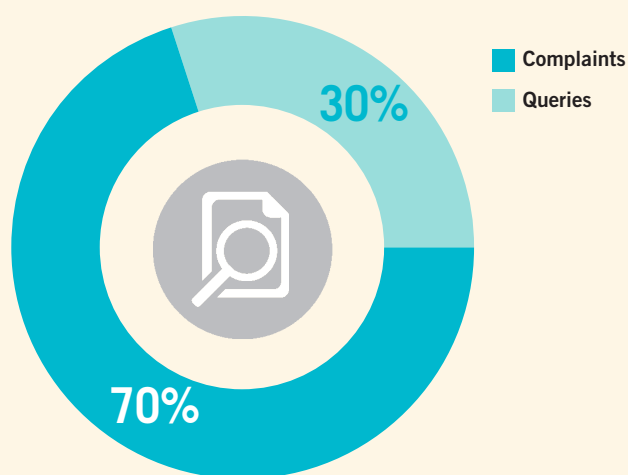
INTAKES WERE STILL IN PROGRESS AT THE END OF THE YEAR.

There was a 25% year over year drop in the number of intakes received between 2014 and 2015. We cannot be sure what attributed to this drop in intakes – there is often fluctuation from year to year, and we are tracking numbers to identify what the correlation may be.

1 TOTAL INTAKES RECEIVED BY YEAR

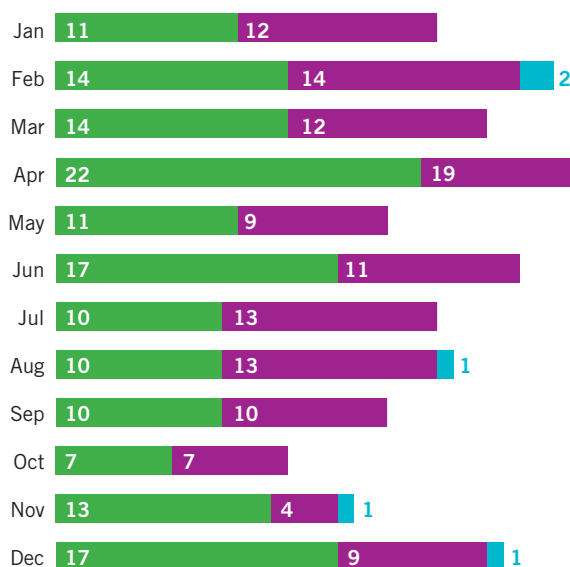


2 TYPES OF INTAKES RECEIVED, 2015



Note: Intakes received by the office are classified into Complaints and Queries. Requests for Information are noted under queries. In response to these queries, the office addresses questions and provides referrals to a variety of other agencies that might be of assistance.

3 TYPES OF INTAKES RECEIVED BY MONTH



The mean average of intakes received by the Commission per month in 2015 was approximately 13 intakes. The month of April was recorded with the largest number of intakes received at 22 intakes. The month of October recorded the least number of intakes at 7 intakes.

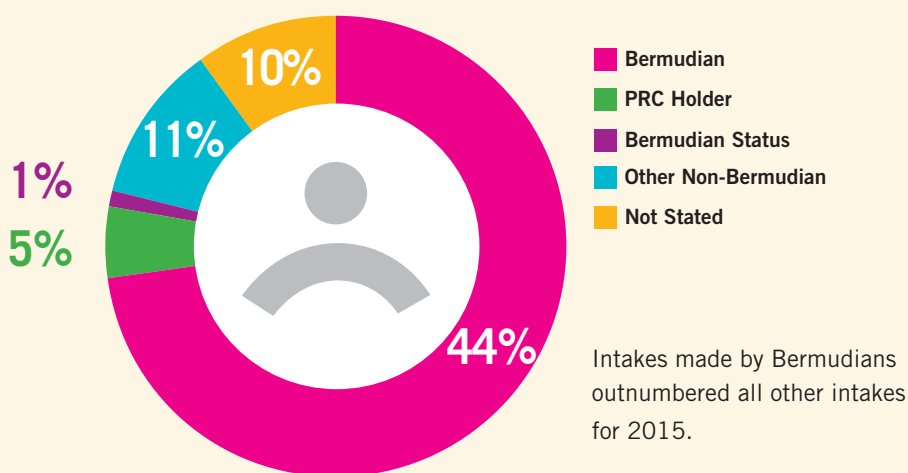
■ New Intakes for the Period Remaining
■ Previous Ongoing Intakes
■ Intakes Referred for Investigation

4 TOTAL INTAKES RECEIVED BY GENDER

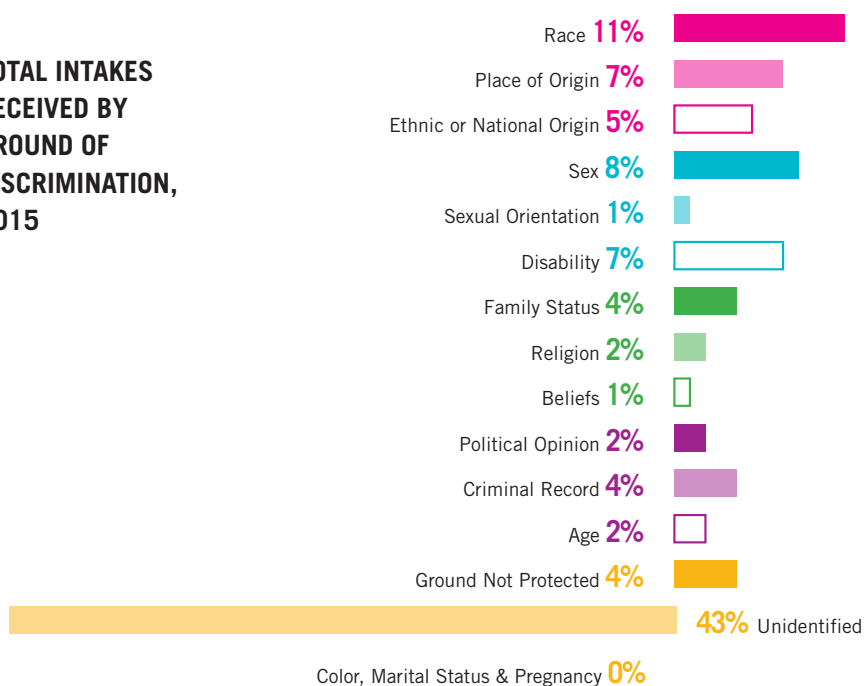


As in previous years, more females contacted the Commission in comparison to males.

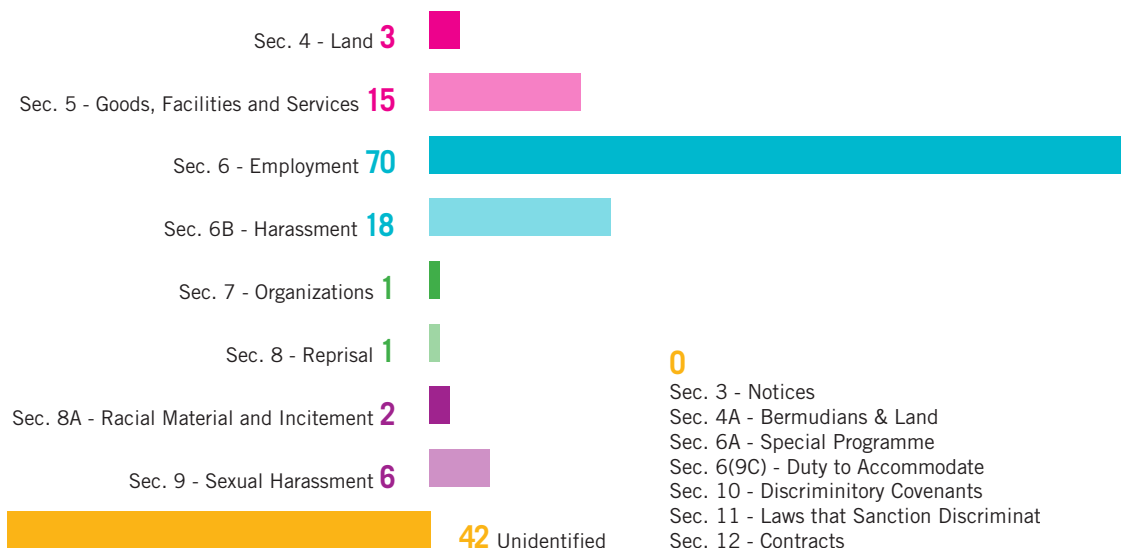
5 INTAKES BY STATUS



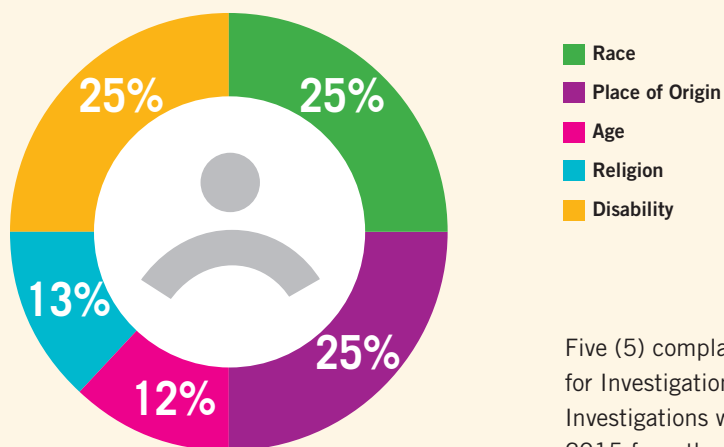
6 TOTAL INTAKES RECEIVED BY GROUND OF DISCRIMINATION, 2015



7 TOTAL INTAKES RECEIVED BY AREA OF DISCRIMINATION, 2015

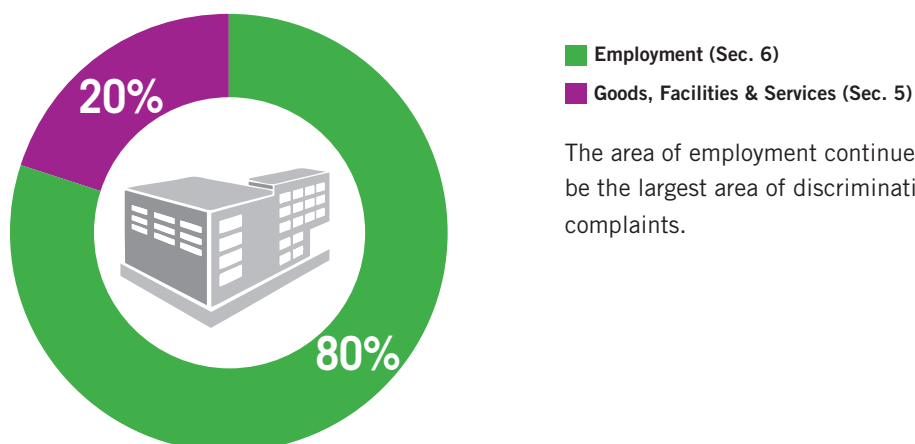


8 INVESTIGATIONS BY GROUND OF DISCRIMINATION, 2015



Five (5) complaints were approved for Investigation in 2015. Seven (7) Investigations were carried over into 2015 from the previous year.

9 INVESTIGATIONS (APPROVED IN 2015) BY AREA OF DISCRIMINATION, 2015



The area of employment continues to be the largest area of discrimination complaints.

PRELIMINARY INQUIRIES

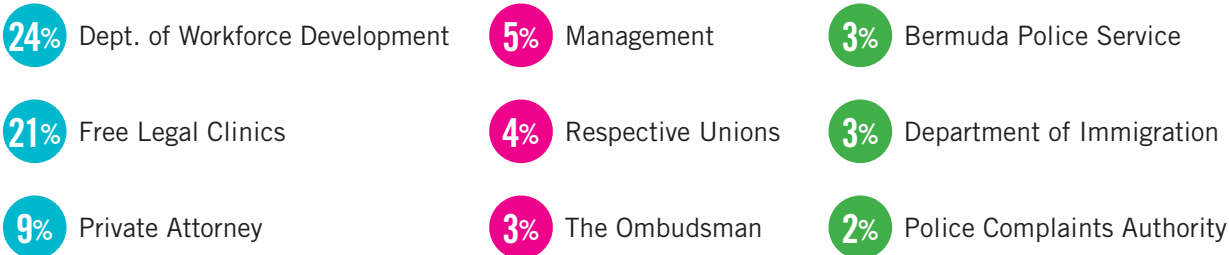
During the reporting period, twenty four (24) preliminary inquiries were conducted.

CONCILIATION

In five (5) cases, parties attempted conciliation in order to try to settle their complaints. One (1) matter was successfully conciliated. The remaining four matters were unable to settle their dispute through conciliation.

REFERRALS TO OTHER AGENCIES

The agencies that the Commission made the most referrals to in 2015 include:



SAMPLE COMPLAINTS LODGED

Below are some examples of complaints of discrimination that were brought to the attention of the Executive Officer through the year. In order to preserve confidentiality, identifying information was omitted from each complaint. It is important to keep in mind that each case is unique, and the determining factors may vary significantly.



Complaint A

The Complainant stated that while he was sitting in his car he witnessed a man in a motorized wheelchair trying for a period of time to get into a local store but was prevented from entering due to a small step at the entrance. The Complainant said that he had watched the staff through the glass door grinning at the man and not offering any assistance. He said that an employee finally came outside and put down a wheelchair ramp and immediately went back inside. The Complainant was disgusted with what he had witnessed which he believed to be morally wrong. He called to make a complaint and requested that the Commission contact the store to inform them of their staff's behaviour. The Commission contacted the store manager and offered suggestions on accessibility, staff training, awareness and responsiveness. The matter was resolved through this approach and the complaint was closed.



Complaint B

A Complainant stated that she had been discriminated against on the ground of **national origin** when she had been given an eviction notice by her landlord. After further probing, the office discovered that she had actually been evicted for rental arrears. Once the Complainant was invited to provide evidence to illustrate that she had been evicted for discriminatory reasons, she ceased communications with the office. The office attempted to contact the Complainant on numerous occasions, but based on her inaction, the complaint was deemed abandoned and closed.



Complaint D

A female Complainant enquired about an Employment Survey data form which asked applicants to identify their **age** when applying for a position with any organization. The Complainant had been applying for jobs and wanted to know if the requirement was a violation of her human rights and indicated that it did not help in her efforts to secure employment. The Complainant was initially given a provisional referral to the Department of Statistics to get an explanation for why this particular data was being collected. Additionally, the Commission followed up with the Department of Statistics to obtain further clarity. The Complainant confirmed her understanding of the information provided by the Commission which explained that the collection of data, such as that collected under the auspices of the Employment Survey by the Department of Statistics, is allowed under the Human Rights Act specifically under section 6(4) (a). Based on her satisfaction with how the query was addressed, the matter was closed.



Complaint E

A female Complainant alleged discrimination on the ground of religion by her employer. She wanted to know if it was discriminatory for her employer to reference one's practice of praying in the workplace. Before the complaint could be fully reviewed by the Commission, the Complainant reported that she wished to withdraw her complaint and the matter was closed.

HUMAN RIGHTS TRIBUNALS

The Human Rights Tribunal is a quasi-judicial body whose main function is to adjudicate matters referred by the Executive Officer to the Chair of the Commission (See *Annex 3: Tribunal Process*). Each Tribunal is composed of up to three Commissioners who are empaneled to hear cases. The judgments made by the Tribunal are registered with the Supreme Court and are enforceable.



REFERRALS TO A TRIBUNAL

The Executive Officer referred a total of six (6) complaints to the Chair in 2015 for adjudication.

REFERRED FOR TRIBUNAL	TOTAL
IN 2015	6
TRIBUNALS ONGOING	6

RESOLVED THROUGH MEDIATION

All cases were offered mediation in an effort for parties to resolve their complaints before a Tribunal Hearing was held. Two (2) of the matters settled during mediation. The remaining two (2) cases declined the mediation offer however, one Complainant later resolved their complaint outside of mediation before the hearing was held.

COMPLAINTS WITHDRAWN PRIOR TO TRIBUNAL

Two (2) Complainants withdrew their complaints before their Tribunal Hearings were held.

DISMISSED BY TRIBUNAL CHAIR

Two (2) complaints were dismissed by the Tribunal Chair before the Tribunal Hearings were held. Both complaints were deemed abandoned after multiple attempts to contact the Complainants were unsuccessful.

CARRIED OVER INTO 2016

Three (3) complaints referred for Tribunals remained active at the end of the year and are expected to be held in 2016.



TRIBUNALS HELD AND JUDGMENTS RENDERED IN 2015

PHILLIP ANTHONY INGHAM (Complainant) V. DIET CENTER AND MAGNUM POWER FORCE GYM LTD. (First Respondent), KAREN MAGNUM (Second Respondent) AND TONI-LEE CURTIS (Third Respondent) [2015]

Facts

The Complainant is a former employee of the First Respondent, which is a limited liability company in the business of operating a members' fitness gym. The Second Respondent is a shareholder, a director and a manager of the First Respondent. The Third Respondent is an employee of the First Respondent. The Complainant has alleged that he was terminated because of his disability cerebral palsy. The Complainant has additionally alleged that he was harassed by the Third Respondent and the First and Second Respondents failed to take steps to prevent the harassment from taking place or taking remedial steps upon the Complainant complaining that he was being harassed because of his disability.

Issues

The issues decided are as follows:

- (a) Did the First Respondent and the Second Respondent upon the termination of the Complainant's employment by the First Respondent and the Second Respondent because of his disability discriminate against the Complainant?
- (b) If the First Respondent and the Second Respondent upon the termination of the Complainant's employment by the First Respondent and the Second Respondent because of his disability discriminated against the Complainant, was there a bona fide occupational requirement for the Complainant within the meaning of subsection 6 (9B) of the Act.

(c) If there was a bona fide occupational requirement, have the First Respondent and the Second Respondent shown that it was not possible without unreasonable hardship to modify the circumstances of the Complainant's employment so as to "eliminate the effects of his disability in relation to the employment".

(d) Did the Third Respondent discriminate against the Complainant when the Third Respondent allegedly harassed him because of his disability?

(e) Did the First Respondent and the Second Respondent fail to take steps to prevent the Complainant from being harassed because of his disability, and also failed to take remedial steps in response to the Complainant's complaint that he was being harassed?

Issue 1

In giving its ruling the Tribunal indicated that the Complainant must show that the disability was a factor in the decision to terminate his employment but not he would not have to show that it was the sole or even the dominant reason. The Tribunal highlighted that while the Respondents' averred that they were not aware nor made aware by the Complainant of his disability until the end of his employment, the Second Respondent's evidence indicated that she knew of the Complainant's limitations with respect to his right arm and with lifting heavy things since the date of the interview and also purchased him a left handed mouse. The Tribunal accepted the evidence of the Complainant that he informed Mr. Jent, Mr. Magnum and the Third Respondent that he had cerebral palsy.

The Tribunal agreed with Counsel for the Complainant that the First Respondent was under a duty to take pro-active steps in response to the disclosure of his disability.

Accordingly, the Tribunal ruled that the ignorance of the employer is not a defence to a claim for discrimination. Further, once the disability is apprehended or disclosed, there is a positive legal obligation on the employer to make enquiries about the employee's disability, and to make accommodation for the disability where appropriate. The Tribunal found that the First Respondent failed to make such enquiries and ruled that on the balance of probabilities the Complainant had established at least a prima facie case that his disability was a factor in the decision to terminate his employment.

Issue 2

The First Respondent failed to expressly aver a specific bona fide occupational requirement however the Tribunal concluded through evidence adduced that the ability to multitask amounted to a bona fide occupational requirement for the post. The Tribunal reached this decision based on the evidence, which detailed the requirements of the front desk post along with the busy periods of the gym being the period of time the Complainant worked.

Issue 3

The Tribunal concluded that the First Respondent would suffer undue hardship if it was compelled to modify the circumstances of the Complainant's employment by changing his working hours or the timing of his shifts generally to a less busy period. This was due to the Complainant's employment came about as he was filling a temporary post that had become available.

Issue 4

The Tribunal found that the Third Respondent's treatment of the Complainant was vexatious and that she knew or ought to have known that such treatment was

unwelcomed by the Complainant. The Tribunal in giving their ruling found that on the balance of probabilities the Complainant was harassed in the workplace by the Third Respondent on the basis of his disability.

Issue 5

It was established that the First Respondent did not possess a written anti-discrimination policy or an anti-harassment policy. The Tribunal further ruled that the First and Second Respondent failed to make enquiries when put on notice about the Complainant's disability and into the alleged conduct of the Third Respondent. There was no awareness by the First Respondent as to what its obligations were when it employs someone with a disability. With this in mind, the Tribunal found that the First and Second Respondent failed to take steps to prevent the Complaint from being harassed because of his disability, and also failed to take remedial steps upon the Complainant complaining that he was being harassed because of his disability.

WHAT THIS MEANS FOR BERMUDA

This Decision highlights the importance of local companies adequately investigating complaints made by employees, specifically those that reference discriminatory acts by colleagues. Additionally, it sets out the liability of employees that seek to engage in discriminatory practices against colleagues. The Decision also details the consequences as regards liability in allegations of discrimination where there does not exist a written anti-discrimination policy or anti-harassment policy.



DION LIGHTBOURNE (Complainant) v. FOURWAYS LIMITED (First Respondent) AND PETER KOVACS (Second Respondent) 2015

Facts

The Complainant who is employed at Café 4 alleged that the Second Respondent sexually harassed her on three separate occasions by hitting her on her behind (First Complaint). The Complainant additionally alleged that the First Respondent failed to take reasonable action to stop the sexual harassment from taking place (Second Complaint), and further, on receipt of the complaint of sexual harassment, failed to address it properly, or at all (Third Complaint).

Issues

The Tribunal focused on three distinct issues:

- (a) What actually occurred between the Complainant and the Second Respondent on 8 October 2013 at Café 4 (Incident);
- (b) What was the working environment at Café 4 at the time of the Incident (i.e. what attitude, policy and procedures did the First Respondent have in respect of preventing sexual harassment in the work place) (Environment); and
- (c) On receipt of the Complainant's complaint, how did the First Respondent react to, and deal with her concerns (Reaction).

Second Respondent

In relation to the first complaint of sexual harassment the Tribunal found that while it wasn't on the serious end of the spectrum that itself did not affect the test to be applied in deciding whether there had been a breach of the Act.

The Tribunal dealt firstly with the liability of the Second Respondent, finding that the act of blocking the pathway of the Complainant and then tapping her on the head, which followed with further unwelcomed conduct now directed at the Complainant's behind was sufficient for the harassment to become sexual in nature along with conduct that undermined the Complainant's dignity at her workplace. The Tribunal in their ruling found that the conduct complained of met the test set out in Section 9 (4) of the Act.

The Tribunal when dealing with submissions that the Second Respondent, who was a waiter, was not in a position of authority over the Complainant found that Section 9 (3) of the Act made it possible for liability to be found against any fellow employee of whatever level as the purpose of the Act is to prohibit sexual harassment. The Tribunal went further to add in its ruling that to suggest that the legislature only intended to protect an employee from harassment by those working at a more senior level is at odds with the intent of the Act.

First Respondent

The Tribunal finally dealt with the issues relating to the First Respondent's liability. The Tribunal found that while the First Respondent had a Handbook, there was no evidence of any formal training for any of the employees on its implementation. The Tribunal relied upon the First Respondent's delays and failure to follow their own policy in investigating the sexual harassment complaint to reach the conclusion that they clearly did not take the necessary steps to ensure that the workplace was free from sexual harassment. The Tribunal in those circumstances had no difficulty in finding the First Respondent liable under Section 9 (3) of the Act, as they were guided by the decisions in *Robichaud v Canada*

(Treasury Board) [1987] 2 SCR 84 whose principles were approved in the Supreme Court of Bermuda decision *Apex Construction Management Ltd. et al v. Grant* [2015] SC (Bda) 24 App (6 April 2015).

The Tribunal subsequently awarded damages for injury to feeling in the sum of \$4,000.00, which required the First Respondent to pay \$3,500.00 to the Complainant and the Second Respondent to pay \$500.00.

WHAT THIS MEANS FOR RESIDENTS OF BERMUDA

This Decision clearly sets out that Section 9 (3) of the Act makes it possible for an employee to be found liable of sexual harassment despite not being in a position of authority to a complainant. The Decision further highlights the importance of employers actively creating a work environment that denounces sexual harassment and having policies and procedures in place to ensure complaints of sexual harassment are adequately investigated. The Decision also sets out the consequences of the failure to ensure that the work environment is both free from sexual harassment and that an adequate investigation is conducted in circumstances where complaints are lodged citing sexual harassment in the workplace.

MARK ANDERSON (Complainant) v. DESAI JONES (Respondent) 2015

Facts

The Complainant who is employed as a bus operator by the Department of Public Transportation was driving a bus towards Somerset, which stopped at the Manse Road bus stop, where the Respondent boarded. The Respondent informed the Complainant that he was only in possession of a fifty-dollar bill and did not have exact change. The Complainant nevertheless allowed the Respondent on the bus. Prior to the Respondent leaving the bus the Complainant realized that this had happened on two prior occasions and as the Respondent was exiting the bus he informed him that he would not be allowed on the bus again without paying the correct fare. A few days later the Complainant was advised that comments were made on the social media site 'Facebook', which referenced the incident on the bus and contained derogatory comments and references about the Complainant and his sexual orientation.

Complaints

The Complainant's complaint against the Respondent was as follows:

- (a) On the 12th March 2014, the Respondent discriminated against him by publishing or displaying a notice, sign, symbol, emblem or representation before the public indicating discrimination against him or with an intent to discriminate against him because of his sexual orientation in contravention of Section 3(1) of the Act, as read with Section 2 (2)(a) (ii) of the Act; AND
- (b) On 28th March 2014 the Respondent discriminated against him by trying to intimidate or coerce him by trying to prevent him from making a complaint to the Human Rights Commission or



to try to prevent him to continue to participate in proceedings under the Act in contravention of the Section 8 (d) of the Act.

First Complaint

The Respondent in this matter accepted as accurate the Complainant's evidence of the exchange on the bus on the 11th March 2014 and accepted authorship of the Facebook comments. The Respondent further indicated that his Facebook page is open to the public, which would allow anyone with Facebook access to his page. The Tribunal found that the comments posted were done in reference to the Complainant and that the Respondent treated the Complainant less favorably than he treats or would treat another as the comments were deliberate and entirely based on the sexual orientation of the Complainant. The Tribunal when considering whether the complaint was conducted in a manner set out in Section 3 (1) of the Act concluded that the published comments were not equivalent to a notice, sign, symbol, emblem or other representation as listed within the relevant section of the Act. The Tribunal reached that conclusion with guidance from the Canadian interpretation of a similar statute, Section 12 of the Canadian Human Rights Act 1985, which is very similar to Section 3 (1) of the Bermuda Act. The Tribunal despite finding that the Respondent discriminated against the Complainant it was not able to find on a fair, large and liberal interpretation of Section 3 (1) of the Act, that the provision could be construed to allow the comments and conversations on Facebook to be described as a notice, sign, symbol, emblem or other representation, as intended under the Act and the Tribunal regrettably dismissed the first complaint. The Tribunal did however

recommend that Section 8A of the Act, which seems to clearly envisage capturing a set of circumstances similar to those of the first complaint, be amended to include sexual orientation to ensure in the future a just verdict could be given in circumstances similar to the first complaint.

Second Complaint

The Tribunal heard no evidence from the Complainant that he felt intimidated by the Respondent's comments posted in relation to receiving correspondence from the Human Rights Commission. The Tribunal noted that while they were greatly disturbed by the inflammatory comments, language and opinions expressed by the Respondent on his Facebook page, they did not indicate that the Respondent sought to intimidate the Respondent from proceeding with his complaint. The Tribunal accordingly, dismissed the second complaint.



WHAT THIS MEANS FOR RESIDENTS OF BERMUDA

This Decision of the Tribunal in respect of the first complaint highlights the need to amend the Act to ensure that the rights of all people living and working within the islands of Bermuda are truly protected. The Tribunal has called for the amendment of Section 3 (1) of the Act to encompass the written word such as articles and statements along with the amendment of Section 8A to allow protection for all prohibited grounds of discrimination.



ANDRE HYPOLITE (Complainant) v. WESTGATE CORRECTIONAL FACILITY (First Respondent), COMMISSIONER EDWARD LAMB (Second Respondent), MICHAEL CHRISTOPER (Third Respondent) AND PHILIP DOWNEY (Fourth Respondent) [Preliminary Hearing] 2015

Facts

The Complainant is an inmate at the Westgate Correctional facility and the basis of his complaint is that on two separate occasions between September and December 2011 he was stripped naked and targeted by the Third and Fourth Respondent for intrusive searches, which amounted to sexual harassment. The Complaint alleged that those searches were a breach of Section 9 (2) of the Act as read with Section 2 (2)(a)(vii). The Complainant further asserted that the searches were only carried out as a result of the Complainant making various requests for information and/or a complaint to the Human Rights Commission.

Issues

The preliminary hearing held on the 9th day of October 2014 dealt with the following issues:

- (a) An application made by the Respondents to strike out the Complainant's case on the grounds that the Tribunal had no jurisdiction to hear a complaint under Section 9 (2) of the Act on the facts of this case, and/or the Complainant's case was vexatious and/or an abuse of process (First Issue);
- (b) An application by the Complainant to amend his claim to include a claim that the Respondents were in breach of Section 8 (d) of the Act (Second Issue);

- (c) An Application by the First Respondent that any claims against it should be dismissed on the grounds that it is not a legal entity (Third Issue);
- (d) An application by the Second Respondent that the Complainant provide further particulars of the claim against him (Fourth Issue); AND
- (e) An application by the Complainant to subpoena a witness and for the Respondents to provide specific disclosure (Fifth Issue).

First Issue

The Tribunal at the outset declared that it was satisfied that the incarceration of the Complainant did not exclude him from being able to bring a claim under the Act. The Tribunal was left with the question of whether it had the jurisdiction to hear a complaint by a prisoner alleging sexual harassment by his prison guards under Section 9 (2) of the Act.

Counsel for the Complainant argued that the complaint fell under Section 9 (2) of the Act as a person could occupy accommodation despite not being a tenant. Counsel for the First and Second Respondents submitted that the position in Canada was that prisoners and prison guards did not fall under the definition of occupant or landlord, which the Tribunal found persuasive, as they dealt with the interpretation of our Act, which is derived from the Ontario legislation. Counsel for the Third and Fourth Respondents focused on the legal definition of the wording and interpretation of Section 9 (2) of the Act. The Tribunal found that it couldn't be said that any of the Respondents were landlords or agents of the landlord as there is no leasing of property to inmates at Westgate. As regards the issue of the Third and Fourth

Respondents being occupants the Tribunal found that the Complainant had no possession of his cell nor the right or ability to exclude the Respondents from entering it.

The Tribunal in its ruling on this issue determined that it had no jurisdiction to consider the Complainant's complaint, as it was not the intention of the legislators to include incarceration in Section 9 (2), and they formed the view that to do so would distort the meaning of the words of Section 9 (2) of the Act.

Second Issue

The primary concern of the Complainant was his treatment by the Third and Fourth Respondent following requests for documents and/or making complaints to the Human Rights Commission. It was also clear that the Respondents understood this. The Complainant sought to amend his claim to include a claim under Section 8 (d) of the Act. Counsel for the Respondents objected to the proposed amendment, as the section was not designed to deal with the circumstances set out within the complaint.

The Tribunal however found that it cannot be logically argued that the legislators intended to prohibit a more indirect form of discrimination while allowing such discrimination if directed straight at an individual. The Tribunal was satisfied that the wording within Section 8 of the Act "or

with a view to penalizing any person for having made such a complaint or disclosure or for having testified" captures the scenario of the Complainant's complaint.

The Tribunal when dealing with whether it had the jurisdiction to hear a claim under Section 8 (d), which wasn't specifically referred to in the complaint ruled that the entire complaint focused on the allegation that the Complainant was penalized and/or targeted for making complaints to the Commission. All parties knew this from the outset and it cannot be suggested that either Respondent would suffer prejudice if the Tribunal allowed it to proceed. The Tribunal subsequently ruled that the matter would proceed subject to their further findings. The Tribunal also rejected the submissions that the complaint should be dismissed as being vexatious and/or an abuse of process.

The Tribunal further ruled that the new complaints alleged have come out of time and the Tribunal has no jurisdiction to allow a further complaint under Section 2 (2)(a)(ii) as read with the Bermuda Constitution.

Third/Fourth Issue

The Tribunal determined that Westgate Correctional Facility should not have been listed as a Respondent and that the Commissioner of Prisons should have been the correct First Respondent. However, as Counsel for the Commissioner of Prisons noted there was no actual allegation against that statutory office by way of vicarious liability or otherwise. The

complaint against the First and Second Respondents was dismissed. The fourth issue in those circumstances did not require for the consideration of the Tribunal.

Fifth Issue

The Complainant had not asked for the witness it sought to subpoena to attend nor did he ask the Respondents to provide the required documentation. Counsel for the First and Second Respondents indicated that they did not intend to withhold any relevant documents and were of the view that all had been provided.

The Tribunal at that stage did not make an order as regards the fifth issue and the substantive hearing was ordered to proceed in respect of the Third and Fourth Respondents only.

WHAT THIS MEANS FOR RESIDENTS OF BERMUDA

This Decision of the Tribunal in respect of the first issue made it clear that **anyone incarcerated would still be eligible to bring a claim under the Act.** This has demonstrated that the rights of those who have had their liberty deprived are still able to pursue claims of discrimination.

ANDRE HYPOLITE (Complainant) v. THE COMMISSIONER OF PRISONS (First Respondent), MICHAEL CHRISTOPHER (Second Respondent) AND PHILIP DOWNEY (Third Respondent) [Costs Order] 2015



Facts

On the 9th day of October 2014 a preliminary hearing took place, which considered an application by the Respondents to strike out the Complainant's complaint for being vexatious and/or an abuse of process. The Complainant at the hearing withdrew the complaint against the First Respondent (initially incorrectly named as Westgate Correctional Facility and Commissioner Edward Lamb) and the Tribunal subsequently dismissed the complaint in a judgment dated the 13th day of January 2015. The only remaining parties in the matter were the Complainant and the Second and Third Respondent. Counsel for the First Respondent made an application for costs.

Issues

The First Respondent's application for costs required submissions on two issues:

- (a) Whether the Tribunal should award costs against the Complainant; and
- (b) Whether the Tribunal had the jurisdiction to award costs against the Human Rights Commission itself, and if so, should costs be awarded in this case.

First Issue

Counsel argued that neither the original nor amended Particulars of Complaint contained any specific allegations against the First Respondent nor did there exist a reasonable prospect of the complaint ever succeeding.

The Tribunal noted that no evidence was placed before it to suggest that the Complainant was acting in a vexatious manner and/or there was an abuse of process. The Tribunal noted that this finding neatly dispensed any cost order pursuant to Section 20 (3) of the Act. The Tribunal then went on to consider its broader powers under Section 20 (1)(c) of the Act and noted that when the complaint was made it was done from prison without the assistance of an attorney. In addition to that the Tribunal noted that a substantial part of his complaint was the allegation that he was victimized for making or trying to make a complaint to the Human Rights Commission. Furthermore, the issues of vicarious liability and its application is not one that a layman would be expected to understand.

The Tribunal found that it may or may not have been the case that the Executive Officer should have dismissed the complaint against the First Respondent prior to referring it to the Tribunal but this is not something the Tribunal should consider when dealing with a costs application against the Complainant. The Tribunal concluded that it would be incorrect to exercise their discretion to award costs against the Complainant further to Section 20 (1)(c).

Second Issue

Counsel argued that the decision of the Human Rights Commission to refer the complaint to this Tribunal was wrong and showed a lack of sufficient investigation. Counsel then argued that it follows that the Commission is jointly and severally liable with the Complainant for the legal costs incurred by the First Respondent.

The Tribunal noted that it did not appear as if either the Tribunal or the previous Board of Inquiry had dealt with this issue in detail, as no precedent was put before the Tribunal to suggest otherwise. The Tribunal then went on to consider what jurisdiction a sitting Tribunal had to consider such a cost application.

The Tribunal after being referred to local and Canadian Supreme Court authorities expressed that the Tribunal's jurisdiction differed, as it was limited to dealing with matters referred by the Executive Officer, further to Section 18 of the Act. The Tribunal in those circumstances refused the application for costs, as it was not the appropriate legal jurisdiction for the application.

WHAT THIS MEANS FOR RESIDENTS OF BERMUDA

This Decision of the Tribunal in respect of the first issue demonstrates the need for caution when considering costs applications either under Section 20 (1)(c) of the Act or Section 20 (3) of the Act at a preliminary hearing before full evidence is heard. The Decision in respect of the second issue makes it clear that the Tribunal does not possess the statutory jurisdiction to step into the shoes of the Supreme Court and rule on an application made, which is clearly one for judicial review.



ANNEXES

ANNEX 1: How to Lodge a Complaint

Anyone who has reasonable grounds for believing that the Human Rights Act has been contravened may make a complaint to the Commission.

- **WALK-IN** Human Rights Commission
Milner Place | Ground Floor | 32 Victoria Street | Hamilton HM12
- **MAIL** P.O. Box HM 734 | Hamilton HM CX
- **PHONE** (441) 295-5859
- **EMAIL** humanrights@gov.bm
- **WEB** www.hrc.bm

A complaint must:

1. Be made orally, electronically or in writing.
2. Be made within six months after the alleged discrimination occurred (and up to two years if there is sufficient reason for the delay and that no one would be prejudiced due to the delay)
3. Be made by the Complainant, although the Act also allows for someone to make a complaint on behalf of another person, if that person consents and is unable to do so.

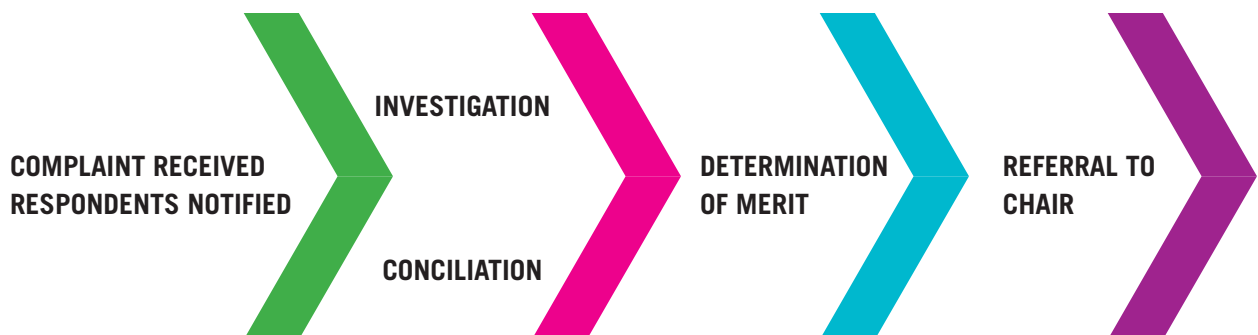
If assistance is required, the Officers can help by drafting the particulars of the complaint. Commission staff may further contact the Complainant to clarify any issues raised in the complaint.

If the complaint does not fall under the jurisdiction of the Human Rights Act, Officers will notify the Complainant and the complaint will be closed however, where appropriate, referrals will be provided to other agencies which may be suited to assist in resolving the matter.

ANNEX 2: Complaint Handling Process

1. **Complaint Received** – A complaint is received and an Officer is assigned to obtain as much relevant information as possible to clarify the complaint. A preliminary inquiry may occur at which point the Respondent will be contacted. The Executive Officer considers the complaint and, if it is determined to be a prima facie case, the Respondent(s) are requested to respond to the formal complaint.
2. **Investigation/Conciliation** – An investigation into the complaint may begin once parties have provided their initial statements. Officers will attempt to conciliate the dispute throughout the investigation process.
3. **Determination of Merit** – Following an investigation, if the matter is not resolved through conciliation, the Executive Officer considers the evidence adduced and then makes a decision as to whether or not the complaint appears to have merit.

If it is determined that the complaint does not appear to have merit, the Complainant is offered the opportunity to be heard and a final decision is made.
4. **Referral to Chair** – If the complaint appears to have merit and the matter was unable to be resolved, the Executive Officer refers the matter to the Chair of the Human Rights Commission who will empanel a Human Rights Tribunal.



ANNEX 3: Human Rights Tribunal Process

A Human Rights Tribunal is an independent body empanelled by the Chair to resolve cases of alleged discrimination in a fair, just and timely way. Tribunal members have no previous knowledge, involvement or information relating to the investigation process. The Chair of the Commission receives only the complaint and Respondent's statements to inform them of the basis of the matter.

Parties are first offered the opportunity to settle the dispute through mediation. If the parties do not agree to mediation, or if mediation does not resolve the dispute, the Chair empanels a Tribunal who holds a public hearing. The onus is on the parties to a complaint to supply the Tribunal with all evidentiary materials to support their claim, including witness statements.

The Tribunal is empowered to determine whether unlawful discrimination has occurred. Upon a finding of discrimination, the Tribunal may award damages and make such orders that are enforceable and registered by the Supreme Court. Appeals of Commission decisions may be brought before the Supreme Court.



ANNEX 4: Boards of Inquiry

The 2012 amendments brought forth changes to the processes and procedures of the Human Rights Commission. One significant change was the replacement of the Boards of Inquiry (BOI) with Human Rights Tribunals.

In 2015, the final remaining BOI, which had been empanelled by the Minister in 2012, was administered by the Department of Human Affairs.

Michael Harkin vs The Commissioner of Police

Mr. Michael Harkin, a British national who worked for the Bermuda Police Service, alleged that the Commissioner of Police contravened sections 6(1)(f) and 6(1)(g) as read with section 2(2)(a)(i) of the Human Rights Act, 1981 when he was denied promotion on the basis of his place of origin. The Complainant also alleged the Respondent contravened section 8(a) of the Act when the Respondent retaliated by refusing to renew his work permit. The liability Hearing was held in February 2013. The Board rendered its Judgment in July 2013, ruling that the Respondent had unlawfully discriminated against the Complainant.

Parties sought an adjournment to see if the issue of damages could be settled. As the issue remained unresolved, the matter was heard by the Board in August 2014 and a written decision on quantum rendered on 11th May 2015. The Decision can be found on the Commission's website.

Note: All Board of Inquiry Decisions are available to the public and are registered with the Supreme Court. Copies are available upon request to the Human Rights Commission.

ANNEX 5: Human Rights Cases in the Bermuda Supreme Court

BERMUDA BRED COMPANY (Appellant) V. THE MINISTER OF HOME AFFAIRS (First Respondent) AND THE ATTORNEY GENERAL (Second Respondent) IN THE SUPREME COURT OF BERMUDA CIVIL JURISDICTION 2015: NO. 40

Facts

The Applicant has sought relief from the Court as it was not disputed that Bermudians in stable long-term same-sex relationships, whether unmarried or legally married in the United States, have no right to have their foreign same-sex partners residing and working in Bermuda which corresponds to the rights available to heterosexual Bermudians who marry foreign spouses. The current Immigration policy permits foreign unmarried partners who are sponsored to reside in Bermuda with their Bermudian partners, irrespective of sexual orientation. There is, however, no policy provision for same sex partners to enjoy the same residential and working benefits accorded to foreign spouses under existing Immigration law or policy.

Issues

The Applicant has sought relief under the following headings:

- (1) Relief under the Bermuda Constitution; and
- (2) A declaration that same sex partners are entitled to the same treatment as wives and husbands under the Bermuda Immigration and Protection Act 1956 as read with section 5 of the Human Rights Act 1981;
- (3) A declaration that a proposed Immigration policy change permitting “partners” of work permit holders to reside to reside and seek employment in Bermuda would be unlawful and contrary to section 5 of

the Human Rights Act 1981 to the extent that does not equally apply to same sex partners;

- (4) Declarations that the Minister’s decision to treat same sex couples in a discriminatory way is unreasonable and/or in breach of a legitimate expectation.

Legal Findings: overview of the key Human Rights Act 1981 provisions

The Court indicated that Section 30B of the Act appears designed to give primacy to the Human Rights Act over all conflicting statutory provisions, which are not explicitly stated as intended to exclude the operation of the HRA. The Court went on to explain that it is given real vitality by an even more powerful and closely connection provision, Section 29 of the Act, which was followed in A and B v Director of Child and Family Services and Attorney General [2015] SC (Bda) 11 Civ. Justice Hellman found that sections 28 (1) and 28 (3) of the Adoption Act 2006 were inoperative to the extent that they discriminated on the grounds of marital status against same sex or unmarried couples.

The Court considered the key provisions within section 5 firstly dealing with subsection (1) as the present claim as based on the prohibition of providing services in a discriminatory manner. The second key provision was subsection (2), which specified “*the facilities and services referred to in subsection (1) include, but are not limited to the following namely - ... the services of any business, profession or trade or local or other public authority.*”

Section 2 of the Act forbids discrimination against another person because of (ii) his sex or sexual orientation (iii) his marital status, which were the two grounds of discrimination

engaged in this authority. The primary issue to resolve was whether or not Section 30 (B) (1) of the Act on the construction of the definition in section 2 (2) of the Act, is that the prohibition on discriminating now embraces conduct by persons acting under the purported authority of any statute that does not expressly dis-apply the primary of the HRA.

Legal Findings: overview of key Bermuda Immigration and Protection Act 1956 provisions

The Respondents raised the question of whether the functions of the Minister under the BIPA constituted “services” for the purposes of section 5 of the Act. Section 8 of BIPA sets out that BIPA takes precedence over any conflicting laws except as otherwise expressly provided.

Legal Findings: distinctive rules governing the interpretation of human rights provisions

The Applicant submitted that the HRA was well recognized as being quasi-constitutional in nature and its provisions should be interpreted broadly to give the fullest effect to the rights protected. The Court agreed with reference made to Benion Statutory Interpretation, which was followed in Canadian Odeon Theatres Ltd. v Saskatchewan Human Rights Commission and Huck [1985] 3WWR 717 “...a statute which guarantees fundamental rights and freedoms and which prohibits discrimination to ensure the obtainment of human dignity should be given the widest interpretation possible.”

Legal Findings: does section 5 of the Act apply to the sphere of Immigration law at all?

The Court found with ease that the HRA generally applied to the Crown, which section 31 of the Act confirms. The Court found that as of April 8, 1993 applied to acts done by the Government Ministers and other public officers in the same way that it applied to acts done by private persons. Section 29

fortified this, which empowered the Court to declare provisions of other statutes inoperative to the extent that they are inconsistent with the HRA. The Act therefore not only binds the Crown, but unless Parliament expressly legislates in terms which include the primacy of the Act, the Crown cannot justify infringing the provisions of the Act by relying on legislative authority conferred by other statutes. The Court found that looking at section 5 of the Act as part of the broad context of Part II of the Act, as opposed to in the wider context of the Act as a whole, the starting assumption would fairly be that any exceptions to the general prohibitory rule against discrimination would be explicitly spelt out.

The Natural and ordinary meaning of the crucial words within the context of Section 5

The Court found when considering the words “services of any public authority” as set out within Section 5 that it would be difficult to ascertain any coherent basis for construing section 6 (2) as intending to include some public services but not others.

The Court when considering a modern approach to interpreting statutory human rights provisions turned to Lord Scarman’s approach in Amin [1983] 3 WLR 258 which has even greater force in the context of construing section 5 (2) of the Act, which provision not only binds the Crown but also (a) has primacy over other legislation (b) empowers the Court to declare conflicting statutory provisions to be inoperative and (c) forms part of a wider statutory human rights code in which each prohibited form of discrimination is drafted in broad terms and made subject to explicit exceptions. The Court found that this was an indicator of legislative intent to give the fullest possible effect to the human rights protected.

The Court when considering the application of “services” ruled citing Canada (Attorney General) v Davis as being highly persuasive in that it confirms that the term services in a human rights statute should be broadly construed according to the natural and ordinary meaning of the words in their context.

The Court ruled that the terms “services” in section 5 of the Act ought to be construed in broad rather than a narrow fashion while also construing the words as encompassing Immigration services, and potentially the services provided by another public authority, involves no distortion of the statutory language and does not entail adopting an artificially wide meaning.

Conclusion: does section 5 (2) include Immigration services?

The court was satisfied just as Justice Hellman was in A and B that section 5 prohibits discrimination in the provision of [Immigration] services.

Findings: does the HRA's primacy provisions trump the BIPA's primacy provisions?

The Court in its ruling flagged that it was difficult to fairly construe that section 30B provided that the HRA was to have primacy over BIPA because it doesn't say so in terms. The Court did however indicate that the transitional period between 1 January 1993 and 1 January 1995 allowed for the Parliament, if it wished, to amend the other legislation to either (a) bring it into conformity with the HRA or (b) to expressly provide that the provisions of section 30B would not apply to such extent as it might be specified.

The Court found that the failure to utilize that transitional period has firstly resulted in it being impossible to read section 8 of BIPA as intending to expressly override the HRA. Secondly the Court found that it still did not sufficiently justify viewing section 30B of the HRA as expressly overriding section 8 of BIPA. The conflict engages the following rules of construction, which is formulated by Bennion as follows:

“Section 80 Implied Amendment – where a later enactment does not expressly amend an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as it is necessary to remove the inconsistency between them.”

The Court applying this principle settled the conflict indicating that section 30B must properly be read as amending section 8 of BIPA by implication to exclude the HRA from the class of other legislation which the BIPA takes primacy over.

Findings: Is the Applicant entitled to a declaration that certain provisions of BIPA are inoperative because they conflict with section 5 of the HRA?

Unmarried Bermudians are clearly discriminated against (on marital grounds) in that their non-Bermudian partners cannot acquire spouse's employment rights. Bermudians with same-sex non-Bermudian partners are indirectly discriminated against (on sexual orientation grounds) in that their foreign marriages are not recognized and local same-sex marriage is not legally possible.

The Court found that the discrimination complaints were clearly meritorious on the basis of a straightforward reading of the

relevant statutory provisions but additionally on judicial authority.

The Court endorsed the broad approach taken by Justice Hellman in A and B and found that in determining whether direct discrimination took place the Court was required to engage in a factual inquiry into whether the discrimination had taken place and if it had then it was unlawful. The Court when dealing with whether indirect discrimination has taken place was required to consider whether the discriminatory condition was justifiable.

The Court ruled that the Applicant was entitled in principle to a declaration that section 25, 27, 27A and 60 shall be inoperative to the extent that they authorize the Minister to deny the same-sex partners of persons who possess and enjoy Bermuda status, and who have formed stable relationships with such Bermudians, residential and employment rights comparable to those conferred on spouses by the said sections 25 and 60 respectively.

WHAT THIS MEANS FOR BERMUDA

This authority has now made it abundantly clear that it is unlawful for Ministers to deny same-sex partners of persons who possess and enjoy Bermuda status, and who have formed stable relationships with such Bermudians, residential and employment rights comparable to those conferred on spouses. The authority has taken the case of A and B one step further to clearly define the interpretation of services while also establishing how the HRA should be interpreted when dealing with primacy issues and conflicting acts.

APEX CONSTRUCTION MANAGEMENT LTD., ANDREAS BATTISTON AND KEVIN MASON V. PERNELL GRANT

Facts

The Respondent's complaint was that he was offered employment on terms less favourable than the terms offered to others, and those others consisted of groups of Polish and Canadian contract workers. Additionally, he complained that he was subject to special conditions of his employment, in that he was denied the opportunity to work overtime and he suffered reprisals in the nature of staged or false complaints in order to justify termination of his employment.

Issues

The court has been asked to rule on the preliminary issue of whether the Second and Third Appellant are liable to the Respondent pursuant to the Human Rights Act, 1981. At the hearing on the preliminary issue it was agreed that the appeal of the Third Appellant should be allowed and the sole issue to deal with was the appeal of the Second Appellant. Counsel for the Second Appellant invited the Court to decide at the preliminary stage whether the Board's findings of liability for breach of the Act were supportable as a question of law.

The preliminary issue essentially turned on the question of what acts or omissions needed to be established on the part of a senior employee who was not a director of a company to establish liability against the employee for discrimination under the Human Rights Act.

Legal Finding: Is liability for discrimination under the Human Rights Act 1981 governed by principles applicable to liability in tort?

The Court found that the Canadian authority *Robichaud v Canada (Treasury Board)* [1987]

2 SCR 84 was persuasive insofar as it supported the proposition that the principles of liability for discrimination under the Act, in the context of a complaint prosecuted before the Human Rights Tribunal ought not to be confined to those principles applicable to purely common law tortious claims.

The Court noted that it has already recognized the similarity between the Bermudian Human Rights Act and the corresponding Ontario Human Rights regimes, and the resultant persuasive force of the relevant Canadian authorities advanced on previous occasions. The Court then ruled that Robichaud should be regarded as evidencing the corresponding position under Bermudian law and the Court noted that five points arose from this preliminary conclusion. They are as follows:

- (1) The Court accepted the broader submission advanced by the Respondent's counsel that the statutory regime applicable to human rights in Bermuda is a distinctive legislative framework for the protection of human rights, informed in part by the European Convention on Human Rights and Fundamental Freedoms, which requires a distinctive interpretative approach to the legislative provisions.
- (2) The statutory complaint mechanism is not intended to be wholly analogous to a claim for breach of statutory duty, which, as section 20A (1) provides, may be pursued like any other civil proceedings in tort.
- (3) The Court in an effort to acknowledge the distinction between the narrow issue, which was explicitly decided in Robichaud from the specific issue in the present preliminary issue explained that in Robichaud, what was in issue was not the test for liability of an employee alleged to have committed discriminatory acts at worst, or to have had knowledge

of discriminatory acts by his employer at best. The Supreme Court of Canada was considering the entirely different issue of whether or not an employer could escape liability for discriminatory acts committed by an employee on the grounds that it was not vicariously liable. The substance of the decision in Robichaud was that the application of the tortious rules relating to vicarious liability was fundamentally inconsistent with the statutory scheme because it would defeat the objects of the relevant statute.

- (4) The distinction notwithstanding, the reasoning in Robichaud nevertheless completely undermines any serious argument that the rules of tortious liability automatically or mandatorily apply to a human rights complaint prosecuted before a statutory board of inquiry.
- (5) The Court found that in determining what the requirements for liability under the Act are in the employment discrimination context, an analysis had to be carried out of the specific statutory provisions, which are engaged by the complaint and the factual matrix of the whole case including – (a) the nature of the discriminatory acts (b) the identify of the respondent in questions and their position in the relevant employment structure AND (c) the basis on which the complaint is prosecuted and defended.

Section 6 (1)(c) and (f) of the Act were relied upon by the Respondent construing the statute liberally with a view to give effect to its goal of protecting human rights, it seems self-evident that the words “no person shall discriminate” includes not just the employer but also directors, managers, supervisors and/or general employees. The Court then found that a person would potentially be liable for discrimination if they either (a) committed the alleged act, (b) procured another to commit

the act and/or (c) they omitted to take remedial steps, in circumstances where the relevant person had knowledge of the discriminatory acts and possessed the authority to put a stop to them.

The Court in giving its ruling found that it was the statutory provisions, which determined the rules of liability, not the common law tort rules.

Legal Finding: Did the Board err in law in finding the 2nd Appellant liable for discrimination based on knowledge alone?

The Court flagged that Respondent's case, as a complainant was not based on the premise that the Second Appellant had committed discrimination by failing to prevent it occurring, despite having knowledge that it was occurring. There was clearly evidence that the Second Appellant was actively involved in discriminatory acts, which were found to have been committed by the First Appellant. It was however, unclear what evidence existed as regards the Third Appellant's participation. Being reminded of Counsel that they should consider the liability of each Respondent separately would have assisted the Board. The Court however without deciding what the impact of the misdirection was on the disposition of the appeal ruled that the Board erred in law by:

- (a) Initially finding that each Respondent had absolutely no intention of training or promoting Bermudians generally, or Black Bermudians in particular; and
- (b) Then proceeding to distinguish between the roles of the corporate and natural Respondents by finding that the First Respondent, with the knowledge if not the actual participation of the Second and Third Respondents, did engage in a form of discrimination against the Complainant of a type mentioned in section 6 (1) paragraphs (c) and (f) in circumstances

where there was no or no sufficient legal and/or evidential foundation for finding that mere knowledge on the Second Appellant's part of discriminatory acts engaged in by other unidentified agents or employees of the corporate employer was enough to render him liable.

The Court not able to resolve the preliminary issue of whether they are liable to the Respondent pursuant to the Human Rights Act, 1981 either in the Second Appellant's favour or against him at this stage.

WHAT THIS MEANS FOR BERMUDA

This authority at the stage dealing with the preliminary issues has again highlighted the persuasiveness in turning to Canadian authorities for guidance. The most notable authority referred to is that of Robichaud, which affirmed that employers could be held liable for discriminatory acts done by employees against coworkers regardless of their position within the company. This is important because it prevents employers from circumventing liability where employees in a more inferior position administer forms of discrimination in circumstances where the employers fail to act to remedy the discrimination.

THE COMMISSIONER OF POLICE (Appellant) V. THE QUEEN (Respondent) IN THE SUPREME COURT OF BERMUDA APPELLATE JURISDICTION 2013 CIVIL APPEAL NO. 250

MICHAEL ANTHONY HARKIN (Appellant) V. THE COMMISSIONER OF POLICE (Respondent) IN THE SUPREME COURT OF BERMUDA APPELLATE JURISDICTION 2013 CIVIL APPEAL NO. 238

Facts

The Applicant Harkin was employed with the Bermuda Police Service (“BPS”) on a five-year work permit, which commenced on 27th Feb. 2005. He filed a Complaint dated 12th Dec. 2009 against the Respondent under the Human Rights Act, 1981 (“the Act”). It alleged that the Respondent had discriminated against him in breach of section 2 (2)(a) of the Act on the grounds of his race, place of origin or ancestry.

The Applicant had qualified for promotion from the rank of constable to sergeant and the Respondent deferred his promotion until it was clarified that the Applicant would obtain a new work permit after his then permit expired on 27th Feb. 2010. When the Applicant filed a grievance about not being promoted at the same time as other officers who has also passed the qualifying exams and alleging a breach of his rights under the Act, the Respondent replied advising the Applicant that his employment would not be extended.

The matter proceeded to a Board of Inquiry where the Board found that the Applicant had been discriminated against (“**Liability Decision**”). The Respondent has appealed against the liability and the Applicant has appealed against the Board’s decision on quantum (“**Quantum Decision**”).

Liability Decision

The Respondent challenged on appeal the following:

- (1) The proper Respondent was the Attorney General or the appropriate Minister under the Crown Proceedings Act 1966. The Respondent’s office was not amenable to suit for the acts of other Police Officers or a previous holder;
- (2) The Board erred in law in failing to find that section 6 (9A) and 6 (9) of the Act excluded a complaint of employment discrimination by a non-Bermudian on contract;
- (3) The findings of retaliation were unsupported by the evidence.

GROUND 1: Was the Respondent the correct party?

The Court in its ruling on this stated that claims, which are brought against the holders of public officers in their public capacity are in no way dependent on the identify of the individual post-holder. The Court ruled that this is essentially because when a statute confers authority on a Minister or public officer, the authority and corresponding responsibility attaches to the officer, whoever its holder may be from time to time, not to the individual officer-holder. The Court prior to dismissing the first ground relied upon section 25 of the Interpretation Act 1951, which provides:

“(2) Where any Act or statutory instrument confers a power or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office or by a person duly appointed to act in that office.”

GROUND 2: Did the Board err in law in holding that a contract worker could validly complain of employment discrimination in the contract renewal context and/or at all?

The Respondent asserted that section 6 of the Act excluded complaints by contract

workers, which expressly or impliedly were based on an assertion that their contracts should have been renewed. The Tribunal was not of the view that the relevant provisions applied, as there was no question of preferring a Bermudian arising and furthermore, the primary complaint was about a failure to promote and a dismissal, not a failure to renew a contract.

The Court when considering section 6 (9) of the Act found that it was correctly found by the Tribunal to not be a bar to relief for the Applicant as on the facts, the impugned decision of the Respondent to terminate his employment when his contract expired was not based on any or any identified desire to prefer a Bermudian for his position. The explicitly stated reason for the decision not to seek to renew the Applicant's contract was the fact that he had complained of not being discriminated against in relation to the promotion process.

The Court found that it was open to the Tribunal to find based on the evidence before it that, but for the existence of a discriminatory promotion policy and the Applicant's discrimination complaint, the Respondent would have sought to renew the contract prior to its expiration in circumstances where there was no evidence of any Bermudians also applying for the post in question. The Applicant's central case on the separate lines of progression the promotion procedure embodied did not entail asserting a right to employment derived from section 6 of the Act.

The Respondent further complained that the Board erred in law by failing to apply the right test as to what amounted to discrimination. The Court ruled that in refusing to promote the Applicant, having allowed him to qualify for promotion because of the pending expiry of his contract, the Respondent was treating him less favourably than other officers, including other officers at an earlier cycle in their contracts. The Court found that the fact that other

foreign officers were not directly affected by the ad hoc policy stance adopted towards the Applicant in no way detracts from the fact that he was, because of his place of origin treated in a discriminatory manner.

The Court accordingly dismissed the second ground of appeal.

GROUND 3: Did the Board err in finding that the retaliation complaint was proved?

The Court in coming to its decision turned to analyze section 8 of the Act. The Court questioned what would be the scope of retaliation under section 8 of the Act citing paragraphs (a) to (d) and explained that the motivations or objectives, which must accompany the punitive actions set out as follows:

- (1) Preventing a person from making a complaint under the Act;
- (2) Preventing a person from making a disclosure under the Act;
- (3) Preventing a person from testifying in a proceeding under the Act;
- (4) Preventing a person from participating in any other way in a proceeding under the Act; and
- (5) Penalizing a person for having made a complaint or disclosure, or for having testified or otherwise participated in a proceeding under the Act.

The Court found that the Respondent's counsel rightly submitted that the Board erred in finding that a "proceeding" for section 8 purposes had already been commenced merely by the Applicant consulting with the Commission and that there was, in any event, no evidential basis for a finding that the Respondent had any relevant knowledge that this consultation had taken place.

I find that although the Board erred in finding that a breach of section 8 occurred on the precise legal and factual basis that

they did, they ought to have found a breach of section 8 occurred, based on the effectively admitted fact that the termination decision was taken as a direct result of the fact that the Applicant made a human rights complaint. The Court however ruled that it found no substantial wrong or miscarriage of justice had occurred due to the flawed reasoning on one facet (the retaliation issue). The Court exercised its discretion and dismissed the third ground of appeal.

THE QUANTUM DECISION

GROUND 1: Mitigation of Loss

The Board chose to make a deduction of the 2/5ths or 40% without explaining the basis for this decision. The expert evidence adduced by the Respondent clearly supported a discount for rounding up 32% to take into account the fact that it appeared that there had been a failure to mitigate his loss by availing himself of overtime opportunities. The Court in its ruling set aside the Board's decision to deduct the 2/5ths of the award to which the Applicant would otherwise have been entitled and direct that the appropriate deduction should be 32%.

WHAT THIS MEANS FOR BERMUDA

This authority has reaffirmed the ruling of the Tribunal that the Applicant was discriminated against on the grounds of his place of origin in that the promotion procedure was applied in a prejudicial manner by virtue of him being a contract worker. This has provided clear protection to those working in similar capacities that are offered promotions, which may be subsequently delayed while their work-permit status is pending. This authority has made it clear that any such practices are discriminatory.

A & B (Plaintiffs) V. DIRECTOR OF CHILD AND FAMILY SERVICES (First Defendant) AND ATTORNEY GENERAL (Second Defendant) IN THE SUPREME COURT OF BERMUDA CIVIL JURISDICTION [2014] No. 308

Facts

The Plaintiffs are an unmarried same-sex couple. They are raising a child together who was at the date of the hearing almost nine months old. Their desire was to adopt him. The First Defendant advised the Plaintiffs that they must each make a separate application for adoption and that the First Defendant will process their respective applications separately and they would be considered separately by the Family Court.

The Plaintiffs are unable to make a joint application for adoption because they are unmarried. They cannot marry in Bermuda because they are a same-sex couple, and if they were to get married elsewhere, as is their intent, their marriage would not be recognized under Bermudian law. Section 28 (1) of the Adoption Act 2006 prohibits the Plaintiffs from making a joint application for adoption.

The Plaintiffs suitability to adopt the child in the circumstances proposed by the First Defendant would result in their applications being assessed separately when in reality they will be raising their child together as a couple, which would mean their applications will be processed and determined on a false premise. Additionally, it was not clear whether the Family Court would have the jurisdiction to make separate but concurrent adoption orders in favour of both Plaintiffs.

Issues

The Plaintiffs have applied to the court for an order to be made, which allows for section 2 (3) and 28 of the Adoption Act to be read so as to be compatible with the Human Rights Act 1981 and thereby allow

same-sex couples/resident same-sex partners of Bermudians to apply for adoption.

Section 2 (3) of the Adoption Act 2006

Justice Hellman in giving his ruling indicated that the court would not be prevented from making an adoption order in favour of the non-resident Plaintiff as section 23 (a) of the Adoption Act provides that the court has jurisdiction to make an adoption order if, as in the present case, the child to be adopted is a resident of Bermuda or was born in Bermuda. The First Defendant nevertheless confirmed that for the non-resident Plaintiff, residency is not an issue and that the First Defendant would complete a home study report with respect to him.

Justice Hellman found that there existed nothing on the face of Section 2 (3) to engage sections 29 or 30B of the 1981 Act.

Section 28 of the Adoption Act 2006

Justice Hellman ruled that marital status includes both the state of being married and the state of being unmarried while referencing the authority of *Re P* and others (adoption: unmarried couple) 2009 1 AC 173 HL, which indicated that permitting a joint application by a married couple but not an unmarried couple is discriminatory in that it involves treating the unmarried couple less favourably than the married couple by providing them with adoption services to one and not the other.

Justice Hellman rejected the submissions of the Defendants that processing the Plaintiffs' applications separately, with the possibility of a separate adoption order in the case of each Plaintiff, would not constitute less favourable treatment. Justice Hellman went on to add that the refusal in those circumstances would constitute a refusal to provide them with adoption services of a like

quality, in the like manner, and on the like terms on which the First Defendant normally makes them available to other members of the public.

Justice Hellman when dealing with whether or not the discrimination was justified ruled that it was not and cited Lord Hoffman at *Re P*, which illustrates that the requirement in Section 20 of the Adoption Act that only married couples can adopt jointly discriminates against the Plaintiffs on two levels: directly as partners in an unmarried couple and indirectly as partners who are in a same-sex couple and thus under Bermuda law unable to marry. Justice Hellman noted that the position adopted is consistent not only within courts in the United Kingdom but also Canada, Gibraltar and South Africa.

Ruling

The Court ruled that a joint application to adopt a child may be made by an unmarried couple, whether same-sex or different-sex, provided that they have been living together for a continuous period of not less than one year immediately before their application.

WHAT THIS MEANS FOR BERMUDA

This Decision has abolished the discriminatory practices previously in place and has now made it possible not only for same-sex unmarried couples to adopt but also different-sex couples that are seeking to adopt a child.

ANNEX 6: 2015 Perception Study Results

The Human Rights Commission participated in the Department of E-Government's "Measure to Improve" public perception study for a fourth year. The study aims to improve customer service throughout the Government by obtaining data on customer satisfaction and measuring aspects of a Department's performance in order to make improvements to its service delivery.

Four hundred and six Bermuda residents aged 18 years and older participated in this year's survey. The results were weighted to be representative of Bermuda's population by gender, age, and education. The below is a summary of the results.

Knowledge of Grounds of Protection covered under the Human Rights Act:

- The top four grounds of protection recalled by participants were:
 - 71% - Race, Place of Origin, Colour, Ethnic or National Origins
 - 57% - Sex or Sexual Orientation
 - 45% - Religion, Beliefs or Political opinion
 - 29% - Disability

The Commission values the insightful information gathered through this process. We continue to use benchmarked data to ensure optimum service delivery.

ANNEX 7: Salaries and Board Fees

OFFICER'S SALARIES

Staff of the Commission is public officers and fixed salaries shall be met out of funds to be appropriated annually by the Legislature as set out below.

Post Title	PS Grade Range	Annual Salary
Executive Officer	PS 34-36	\$113,480.39
Legal Counsel	PS 34-36	\$113,480.39
Investigations Officer	PS 28-30	\$ 92,096.28
Education Officer	PS 27-29	\$ 88,805.08
Project Officer	PS 26-28	\$ 79,727.91
Administrative Intake Officer	PS 16-18	\$ 57,167.70

COMMISSIONER'S REMUNERATION

In accordance with fees provided for members of Government Boards and Committees, Board Members of the Human Rights Commission shall be entitled to receive, out of the funds appropriated by the Legislature, a stipend for their service.

Rates for Commissioner Meetings:	Commission Chair	\$100/meeting
	Members	\$50/meeting
Rates for Tribunal Hearings:	Tribunal Chair	\$300/half-day
		\$600/full day
	Tribunal Members	\$250/half-day
		\$500/ full day



OUR VISUAL IDENTITY: A New Look for the Commission

In 2015, the Commission reviewed its iconic logo and worked with a Bermudian designer to consider how to refresh the 35 year old image. The former logo depicted a design of black and white geometric shapes illustrating what was interpreted as a person standing for their rights.

Working with a Bermudian designer, the envisioning process sought inspiration from diversity of our rich Bermudian heritage and the evolutionary stages of the Commission towards modernized, international standards.

The new logo is fresh, vibrantly-coloured and meets the goal of creating an instantly recognizable symbol of the Commission. The sleek, bright design clearly reflects the ideals of 'Inclusion for All'.

The Commission is excited to introduce its new logo and is looking forward to complete the rebranding process.



**The Human Rights Commission
envisions a community
that honours and protects
human rights **FOR ALL.****



As the national public authority of human rights in Bermuda, our mission is to eliminate discrimination through advocacy, education and enforcement.



Human
Rights
Commission
Bermuda



Human
Rights
Commission
Bermuda

HUMAN RIGHTS COMMISSION

Milner Place
Ground Floor
32 Victoria Street
Hamilton HM 12
Bermuda

Call (441) 295-5859
Email: humanrights@gov.bm

www.hrc.bm