THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain [Part Virtual, Part In-Person]

Claim No. CV2017-01982

BETWEEN

SALOME JACKSON

Claimant

AND

COSTAATT

(College of Science, Technology and Applied Arts

of Trinidad and Tobago)

Defendant

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivered on: 1 April 2022

Appearances:

Ms. Anne Marie Phillip, Attorney-at-Law for the Claimant

Ms. Elaine V. Green, Attorney-at-Law for the Defendant

Oral Judgment

A. Introduction

1. This case arises from the relationship of student and academic institution between the Claimant and the Defendant. The claimant asserts that the relationship was contractual.

2. She contends that the Defendant breached the contract and was negligent in its actions concerning her academic pursuits. The result of the said breach and negligent actions, according to the Claimant, was the failure to award her a BSc Degree. She argues that the underlying motive for the actions was malice and bias.

3. In the early stages of the proceedings, the Claimant obtained Judgment in Default of Defence. The Judgment was set aside on 29 January 2019, following an Application by the Defendant filed on 27 March 2017. Thereafter, the Defendant filed a Defence on 11 March 2019. The pleadings closed with the Claimant's Reply on 18 September 2019.

4. During Case Management thereafter, the parties complied with disclosure directions, filed witness statements and also propositions of law with a view to expeditious determination of the matter by way of oral judgment. Parties were further encouraged to engage in alternate dispute resolution to settle the matter, however those efforts bore no fruit.

5. The Trial commenced, virtually, on 20 August 2021 but was aborted due to technical difficulties. After further postponements related to the ongoing pandemic, the oral witness testimony and closing submissions concluded at an in-person hearing on 31 March 2022.

B. Issues

6. There appears to be no dispute between the parties as to the fact that a claim can arise in contract and tort based on the student relationship with an academic institution, such as the Defendant. However, the Defendant raises, in the first instance, points of law in arguing that this Claim need not be considered on the merits as it was incorrectly filed too late and by the wrong process. Additionally, the Defendant challenges the merits of the Claim.

7. The issues that arise, based on the Claim and the Defence, are therefore as follows:
    i. Was the Claim statute barred by **Section 3(1) of the Limitation of Certain Persons Act Chap. 7:09** when it was filed?

ii. Is the Claim one that should have been filed as a Judicial Review application and if so, was it an abuse of process for it to be filed as a private Claim to circumvent the time limits for Judicial Review?

iii. As to the merits of the Claim, are the matters raised as to breaches of contract and negligence on the part of the Defendant non-justiciable because they concern the exercise by the Defendant institution of academic and pastoral judgment?

iv. Was the exercise of academic judgment challenged in this case, motivated by malice and if so, does that render the matter justiciable?

v. If the Claimant has proven breach of contract and tort, what is the appropriate relief to be granted?

C. Chronology of Events and Pleaded Facts

8. Timing is of critical importance in this case as a main plank of the Defence is that the Claim is statute barred. However, there are a number of typographical errors in the pleadings of the parties as it relates to relevant dates. The date January 2013 cited at paragraph 3 of the Statement of Case, for example, as to when the Claimant began to read for her degree is clearly incorrect, as at paragraph 10 there is a pleading that she had completed her first semester courses and registered for second semester courses by January 2013.

9. Accordingly, in preparing for this decision it was necessary to carefully peruse the supporting documents disclosed by the parties to ascertain the correct chronology of events. Of particular assistance was the first pre-action letter issued by then Attorney for the Claimant, Mr. Imran Ali, dated 5 February 2014. It is attached with other correspondence at "H" to the Statement of Case.

10. It is clear from the above-mentioned perusal that the Claimant completed an Associate Degree in Nursing at the Defendant institution, COSTAATT, in 2011. Thereafter, she enrolled in the Defendant's advertised Bachelor of Science (BSc) degree programme in Occupational Safety and Health (OSH) in January 2012. It is not in dispute that she registered for this programme.

11. According to the Defendant, the OSH BSc degree programme that the Claimant enrolled in was a 4 or 5-year programme. However, there is no documentary evidence of this. A senior official of the Defendant's institution, Ms. Ramona Boodoosingh, advised the Claimant on the matriculation requirements. In particular, the Claimant would be required to take an additional fourteen (14) listed courses from the OSH Associate Degree programme in order to complete the OSH BSc degree successfully.

12. Ms. Boodoosingh gave this advice based on the Defendant's Faculty Handbook. The Defendant has not disclosed its handbook in the instant proceedings. There is no indication in the pleadings of the parties or in any document disclosed that the Claimant was required to pursue her courses in any order or that all the Associate Degree courses had to be completed before the BSc courses.

13. The Claimant commenced courses in the OSH degree programme in September 2012 and successfully completed her first Semester at the end of the year 2012. In January 2013, she selected five courses for her second semester and commenced that stage of the programme. There was a mix of courses. Two selected were from among fourteen additional OSH Associate Degree programme courses. The other three, namely OSH 406 Psychosocial Factors, OSH 409 Hazardous Communications & Industrial Hygiene and OSH 412 Toxicology, were from the OSH BSc Degree programme. [In the following Semester, she enrolled in OSH 415 Occupational Health Programmes]

14. Six weeks into the 2012-2013 second semester, Mrs. Charles-Harris, then Chair of Environmental Studies ["the Chair"], who the Court takes judicial notice subsequently disappeared on or around July 2017, emailed to a lecturer, Ms. Du Four, a request to see four students, including the Claimant. The email, dated 5 March 2013, is attached as "A" to the Statement of Case.

15. According to the Claimant, the Chair told the four students she did not want them in the OSH BSc programme until they completed the OSH Associate Degree. Accordingly, they should drop out of the BSc programme, complete the Associate

Degree, and then re-enroll in the BSc programme. The Claimant's case is that, following this meeting, three of the four students dropped out of the OSH BSc degree programme. However, the Claimant persisted.

16. The Defendant's pleadings dispute that the Chair directed the students to drop out. The Defence is that the Chair merely acted in the exercise of her academic and pastoral judgment in advising the students that the BSc courses were beyond their capability. This position was taken, according to the Defendant's pleadings, based on complaints by other students that the four were keeping back the progress of the class. Accordingly, the Defendant says the four students were advised by the Chair to pursue the relevant year 1 and 2 foundation courses before pursuing BSc OSH completion courses. However, there is no pleaded denial that the other three students 'dropped out' after this meeting.

17. The Claimant did not accept the advice to drop out of the BSc programme. Instead, she sought the intervention of other high officials at the Defendant's institution, namely Administrator Albert Skair and Dean Anjenny Dwarika. They agreed to seek approval of the Defendant's President for a student plan for the Claimant, which would confirm in writing that she was allowed to continue with her selected second semester courses and to complete the BSc degree in two years plus one semester.

18. A copy of the plan for the 'entry year January 2013' is attached at "B" to the Statement of Case. A point made in the Defendant's case is that an introductory course OSH 123 taught by Mr. King, which is included in the plan, ought never to have been a course for the Claimant because it is for the protective services.

19. An overarching position taken by the Defendant in this case is that it was the Claimant who insisted on taking final year courses without an override for the pre-requisites, because she wanted to complete the course in two years. That was why she had to be asked to de-register from the courses but refused to do so.

20. The Claimant puts the Defendant to strict proof that she was never told she had to de-register from any courses. Furthermore, the Claimant's case is that she had override permission from the start of each semester to pursue certain courses.

21. Upon the Claimant being permitted to continue the BSc programme, she says the Chair informed her "she was going to make sure that she leave the programme one way or another." Two of the programme lecturers, thereafter, ridiculed her and questioned her entitlement to "be in the degree programme." The first of these two was Ms. Du Four who taught one of the Claimant's classes - OSH 409. She informed the Claimant that the Chair told her that the Claimant was not supposed to be in the degree programme. The second of the two was Mr. Rupert King, who taught three of her classes namely OSH 123, 406, and 415.

22. On 16 May 2013, the Claimant had not yet received her grades for the second semester. She went to a senior lecturer, Mr. Dalrymple, to seek advice for the upcoming semester. He told her to go to the Chair. On meeting with her, the Claimant was told "You failed all the courses in the programme, did you think I will allow you to pass, no, no, no, get out the programme". According to the Claimant, she did not know her grades, as they had not been released. Thus, these utterances by the Chair caused her to feel traumatized.

23. She persevered in seeking her advisement for the next semester by approaching the Defendant's administrators. Eventually, Ms. Koylass assisted by joining the Claimant, so they together approached the Chair. The Chair eventually signed off on the advisement for the next semester, including BSc level courses, one of which was OSH 415.

24. About one week after the meeting in May 2013 with the Chair, an unofficial transcript of grades for the second semester was published. The claimant refers to it at paragraph 29 of the Statement of Case and attached as "E". According to the Claimant, she observed that "as maliciously predicted by Mrs. Charles-Harris", there were failed grades in two of the Claimant's five courses that were from the BSc programme, plus one other course taught by Mr King - OSH 123. The Claimant

avers that she submitted all assignments and wrote all final exams for the second semester courses in relation to which she received these failing grades.

25. During the months of July and August 2013, the Claimant met with the Defendant's then Vice-President- Academic Affairs, Dr. Gillian Paul. She complained about the unfairness and inequality of treatment she received from the Chair, Mr King and Ms. Du Four which resulted in her being given failed grades in the BSc courses. The fact that this meeting took place is not denied in the Defendant's Defence.

26. The Claimant's case is that, while meeting with Dr. Paul, she also complained about Mr. King's failing to lecture on the course as advertised in the course outline, allowing students to set the final exams, and emailing students the material for the exams. She received only the questions but not the answers.

27. The Defendant issued the official results for the Second Semester in January 2014. As it relates to these results and the results for the following semester, the Claimant's complaints are as follows:
    i. OSH 409 – Omission by Ms. Dufour of 6 marks from 1st exam script and unexplained deduction of 2% from 2nd exam. Later, on review, there was deduction of marks to ensure only a passing D grade was achieved.
    ii. OSH 123 - The Claimant was given zero (0) out of twenty (20) for a group project in which others in the group got 19 out of 20. Her overall grade was changed from F to D+ to I and remains under review to date.
    iii. OSH 415 – Exam grade changed from 100 to 0. This was the only change noted as having been made by lecturer Mr. King to any of the students' grades and all others were graded 100.

28. Based on her concerns regarding her treatment by the lecturers and the unexplained issues with her grades, the Claimant retained Counsel shortly after the official release of her 2012-13 Second semester grades. Her then Attorney, Imran Ali, wrote to the Defendant on 5 February 2014 requesting rectification of her grades and an investigation into the actions of the Chair. The Claimant changed counsel a few days later. On 18 February 2014, her current Attorney

wrote to the Accreditation Counsel of Trinidad and Tobago ("ACTT"), reiterating the allegations made by Attorney Imran Ali against the Defendant. She asked that the ACTT intervene to investigate the actions of the Defendant's lecturers and have the Claimant's second semester grades rectified.

29. There is no disclosure of any response on record to either of these letters. However, the documents on record herein indicate that up to June 2014, there were changes to the Claimant grades and that the grades then remained under review. This is clear from the Grade Change Request Form for Mr. King's class OSH 123, dated 24 June 2014, attached at "F" to the Statement of Case. The change was from F to D+ to I. It was signed by the Chair and not by Mr. King.

30. There was a prior Grade Change Request Form dated 19 February 2014, signed off by Mrs. Du Four who was also the lecturer in OSH 409. The change was from F to D. The Defendant admits, at paragraph 42 of the Defence, that Ms. Du Four herself undertook the review.

31. It is clear that whatever the Defendant, in response to prior legal letter may have done, did not satisfy the Claimant's requests. This is so because her current Attorney wrote again on 27 October 2014, this time to Senior Counsel for the Defendant requesting a review and award of the correct grades to the Claimant.

32. On 9 February 2015, Senior Counsel for the Defendant responded to the Claimant. The letter gave a report on information gleaned from the records of the Defendant. The information was that the Claimant passed OSH409, but failed OSH 406 and 123 because she did not hand in assignments #2 and #3 for each of these courses. Nothing in the letter explained the discrepancies regarding reductions of a grade in OSH 415 from 100 to 0 by Mr. King. In the instant Claim, the Claimant's Reply pleading puts the Defendant to strict proof that there was any independent review of her grades as alleged by the Defendant.

33. From December 2015 to October 2016, the Claimant sent three Freedom of Information Requests to the Defendant and later, in 2016, filed a Judicial Review

Claim alleging failures in responding to same. That Claim was withdrawn on 6 February 2017 to allow the Defendant to provide the information requested. On 23 February 2017, the Defendant provided some of the information. Thereafter, on 31 May 2017, the Claimant filed the instant Claim.

34. According to the Claimant's Counsel, the Claimant continued in the course, achieving excellent grades, but did not receive her BSc degree award from the Defendant. Attached as "E" to the Statement of Case is a transcript, which shows that she was enrolled and completed courses in the degree programme up to 1st Semester 2014-2015. She pleads in her Reply that, on an unstated date, she missed an opportunity to obtain an unnamed job she applied for in the oil and gas industry because she did not have the BSc Degree.

35. In addition to the facts set out in the above chronology of events, there are some other factual allegations by the Defendant. In the pleaded Defence, the Defendant claims that the OSH BSc, enrolled in by the Claimant, was a five-year programme, however persons with the OSH Associate degree could complete it in a two-year one semester time frame.

36. The Defendant contends that the Claimant was required to take all the 14 required OSH Associate Degree courses, which are the same as the year 1 to year 3 BSc courses, in order to advance to the BSC completion phase of the programme i.e., years 4 and 5. Furthermore, she was contractually obligated to accept academic and pastoral guidance on how to complete the programme.

37. The main thrust of the Defence is that the Claimant was the author of her own demise as it relates to the failed courses. This was so, they contend, since "she well knew" that three of the courses she selected were not to be taken until the completion stage. Furthermore, OSH 123 was a course reserved for the protective services.

38. The Defendant denies that the Claimant was asked to drop out of the BSc programme and contends that she was merely advised to take prerequisite

courses before the three completion courses selected and to withdraw from OSH 123. These requests, according to the Defendant, were made in the exercise of pastoral judgment. The Claimant is alleged to have refused to accept the advice.

39. Regarding course OSH 123, the Defendant contends, at paragraph 55 of the Defence, that the Claimant arrived very late, halfway through the final exam. There is no further pleading as to how this affected her final grade.

40. Further, as to course OSH 123, the Defendant admits, at paragraph 56, that the Claimant was never given her grade for the group project. However, the Defendant avers that her group partners only received 18 out of 20 and as such "even if this grade was credited to the Claimant, she would have still received a failing grade of 55%."

D. Legal Analysis

Legal principles governing obligations between students and educational institutions

41. The main thrust of the pleaded Claim is that there are implied terms in the contract of employment between the Claimant and the Defendant as set out at paragraphs 6 to 9 of the Statement of Case. The allegations of the tort of negligence included in the Claim are, for all intents and purposes, subsumed within the breach of contract claim. In other words, the actions alleged to be negligent are the same ones alleged to be in breach of implied contract terms. Overall, it is clear that the Claimant is contending that a duty of care in not treating negligently with the Claimant's academic interests is an implied term of the contract.

42. The implied contract terms pleaded by the Claimant include the Defendant's obligations and the Claimant's obligations as follows:

    i. That the Defendant, its agents and/or servants would perform teaching, research and guidance duties inclusive of classroom instructional planning and responsibilities to achieve the requisite standards of the Defendant's mandate for the delivery of Professional Education, with integrity, ethics and professionalism;

ii. That the Defendant would deliver these services to the Claimant through the hiring of persons with the reasonable skill, qualifications, experience and competencies of their professions;

iii. That the Defendant would establish a system to ensure that there is transparency and fairness in the Defendant's operations; and

iv. That the Claimant would attend classes and take responsibility for the completion and submission of all assignments, participate, and contribute to all group assignments and activities, attend all exams, and adhere to all of the Defendant's policies and procedures.

43. The authority cited by the Claimant is **Winstanley v University of Leeds [2013] EWHC 4973 (QB)** at para. 71.

44. The Defendant, however, denies that there were any such obligations on the part of the Defendant. They argue that, even if such implied obligations by the Defendant exist, the Claimant was under a corresponding duty to accept the academic and pastoral judgment of the Defendant's academic staff. She was also required to adhere to the rules and guidelines on academic study.

45. In the case of **Doane v Mount Saint Vincent University et al. (1977) 24 NSR (2d) 298** cited by the Claimant, the Court determined that it had the power to intervene in the internal affairs of a university in certain circumstances, e.g., if the decision of the university, which is being challenged, was "arbitrary or malicious, or otherwise exercised on a principle of bad faith". The court also considered a denial of natural justice to a plaintiff to be sufficient to give the Court jurisdiction to interfere. This statement of the law is supported by the South African decision in **Praneel Misthry v University of Kwazulu-Natal Case No. 3518/2008 [2014] ZAKPHC 55**.

46. In **Doane**, an article entitled "Judicial Intervention into University Affairs" printed in **21 Chitty's L.J. 181 (1973)**, was cited as follows:

"Universities when examined closely from the point of view of their juridical position and the legal nature of their activities, are very curious bodies. On

the one hand ***they are legal corporations, self-governing and legally independent, which enter into contractual relations with members of the staff, both academic and nonacademic*** *(as well as with students) and make whatever rules they consider fit or feasible to regulate such relationships.* ***The law of contract applies in such a context as it does elsewhere. Looked at in this way, it would seem that, whatever disputes may arise from any of these relationships, should be and can be resolved by the application of general contractual principles, even though some special considerations may be relevant, just as, in other contracts, the peculiarities of the personal or commercial situation render it necessary to adapt to the basic contractual doctrines to meet the needs of the situation****. This attitude would make it possible to say that the internal affairs of universities are domestic matters which do not concern the state, or the courts as the judicial organs of the state, except in the same way as a private relationship can become the concern of the courts, i.e., when there is a difference, a dispute, which needs resolution by means of litigation based upon the contract between the parties." [Emphasis added]*

47. In the case of **Young v. Bella 2006 SCC 3 (CanLII), [2006] 1 SCR 108,** the Supreme Court of Canada applied the classic formulation of a cause of action in both contract and the tort of negligence to a relationship between a University and its student. In assessing the duty of care owed, the court considered:

"In short, in the present case, proximity was not simply grounded in a misguided report to CPS, but was rooted in the broader relationship between the professors at Memorial University and their students. The appellant, even as a "distant" student, was a fee-paying member of the university community, and this fact created mutual rights and responsibilities. ***The relationship between the appellant and the University had a contractual foundation, giving rise to duties that sound in both contract and tort:*** *Central Trust Co. v. Rafuse, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147."[Emphasis added]*

48. The **Young v Bella** case considered a factual scenario where a report was negligently made in relation to a student that resulted in long-lasting reputational damage. The case did not directly concern issues of academic judgment.

49. The case of **Van Mallaert v Oxford University and others [2006] All ER (D) 224,** cited by the Defendant as demonstrating the non-justiciability of academic judgment, involved a report on a student's thesis which contained a number of academic criticisms. This report was reviewed in accordance with the University's regulations for investigation by a senior proctor, then by a professor appointed by the High Steward of the University. The court considered the claimant's case to have no prospect of success as "there was nothing about the way in which the university dealt with the claimant which would justify interference on the part of the court". The circumstances of that case did not fall within the categories outlined in **Doane** above and therefore does not exclude the justiciability of the present case.

50. The case of **Abramova v Oxford Institute of Legal Practice [2011] All ER (D) 229,** cited by the Defendant in this case, involved a challenge to teaching techniques and the provision of educational services. The court, examining the case on its merits, found the teaching methods to be adequate considering, inter alia, "success of the overwhelming majority of students". This case also does not support that there is a bar to the justiciability of the present case.

Does malice in the exercise of academic judgment render the Claim justiciable?

51. On this point, the Claimant cites **Rittenhouse-Carlson v. Portage College, (2009) 473 A.R. 298 (QB)** at para 78, as authority that, where it can be proven, a dispute about an action taken on behalf of an academic institution in the exercise of academic judgment is motivated by malice, that judgment can be adjudicated upon by the courts. In the **Rittenhouse** case, the matter was so addressed in the context of a claim like the instant one of breach of contract.

52. Additionally, the Claimant cites the case of **Dawson v. Ottawa Univ. (1994), 72 O.A.C. 232 (DC)** where, at paragraph 7, it was explained that the court is reluctant

to intervene in decisions of educational institutions relating to academic evaluation, save where "the applicant has shown that he has been treated with such manifest unfairness that there has been a flagrant violation of the rules of natural justice".

When contract and tort claims are statute barred

53. **Section 3 of the Limitation of Certain Actions Act Chap. 7:09** provides:

> *"(1) The following actions shall not be brought after the expiry of four years from the date on which the cause of action accrued, that is to say:*
>
> *(a) actions founded on contract (other than a contract made by deed) on quasi-contract or in tort"*

54. The Defendant submits that the Claimant's claims in contract and in negligence in respect of the OSHE 123, OSHE 406 and OSHE 409 courses, first accrued on or before the 16th of May 2013, as she knew by that date the grades which she had been awarded for those subjects.

55. The Claimant submits, however, that the claims are not statute barred as the cause of action did not accrue until mid-2014 when the Defendant completed its "Grade Change Request Forms" process. The Claimant only admits knowledge of the results of each Grade Change Review after 8 January 2014, 19 February 2014, and 25 June 2014.

56. Counsel for the Claimant submits that the cause of action only became actionable when the Defendant completed what she refers to as the review of the Claimant's queried grades, but which was in fact the processing of her Grade Change Request forms. Though the Defendant submits that the review itself is unchallenged, there is no evidence that any independent review exercise was conducted in relation to the Grade Change Request forms such that there would be anything specific to those reviews to be challenged by the Claimant.

Whether a claim against an institution, such as the Defendant, established by statute must be by Judicial Review?

57. The Defendant cites the case of **Gopeesingh v AG & anor. CV2016-01567** as authority for its submission that the present private law claim is an abuse of process as it circumvents the time limits of judicial review. The Court in **Gopeesingh,** in fact, did not find the bringing of a claim as a construction summons to be an abuse of process where judicial review was an alternative remedy. It considered that the alternative was not adequate due to its impracticality and the fact that it was now out of reach for the claimant. The court quoted extensively from **O'Reilly v. Mackman, [1983] 2 A.C. 237**, highlighting the flexible and sensible approach courts ought to adopt:

> *"There is a great variation between individual cases that fall within Order 53 and the Rules Committee and, subsequently, the legislature were, I think, for this reason content to rely upon the express and the inherent power of the High Court, exercised upon a case by case basis to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly,* ***I do not think that your Lordships would be wise to use this as an occasion to lay down any categories of cases in which it would necessarily always be an abuse to seek in an action begun by Writ or Originating Summons a remedy against infringement of rights of the individual that are entitled to protection in public law****."[Emphasis added]*

58. The **Clark v. University of Lincolnshire and Humberside, [2001] 1 WLR 1998 (C.A.)** case (also cited by the Defendant) involved a student bringing action for breach of contract outside the period for bringing judicial review proceedings. The Court held "that a claim against a public body for breach of contract should not be struck out merely because an application for judicial review might have been more appropriate". At para. 16, the Court considers:

> *"The critical decision for present purposes was in fact not O'Reilly v. Mackman, where the issues were purely public law ones and the problem therefore entirely procedural, but the companion case of Cocks v. Thanet District Council [1983] 2 A.C. 286 which decided that where private law rights depended on prior public law decisions they too must ordinarily be litigated by judicial*

review. That this could not, however, be a universal rule was established not long afterwards by their Lordships' decision in Wandsworth London Borough Council v. Winder [1985] A.C. 461 in relation to public law defences to private law actions, notwithstanding the availability of collateral challenge. And in Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 A.C. 624 their Lordships made it clear that it was not necessarily an abuse of process to elect to sue in contract for statutory payments where the public law element was not dominant. The present class of case is if anything stronger from this point of view than Roy's case, for where in Roy's case a statutory relationship happened to include a contractual element, here it is a contractual relationship which happens to possess a public law dimension."

E. <u>Evidential Analysis</u>

59. Each of the parties relied on one witness. The Claimant was her own sole witness and the Defendant's witness was Dr. Camile Samuel, the former Vice President-Student Affairs of the Defendant institution.

60. The Claimant proved to be a credible witness as she testified consistently with the overwhelming majority of her pleaded allegations. The one area in which there appeared to be some possible inconsistency was regarding the allegations of ridicule. Her pleaded case, at paragraph 17 of her Statement of Case, was those lecturers, Du Four and King, ridiculed her openly during classes in the second semester of year 2012/2013. At that time, she was enrolled in OSH 123, 409 and 406. The paragraph also indicates that she was ridiculed during the OSH 415 course taught by Mr. King the following semester.

61. Under cross-examination however, the Claimant seems to have been contending that it was only after the second semester of year 2012/2013 that Mr. King ridiculed her. This minor inconsistency does not serve to discredit the Claimant but rather by her limiting of the timeframe of ridicule by Mr. King, she presents as a reasonable witness and not prone to embellishment of her case.

62. The Defendant needed evidence to prove its version of events in order to tip the balance of probabilities away from the Claimant's case. However, the Defendant's case was very deficient in this regard. In particular, it is notable that the Defendant called none of the senior academic or administrative officers referred to in the Claimant's case.

63. Adverse inferences can be drawn that the Claimant was truthful about the role played by Dean Dwarika, Administrator A. Skair, Ms. Koylass and Mr. Dalrymple in the Defendant's own academic advisement, having allowed for her to continue the second semester with the courses she was enrolled in, including the year four courses.

64. It is further inferred that the Claimant was truthful in her evidence about the malicious and biased treatment meted out to her by the Chair, Ms Du Four and Mr. King. That evidence was entirely un-contradicted by testimony of the sole witness, Dr. Samuel, who admitted she was not present to observe the incidents in contention.

65. Furthermore, although she said she conducted an investigation, which included interviews with the Chair and other persons, the said report was neither disclosed nor presented as evidence to prove that, from the interview statements taken, there was no malice or bias. Additionally, the Claimant was not interviewed, a clear breach of natural justice in the circumstances of this case and a negligent failure to examine relevant information she may have provided. Dr. Samuel was careful to indicate, under cross and re-examination, that she wanted to do so but was barred by the Defendant after the Claimant retained counsel.

66. The Defendant also failed to present any witness testimony from persons referred to in its own Defence, such as other students enrolled with the Claimant in BSc courses who complained that she and others without Associate Degrees held back the class.

67. In addition to failing to call relevant witnesses, the Defendant failed to present documents to prove the following:
    i. That the course was for 5 years.
    ii. That the Claimant was required to take associate degree courses before BSc level ones.
    iii. That a two-year study plan, prepared by the Defendants admin staff, was only based on the Claimant's desires.
    iv. That having been enrolled in the second semester for six weeks, the Claimant was not told to drop out of the BSc programme but only advised to withdraw from degree level courses. The case that this was the advice given is not supported by any written note of the advice and there is no report of any investigation done or contemporaneous statements on file to prove exactly what the Chair called in four students to discuss in March 2013.
    v. That the Defendant's witness, Dr. Samuel, investigated the matter and took statements from the persons involved.
    vi. That any independent reviews were conducted into the reasons for the anomalies in three courses in the Claimant's 2012/2013 second semester grades, as well as her grade for OSH 415 the following semester.

68. The Defendant's sole witness Dr. Samuel, testified in a calm, professional, transparent, and open manner. She readily admitted that she had no first-hand basis to disprove the Claimant's allegations about malice and mistreatment.

69. There was no explanation she could give when confronted with the evidence that Mr. King "corrected" only the Claimant's grade in one of her OSH 415 assessments to zero when all other students received 100%. Likewise, when questioned about the Defendant's case that lateness for an exam would have been the reason for the claimant failing an OSH 123 assessment, Dr. Samuel could not explain why, on the register, the Claimant was the only person singled out by a handwritten note as to when she arrived.

70. It was put to her that the register failed to indicate the arrival time of the 27 other students including four who arrived after the Claimant. In these circumstances, the Defendant failed to refute the testimony of the Claimant that she, in fact, was not late, others may have arrived mere seconds before her and that the start time for the exam was tailored for military persons attending as soon as possible after work. Accordingly, the 2.00 p.m. start time was not necessarily when any of the other students arrived. Furthermore, Dr. Samuel confirmed that there was a signature by the Claimant along with several other students indicating that they completed the exam.

71. Additionally, as it relates to OSH 123, Dr. Samuel admitted that her investigations revealed that, in another assessment which was a group project for which the Claimant was graded zero, the Claimant's group was graded 18 out of 20. Yet no effort was made to correct the Claimant's overall grade because, according to Dr. Samuel, that would not cause her to pass the course.

72. Dr. Samuel admitted further that, in coming to this conclusion, she did not investigate why the Claimant was assigned a zero grade for assignment 3 in OSH 123. She said she did not examine that because the Claimant did not raise it. My finding is that, in light of the questionable judgment of the Claimant as being late for one assessment and the failure to award her a group project grade in a second assessment, a more thorough review of all components of her assessments was required to come to a conclusion that she would have failed in any event if the errors complained of were corrected.

73. As to one of the main planks, though unsupported by any evidence, of the Defendant's case that the Claimant somehow got herself into final year courses before she had pre-requisites, Dr. Samuel admitted that this could not be so. The Claimant had to have been granted an override to be listed for six weeks and participating in the 2012-13 second semester courses before the Chair spoke with her and three other students.

74. Dr. Samuel admitted that change or dropping of courses usually takes place within the first week of courses. To change courses after six weeks is possible but not the norm. It, therefore, defies logic that, as alleged by the Defendant, all the Chair was doing half-way through the second semester was asking the four students to change most of their courses. Instead, the Claimant's case that they were asked to drop out of the BSc programme is more credible.

75. Counsel for the Claimant confronted Dr. Samuel with a detailed cross-examination about thoroughness and natural justice in the investigation conducted after the Claimant's complaint via letter from her Attorney. The responses were candid and truthful. Dr. Samuel admitted that, as was apparent from the records, persons complained against participated in processing of the Claimant's Grade Change Requests. She admitted to changing the Claimant's final grades in two courses to grade I for incomplete, but said it was an administrative but not an academic decision.

76. In the testimony of Dr. Samuel, no substantive explanation was given to justify that the Claimant failed three courses. Dr. Samuel admitted that she never lectured the Claimant and had not interviewed Mr. King who gave most of the failing grades.

77. On the other hand, Dr. Samuel confirmed that the Claimant achieved good grades of mainly As and Bs for the duration of her enrolment in the course. As such, the grades received from Mr. King in second semester 2012-13, after the incident with the Chair telling the Claimant to drop out, were an unexplained anomaly.

78. The fact that Mr. King awarded one B grade to the Claimant in another level four course during that time does not, on a balance of probabilities, disprove the Claimant's allegations of malice and bias as the reason for the unexplained actions that affected her grades.

F. Consideration of Remedies

79. The Claimant's pleaded case seeks only general and exemplary damages as remedies for the Defendant's breach of contract and negligence. The general purpose of damages in contract is to compensate for the loss suffered because of the breach of legal duty. As Lord Shaw puts it in **Watson, Laidlaw & Co Ltd v Pott, Cassells and Williamson 1914 SC (HL) 18**, at 29:

> *''In the case of damages in general, there is one principle which does underlie the assessment. It is what may be called that of restoration. The idea is to restore the person who has sustained injury and loss to the condition in which he would have been had he not so sustained it".*

80. In **Karlshamns Oljefabriker A/B v Monarch Steamship Co 1949 SC (HL) 1** at **18,** Lord Wright refers to:

> *''the broad general rule of the law of damages that a party injured by the other party's breach of contract is entitled to such money compensation as will put him in the position in which he would have been but for the breach".*

81. In the instant case, there is great difficulty in assessing the quantum required to put the Claimant in the position she would have been in had the contract not been breached. This is so as the Claimant's case does not particularise the losses claimed. The Claimant makes only general statements relating to the losses experienced – including the bare assertion in her witness statement that she "would have to refund all monies paid on my behalf through the GATE facility" and that she suffered loss of chance to obtain i) the benefit of further education and ii) a better position within her field.

82. There are no particulars, for example, on matters such as the following:

    i. The quantum of fees paid upon registration as pleaded at paragraph 5 of the Statement of Case.

ii. The extent to which the Claimant "utilised the GATE facility" as pleaded at paragraph 31 of the Statement of Case.

iii. The quantum, if any, recovered from the Claimant regarding GATE.

iv. The earnings of a specialist industrial nurse in the energy sector regarding which she lost the opportunity to benefit, pleaded at paragraph 31 of the Statement of Case and 19 of the Reply.

v. Or even her own earnings.

83. The Statement of Case claims generally for damages for breach of contract and damages for negligence. The **Law of Contract (Common Law Series) 2017**, **Chapter 8, para. 8.7,** discusses the award of damages for loss of chance in breach of contract:

"Damages for loss of a chance are arrived at by a 'two stage assessment' starting with the profit which the claimant could make and discounting it by a factor reflecting the likelihood that he will be able to do so. In Chaplin v Hicks the defendant's breach of contract deprived the claimant of the opportunity of competing in a beauty contest organised by a newspaper, the winners initially to be chosen by a poll of its readers. There were 50 contestants and a total prize fund of £7,488 which would suggest an award of approx £150 (£7,488/50). In fact £100 was awarded by the jury. In a modern case the Court of Appeal had to quantify the damages recoverable from solicitors whose negligence had deprived their client of the opportunity of concluding matrimonial proceedings on more favourable terms. The claimant's loss was said to be the amount which the Judge in the matrimonial proceedings could have awarded discounted to reflect the likelihood that he would have done so. In Wellesley Partners LLP v Withers LLP a firm of head-hunters successfully claimed that the negligence of their solicitors had caused them to lose the chance of obtaining a lucrative contract to 'source' staff in the US for a major Japanese bank.

Such awards for loss of a chance are not quantified with arithmetic precision because '[t]here are too many variables at play' but rather reflect the court's robust and practical sense of justice. In Durham Tees Valley Airport v bmibaby Patten LJ in the Court of Appeal emphasised that '…difficult questions … and …

speculative factors [are] not a sufficient reason for denying … an assessment'. In a recent case it was acknowledged that even though the calculation of appropriate damages was more difficult than in Chaplin, where the prizes were at least 'arithmetically identifiable', nonetheless any inevitable imprecision 'is not in itself … a bar to making an award'. On this basis, damages were awarded to a Formula 1 driver who, in breach of contract, was deprived of time testing a car even though the exact financial benefit that would have resulted from the testing was impossible to assess. Nonetheless there appears to be a de minimis principle operating whereby nothing will be awarded when there is a 'negligible' or less than 'a substantial chance' of loss."

84. Damages in respect of lost or impaired opportunities for re-employment (so-called 'stigma compensation') have been recognised by the House of Lords in **Malik v Bank of Credit and Commerce International SA [1998] AC 20**. However, their lordships emphasised that "the limiting principles of causation, remoteness and mitigation present formidable practical obstacles to such claims succeeding".

85. In the present case, though the Claimant suggests that the failure to award her degree resulted in impaired opportunities for employment, she has not demonstrated any lasting stigma that would affect future employment. 'Stigma compensation' is an award of damages premised on a loss of reputation which the Claimant has not alleged.

86. The Claimant has provided no evidence of her current earnings and no evidence of what she might have earned had she obtained her degree and successfully acquired a job in her field of study. It is the Claimant's general assertion in her Reply that she missed the opportunity to obtain a specific job in the "oil and gas industry" as an Industrial Nurse. Though she claims she reached the interview stage, no evidence of the job specifications, potential remuneration or the date of such interview were provided. This failure to provide cogent evidence makes an assessment of her chances impossible.

Mental distress/inconvenience

87. The **Halsbury's Laws of England on Damages (Vol. 29 (2019))** states at para. 438:

> *"Where shock, shaking up or worse occur in combination with physical injury the position is straightforward: the psychiatric element will be reflected in the award for general damages…*
>
> *If there is no physical injury, there must be a psychiatric illness; damages are not awarded for an emotional reaction or for grief and distress."*

Aggravated/Exemplary Damages

88. The House of Lords in **Johnson** and the Hong Kong Court of Appeal in **PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd [2017] SGCA 26** have both expressed the view that concept of punishment in the form of exemplary damages has no place in the common law of contract.

89. In **Kralj and anor. v McGrath and anor. - [1986] 1 All ER 54,** the court held that it was "wholly inappropriate to introduce into claims of this sort, for breach of contract and negligence, the concept of aggravated damages".

Nominal Damages

90. An *injuria*/wrong, even without proven loss or damage, entitles the Claimant to a nominal sum – **McGregor on Damages (17th Ed.) on Nominal Damages** at para. 10-001.

91. In **Sammy & ors. v More FM Ltd & ors. CV2016-04456**, the court awarded nominal damages of $7,500 for libel where there was a lack of evidence as to actual damage to business or goodwill.

92. In **Trotman v TECU Credit Union CV2010-01135,** which concerned a breach of contract and/or negligence in the performance of a title search, the court awarded $50,000 considering the following:

> *"that the claimants cannot pursue their building plans on the said land and are now burdened with the task of resolving the resultant problems from the breach of contract by the defendant and as such, the claimants are entitled to*

some measure of compensation for this. Nevertheless, given the insufficiency of the evidence before me as regards the proof of their loss, general damages will be awarded in an attempt to place the claimants in the position they would have been in had the contract been properly performed."

93. In light of the foregoing, it is clear that the Claimant has in no way proven any pleaded claim for special or general damages for breach of contract. In the circumstances, she may only be entitled to nominal damages.

94. In the Claimant's Witness Statement, there is a plea to the Court to compel the Defendant to award the Claimant the Bachelor of Science degree. This was not pleaded in the Statement of Case, so the Defendant has not had the full opportunity to answer such a claim. However, in closing oral submissions, Counsel for the Claimant disclosed that the Claimant's interest is not so much in pecuniary relief as in being awarded her degree and recovering enough to cover her legal costs. The Claimant cites no authority for the Court's jurisdiction to grant the award of a degree as relief for breach of a contract of this nature.

95. Counsel for the Defendant, in Reply submissions, emphasised that the court has no such jurisdiction in matters such as the award of grades for a university degree. Such decisions are dependent on the academic judgment of the relevant institutions and cannot be made by a court. The case of **Walsh v University of Technology, Sydney [2007] FCA 880** was referenced by the Defendant in support of this submission.

G. Conclusion

96. The Claimant has succeeded in establishing her case that the Defendant's actions were so tainted by malice and bias that the grading decisions made were not within the realm of academic judgment such that they are non-justiciable. Additionally, the Claim was not statute barred when it was filed since the cause of action could only have reasonably accrued when the grades were finalized. There were no final grades in May 2013 when the Defendant says the cause of action accrued. In May 2013, the Claimant had just completed her exams and only

received unofficial grades that were not final later that month. The Claimant's testimony that these grades were not officially "posted" until after May 2013 is un-contradicted. This is further borne out by the fact that Grade Change Requests were still being processed up to 24 June 2014 with an indication that the grade remained under further review.

97. Additionally, the Claimant was not required to commence this case as a Judicial Review Claim. The Defendant's preliminary points and the Defence on the merits therefore fail.

98. The Claimant failed, however, in establishing any proof of loss to quantify an award of damages. The only fair conclusion is to grant the Claimant a nominal sum of damages for breach of contract/ loss of chance and to suggest that she be allowed to retake the exams for the three courses currently recorded as either I or F with a view to obtaining her degree without further delay.

99. Accordingly, I recommend that, within one month of the date of issue of this Decision, the Defendant writes to the Claimant offering an open apology and an opportunity to re-sit the said courses[1].

100. I further suggest that the Defendant consider clarifying all documentary communications concerning the BSc ODH degree course and any rules as to pre-requisite courses during enrollment in the programme. There should also be a review of procedures to be adopted and the documentation required upon receipt of complaints as to unfair treatment of students.

101. As there was neither pleaded claim for the aforementioned relief nor precedent cited by the Claimant, these remain recommendations to be considered by the Defendant in the best interests of the Claimant, the welfare of students generally and its reputation as an academic institution.

[1] An Addendum concerning this point is attached at the end of this Judgment. This was added after delivery of the Judgment when parties agreed that pre-trial "without prejudice" attempts were made to offer the Claimant the opportunities referred to in this recommendation.

102. **IT IS HEREBY ORDERED**:

i. Judgment is awarded to the Claimant against the Defendant.

ii. The Defendant is to pay to the Claimant nominal damages in the amount of $36,000.00 and costs on the prescribed basis in the amount of $14,000.00.

……

Eleanor Joye Donaldson-Honeywell

Judge

Addendum

Anne Marie Phillip
LLM, LEC, LLB (Hons), BA (Hons)
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5th July, 2021.

Ms. Elaine V. Green,
Hudson Phillip Chambers 2nd Floor,
The Henry Hudson Phillips Building
No. 33 St. Vincent Street,
Port-of-Spain.

Dear Madam,

Re: Proposed Settlement in the matter of CV 2017-01982 - Salome Jackson -v- COSTAATT

I have been instructed by my client to enter into negotiations with you with a view to bringing the matter at caption to an amicable settlement.

We propose to withdraw the matter before the Court if your client agrees and is willing to award my client her Bachelor of Science Degree in O.S.H.E., as well as pay her legal fees in the matter.

My client has done exceptionally well in their Degree Programme, except for those courses which are before the Court.

Should your client agree to the award of the Bachelor of Science Degree, my client has no objection to signing any required documents with regard to this matter before the trial date in August, 2021.

I look forward to a favourable and timely response from your goodself so as to bring this matter to a speedy resolution.

Kind Regards,

ANN MARIE PHILLIP
ATTORNEY-AT-LAW
For the Claimnant

Pc Salome Jackson

ELAINE V. GREEN,

ATTORNEY-AT-LAW

Chambers:

Ad honorem, et ad perpetuam memoriam Mr. Karl T. Hudson-Phillips, Q C
Miss Elaine V. Green
Miss Jennifer A. Hudson-Phillips
Ms Jessica Maicoo
Mrs Kishma C. Belgrave
Ms Vaasha Parag
Ms Amanda John

The Henry Hudson-Phillips Building
33, St. Vincent Street,
Port of Spain,
Trinidad, W.I.

WITHOUT PREJUDICE

22 July 2021

VIA EMAIL ONLY

Ms Anne Marie Phillip,
Chambers,
40 Alfredo Street,
PORT OF SPAIN.

URGENT

Dear Madam,

Re: Claim No. CV2017-01982; Salome Jackson v. College of Science, Technology and Applied Arts of Trinidad and Tobago

We wish to refer to your letter of the 5th July 2021 proposing terms of settlement for the above.

The delay in responding to you is regretted but my client's interest in settlement required that your proposal be considered most carefully at the highest executive and relevant academic levels of the College.

A review of Ms Jackson's academic profile discloses that she is nine (9) credits short of the requirements for the award to her of the Bachelor of Science Degree in Occupational Safety and Health (the "B. Sc. OSHE"). There are three (3) credits each outstanding for the following courses:

i. OHSE 123 — Introduction to Occupational Safety and Health;
ii. OSHE 406 - Occupational Safety and Health Psychosocial; and
iii. OSHE 415 — Occupational Health Programmes.

As attractive as the prospect of settlement may be to the parties, the College's academic policies procedures and standards (the "Standards") do not permit the award a degree to a student where, as here, a student has not successfully met all the requirements for the conferment of a degree. Accordingly, the College is unable to agree to award your client the B. Sc. OSHE without doing violence to the Standards or to your client's academic integrity.

With a view to maintaining the Standards and preserving Ms Jackson's academic integrity, I am to express the College's interest in working with Ms Jackson to facilitate her successful completion of the B. Sc. OSHE by using strategies that are alternatives to a written assessment or an examination, as we set out below.

<u>OSHE 123 — Introduction to Occupational Safety and Health</u>
This is a foundation course in the B. Sc. OSHE programme. Given Ms Jackson's successful completion of advanced level courses in the programme, the College is prepared to use a process

known as Prior Learning Assessment and Recognition ("PLAR") to allow Ms Jackson to provide documentary

evidence that she has met the course requirements in order to be considered for the award of the three (3) credits required for this course. The process will be implemented under the guidance of an advisor and assessor at the College.

<u>OSHE 406 – Occupational Safety and health Psychococial and OSHE 415 – Occupational Health Programmes</u>
In order for Ms Jackson to demonstrate that she has acquired the necessary competencies and learning outcomes for these courses, the College is willing to allow Ms Jackson to take these courses as Independent Study Courses (the "ISC") by her presenting research projects on a specific subject area covered by these courses. The ISC will be guided and supervised by a senior member of the Faculty of the School of Nursing, Health and Environmental Science.

Upon successful completion of the PLAR for OSHE 123 and the ISC for OSHE 406 and OSHE 415, Ms Jackson will be awarded a "P" grade for these courses, and the course credits will be applied towards her outstanding credit requirements for the award of the B. Sc. OSHE. We are to express on behalf of the College their confidence that, with the required guidance and supervision, Ms Jackson should be able to complete the credit requirements successfully for the award of the B. Sc. OSHE to her.

Please let me know urgently whether your client is prepared to agree the PLAR and ISC processes as outlined above. If there is agreement, we would suggest that a joint letter be sent to the Court requesting a stay of these proceedings *pro temp*. My client makes no proposal regarding costs. Please understand, however, that should your client decline the terms proposed herein, we reserve the right to disclose the contents of this letter to the Court on the issue of costs arising from any trial.

Yours sincerely,

Elaine V. Green.