

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-00331

IN THE MATTER OF THE INTERPRETATION OF THE CONTRACT OF EMPLOYMENT OF PERSONS OCCUPYING THE OFFICERS OF TEACHER I, II, III, HEAD OF DEPARTMENT (Secondary), DEAN (Secondary), IN THE TEACHING SERVICE OF TRINIDAD AND TOBAGO.

AND

IN THE MATTER OF THE INTERPRETATION OF THE MEMORANDUM OF THE CHIEF PERSONNEL OFFICER DATED 27 JUNE 2018.

BETWEEN

THE TRINIDAD AND TOBAGO UNIFIED TEACHERS ASSOCIATION

First Claimant

EMELENE HASSANALLY

Second Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Wednesday 11 September 2019

Appearances:

Mrs. Deborah Peake S.C. leads Mr. Ravi Heffes-Doon instructed by Ms. Kenniesha Wilson, Attorneys at Law for the Claimants.

Mr. Fyard Hosein S.C. leads Mr. Rishi Dass instructed by Ms. Savi Ramhit, Ms. Anala Mohan and Mr. Vincent Jardine, Attorneys at Law for the Defendant.

JUDGMENT

1. The main question for determination in these proceedings is whether the marking of School

Based Assessments (SBAs) by teachers in the teaching service forms part of their contract of employment. The SBAs are part of the examinations of the Caribbean Examinations Council (CXC) and are part of the school's curriculum. In determining the scope of the contractual duties of teachers, the Claimants have in the main part pointed out that their job descriptions do not specifically mention this task of "marking" SBAs. They say that the marking of SBAs is a function of CXC and that they should be paid to do it for CXC if they must perform this task at all.

2. The Defendant has asserted that this main question ought to have been referred to the Special Tribunal in accordance with a special statutory mechanism designed to determine what is essentially a disciplinary matter or a labour dispute between these parties as to the applicable terms and conditions of employment for teachers. It also contends that there is a long standing practice of teachers marking SBAs and that the entirety of their contractual obligations cannot be determined by reference only to their job descriptions.
3. I have been provided with lengthy affidavits on both sides on the requirements of SBAs, the job descriptions of some teachers in certain subject areas, the impact the SBAs have had on teachers and the management of schedules to accommodate SBAs. In my opinion, this is not a case of an interpretation of an agreed contractual text which will form the basis for the declaratory reliefs sought under Part 56 of the Civil Proceeding Rules 1998 (CPR), loosely referred to as an interpretation or construction summons under the former rules of Court. It is in essence a labour dispute on the applicable terms and conditions of employment of teachers that is best resolved in its entirety in the statutory framework designed to deal with those issues. This Court would be ill advised to pronounce on the question asked of it by the teachers in light of the absence of an agreed contractual text, the great factual conflict of the nature of the contractual duty, the long history of conduct of teachers in discharging the role of both the formative assessment (of which there is no complaint) and the summative assessment or marking of SBAs and the impact a determination may have on other terms and conditions. In any event, while the job descriptions disclosed in these proceedings for some teachers literally do not expressly list "marking SBAs" as one of their duties, in the context of the role played by teachers, their conduct over the years and the

nature of SBAs so intimately connected to the job of teaching, it is difficult to assert that it ought not to be and is not a part of their duties and functions through settled custom and practice. This would, however, be a matter best answered by the Special Tribunal.

4. In addressing these issues in this judgment I examine briefly the nature of the claim, the factual backdrop of SBAs and the CXC examination, the rivalling contentions on the teachers' job before addressing two main issues: the first, the question of the jurisdiction of this Court to deal with this dispute in the manner in which it is framed and the second, the problem of interpreting the teachers' duties in this claim.

The Claim

5. By its Part 56 Fixed Date Claim Form, the Claimants are seeking the determination and interpretation of the following questions:
 - a) Whether the contract of employment between the holders of the offices of teacher I, II, III Head of Department (Secondary) and Dean (Secondary), ("the teachers") and the State, requires teachers to perform and/or supply the scoring or marking of the School Based Assessment ("SBA") components of the Caribbean Secondary Education Certificate ("CSEC") Examinations and the Caribbean Advanced Proficiency Examination ("CAPE") of the Caribbean Examinations Council ("CXC").
 - b) Whether the failure or refusal of teachers to perform and/or supply the scoring or marking of SBAs for CXC is a breach of the Code of Conduct of the Education (Teaching Service) Regulations, Chap 39:01.
 - c) Whether teachers are entitled to be paid and/or compensated by the State¹ for making and/or scoring SBAs.
 - d) Whether CXC has any power, authority or prerogative to determine the duties and obligations of teachers in relation to marking SBAs.
 - e) If the answer to question (d) is in the affirmative, what is the nature and extent of the power, authority or prerogative of CXC to determine the duties and obligations

¹ The Defendant

of teachers in relation to the provision and supply of the marking of SBAs.

6. The Claimants in their submissions have conceded that a determination of the questions at (b) and (c) are not relevant. There is no dispute in these proceedings between the parties that CXC has no power nor authority nor prerogative to dictate the duties and obligations of teachers in relation to marking SBAs. The question at (e) is also therefore irrelevant. The main issue relates to a determination of the scope of the duties of the affected teachers and specifically whether it includes the marking or scoring of CXC SBAs.
7. The Claim was issued following the issue of a pre-action protocol letter in December 2018 to which there was no response by the Defendant. The failure of the Defendant to comply with the pre-action protocols under the CPR is undoubtedly a matter which this Court will take into account in its final determination on the question of costs in these proceedings as explained at the end of this judgment.
8. The main thrust of the Claimants' case is premised on job descriptions that were negotiated between the first Claimant, the Trinidad and Tobago Unified Teachers Association (TTUTA), as the bargaining body for members of the teaching service of Trinidad and Tobago and the State in 2000 for some of the teachers in the teaching service. Undeniably, the literal reading of those job descriptions do not specifically mention the "marking" of SBAs although mention is made of "marking projects and assignments". However, the Defendant has argued with great force that those documents are not contractual documents and may be evidence of contractual terms. If correct, the entirety of the contract of employment of teachers has yet to be brought before this Court.
9. Both Claimants view a determination of this question as important for them to properly and effectively discharge their functions in the teaching service. For TTUTA, the claim is important as the representative body of teachers in the teaching service, as it is periodically engaged in consultation and negotiation with the Personnel Department in respect of grievances and terms and conditions of employment.² For the Second Claimant, Ms. Emelene Hassanally, as Head of Department and Acting Principal of the Morvant Laventille

² Pursuant to sections 14, 16, 17 and 18 of the Civil Service Act Chapter 23:01

Secondary School, the claim is important so that the threat of disciplinary action is not hanging over her head and the heads of other teachers if they choose not to mark the SBAs.

10. Two preliminary but important matters relate to the nature of these proceedings. First, loosely referred to as an interpretation or construction summons under the previous rules of Supreme Court 1975, this Part 56.1(1)(c) procedure performs a discrete and specific task of seeking a declaration of the Court on its interpretation of a relevant contractual or other document or text of a statute. The facts in such proceedings are commonly not in dispute and the Court's resources are utilised for an efficient and short answer to rivalling legal interpretations of a document or statute or an agreed state of affairs. To this extent see the ruling of Jones J (as she then was) in **The Integrity Commission v The Attorney General of Trinidad and Tobago** H.C.A. 1735 of 2005, and recently Aboud J in **The Attorney General of Trinidad and Tobago v The Law Association of Trinidad and Tobago** CV2018-01231. Second and in this case the critical question is the matter of an alternative process to resolve the real complaint. The Defendant has spent a considerable amount of time in its submission setting out the comprehensive statutory regime to determine a dispute on the terms and conditions of employment by the Special Tribunal. As an important matter of discretion this Court has been asked by the Claimants to view its right to have these questions answered by this Court as an integral feature of the principle of access to justice and not to deflect its grievance to another statutorily competent body.
11. I had initially asked the parties before the filing of the Defendant's evidence whether there can be some agreement on the Court seising jurisdiction of the question asked and the parties simply submit their rivalling legal views on the contract for the Court's determination. As it turns out after the filing of the evidence of the Defendant, such an approach has proven not only undesirable but ill-advised in the face of the conflict of evidence which, if I were to resolve in favour of the Defendant in the absence of cross examination, may lead to negative findings against the Claimants on the question asked.

Brief Background

12. The CXC examinations are an important feature of the study undertaken by students at our

secondary schools. The State became a signatory to the Agreement Establishing the Caribbean Examinations Council in May 1972. Its effect was to introduce a regional system of education replacing any foreign based system. Notably, CXC comprises representatives of the University of the West Indies (UWI), government and teacher representatives from each member state. The National Committee includes representatives of the Ministry of Education (MOE) and the Teaching Profession and its function is to advise CXC generally. The School Examination Committee is responsible for development of syllabuses and advising on matters relating to examinations. It comprises one member of the teaching profession nominated by the National Council. Although CXC was served with these proceedings and took no part in these proceedings, the Defendant's unchallenged evidence is to the effect that any changes advocated by CXC are not imposed domestically in Trinidad and Tobago without the assent of the MOE. The MOE therefore makes its own independent assessment of CXC's suggestions before implementing, delaying or suspending those changes. The Defendant accepts that the requirements for the CXC examinations imposed on teachers domestically are therefore done by the MOE and not CXC.

13. CXC's mission is "to provide the region with: syllabuses of the highest quality; valid and reliable examinations and certificates of international repute for students of all ages, abilities and interests, services to educational institutions in the development of syllabuses examinations and examinations administration, in the most cost effective way". The syllabus is specially designed for the student's overall development. As one syllabus points out (Agricultural Science) it contributes to the development of the "ideal Caribbean person as articulated by the CARICOM Heads of Government"³. The syllabi are designed on the UNESCO pillars of learning contributing to persons who will "learn how to do, learn to live together and learn to transform themselves and society"⁴. SBAs are now an established component of most syllabi for the development of the student. It charges teachers with the responsibility of evaluating a critical area of student achievement from their working

³ Agricultural Science Syllabus annexed "E.H.1" of the affidavit of Emelene Hassanally

⁴ Agricultural Science Syllabus annexed "E.H.1" of the affidavit of Emelene Hassanally

relationship with the student.⁵

The SBAs

14. SBAs were first introduced in 1979 and have been undertaken since that time by members of the teaching service as part of their duties.⁶ The SBA forms part of the assessment of the student for the CXC's examination. The SBA Handbook for Teachers defines SBAs as "a set of assessment tasks/assignments/projects conducted in the school; carried out by the student following guidelines provided by CXC and assessed by the teacher using criteria provided by CXC." The Handbook for Teachers also provides that "All assignments, projects and assessment sheets are part of the examination records and will be considered the property of CXC." The Handbook sets out the important functions of the SBAs. The SBA:

- a) provides opportunities to gather data on student performance over time. Obtaining assessments based on student performance over an extended period of time and developed by those who know the students best-their subject teachers-provides a more reliable assessment of each student;
- b) serves to motivate students by engaging them in meaningful activities that are relevant to them; and for teachers, it can reinforce curriculum aims and good teaching practices;
- c) aligns assessment with curriculum and instruction;
- d) provides students with multiple opportunities to demonstrate their competence;
- e) allows students to be active participants in the assessment process;
- f) gives credence and recognition to the teachers' informed judgments about students' performance; and
- g) allows teachers to be critical leaders in the assessment process.⁷

15. Importantly, the Handbook sets out the role of the teachers in the SBA:

⁵ Caribbean Examinations Council SBA Handbook for Teachers annexed L.D.2 of the affidavit of Lynsley Doodhai

⁶ See paragraph 20 of the affidavit of Anna Meenawattee Singh

⁷ Caribbean Examinations Council SBA Handbook for Teachers annexed page 2.

- a) Ensure the task selected for the SBA activity is related to given syllabus objectives. This task should fit in the normal work being done in the class.
- b) Analyse the task selected and develop a detailed criteria for assessing the selected task using the example given in the syllabus as a guide.
- c) Examine the mark scheme given in the syllabus and if this is different (for example, in the sciences); construct a mark scheme which can be used accurately and consistently.
- d) Provide a list of resources that students will need to complete the SBA.
- e) Mark all practical work according to SBA standards.
- f) Give students access to the criteria and mark scheme that will be used to assess the task.
- g) Give students adequate opportunities to practice similar tasks.
- h) Provide feedback to the students on their work and allow them to revise their SBA based on feedback provided⁸.

16. Notably, in setting out these roles of the teachers, some and not all of the roles discharged by the teachers relate to the marking of SBAs. By parity of reasoning the teachers accept that the other roles do fall within their terms and conditions of employment.

17. To successfully administer the SBA it is important that teachers (a) manage the SBA as part and parcel of the internal work of the school (b) understand what SBA tasks are to be done and how they are to be done (c) be aware of the criteria being used in assessment and (d) assess assignments competently⁹. It appears from the teachers' claim that only their role at (d) is being contended as not forming part of their contractual duties on the basis that no mention is made of "marking" or "assessing" SBAs in their job description.

18. In the 2015 CXC Handbook for Principals, although the format of assignments across subjects may differ, there are a number of common requirements among them:

⁸ Caribbean Examinations Council SBA Handbook for Teachers page 7

⁹ Caribbean Examinations Council SBA Handbook for Teachers page 7

- (i) Students undertake specified assignments over a given period of time, fulfilling specific skills as outlined by the syllabus;
- (ii) Class teachers assess the work and submit the scores to CXC;
- (iii) CXC moderates the scores awarded by the Teachers to ensure that the assessment of the work of students at different schools carried out by different Teachers using sometimes different tasks, is in alignment with the standard as defined by CXC in the syllabus for respective subjects. This is done by remarking certain SBA scripts, either onsite at schools or be remarking samples submitted by the school to CXC.

19. The affidavit of Anna Meenawattee Singh sets out the nature of the SBAs as follows:

“12. The CXC provides guidelines for the School Base Assessment. Criteria and scoring rubrics are provided to ensure that the same standard is applied across the Caribbean. The guidelines are formulated in line with the curriculum, and CXC gives guidelines as to the skills to be assessed and the types of activities that are required. For example, with Science the minimum number of experiments are stipulated and for Visual Arts, the SBA specifies the number of pieces to be created by each student, details the type of task, whether sculpture or leatherwork, and materials to be used etc.

13. Teachers must provide their respective principals with a detailed work plan (scheme of works as stated in the JD) informing how they will implement the curriculum within the school calendar. This work plan must include topics to be taught, curricular objectives, a timeframe when each topic will be taught, the teaching strategy, the assessment which will include the SBA where relevant and resources required.

14. Since the SBA forms part of the curriculum taught, the teacher has autonomy to choose from the topics taught and prepare the SBA question/project using the CXC SBA guidelines and mark the SBA product or performance accordingly. Therefore, the SBA is termed as such as since it is designed and implemented in the school, bearing in mind the overall objective of SBA is serving the function of

providing feedback to students regarding development of targeted skills/concepts.

15. The SBA therefore serves a dual function of assessing each student as a point in the programme as well as supporting teachers in the development of assessment competencies in the specific subject areas.

16. CXC, in order to ensure that the teachers mark their respective students' products and performances fairly, are in keeping with the CXC SBA Guidelines and to ensure that the curriculum is implemented across all schools as per standards, hires moderators to review sample SBA products eg script or artwork etc. Moderation is also done for practical areas such as Physical Education and Food and Nutrition in which the moderator evaluates students actually performing the task that the teacher has assessed (doing a sport or cooking a meal). The Moderator then scores five SBA samples and both moderator's and teacher' scores are submitted to CXC.

17. Moderators are largely teachers from other schools. Moderation is basically done for quality assurance as the SBA marks contribute to the final grade awarded to a student. When doing this review, the moderators use the administering teachers' marking scheme and task specifications.

18. The conduct of SBAs for periods of the programme allows for developmental feedback for students as well as teacher reflection on the efficacy of their own practice. The autonomy of teachers to select areas for SBA assessment allows both teachers and students the opportunity to more deeply explore areas of interest to them. This is not easily facilitated in a final external examination."

20. According to CXC's SBA Manual for Principals, the percentage value of SBAs to the final aggregate mark or grade for each subject ranges from 20% - 70%. The CXC Examination Regulations prescribe that candidates who do not submit SBAs, notwithstanding completion of the externally assessed components of the examination, will be reported "Ungraded-SBA component not received."

21. The subjects at CSEC that have an SBA component at present are: Additional Mathematics, Agricultural Science, Biology, Caribbean History, Chemistry, Clothing and Textiles, Economics, English Language, English Literature, Mathematics, Electronic Document Preparation and Management, Food and Nutrition, Geography, Home Economics Management, Industrial Technology, Information Technology, Integrated Science, Music, Office Administration, Physical Education and Sport, Physics, Principles of Accounts, Principles of Business, Religious Education, Social Studies, Technical Drawing, Theatre Arts and Visual Arts. All subjects in the CAPE examinations now have SBAs.
22. Notwithstanding the wide cross section of syllabus that have a SBA component there is no generic job description for Teachers I, II and III supplied to the Court. What was supplied were the job descriptions for teachers in some subject areas that have a SBA component. Importantly, these offices created by the Education Act do not relate to specific or particular subject areas. It also appears from the Claimants' submissions that the real contractual text to be interpreted is the "job descriptions" of Teachers I, II, III, Head of Department (Secondary) and Dean (Secondary).

The Job Descriptions

23. Even though SBAs were introduced in the 1970s and teachers have since then performed the duties of designing and marking SBAs in accordance with CXC's criteria, no specific task of the marking or grading of SBAs were ever introduced into the teachers' job descriptions. This may not be surprising having regard to the intimate connection between SBAs and the goals of teaching set out in both parties' evidence.¹⁰
24. Around mid-1997-2000 TTUTA entered into negotiations with the State and the Chief Personnel Officer (CPO) of the Personnel Department and officers of the MOE in relation to the formulation and agreement of duties for the offices of Teacher I, Teacher II, Teacher III, Head of Department (Secondary) (Grade V) and Dean (Secondary) (Grade V) (Teachers) in the Teaching Service.

¹⁰ See the evidence of Beverly Roseman and Professor Stafford A. Griffith's article "The Philosophical Underpinnings of CXC's School Based Assessment (SBA)" (Caribbean Examiner, a publication of CXC, Vol. 16 No. 2 October 2017 annexed to the affidavit of Lynsley Doodhai.

25. In 2000 TTUTA agreed together with the CPO upon the Job Specifications and Descriptions for the following offices in the Teaching Service:

- (i) Physical Education, Mathematics, Languages, Industrial Arts, Home Economics, Integrated Science, Arts/Music/Drama and Agricultural Science for Teachers I, II and III;
- (ii) Head of Department (Secondary), Grade V;
- (iii) Dean (Secondary) (Grade V);
- (iv) Vice Principal (Secondary);
- (v) Principal (Secondary).

26. There are no job descriptions provided to this Court therefore for the following subject areas which have a SBA component: Additional Mathematics, Biology, Caribbean History, Chemistry, Clothing and Textiles, Economics, English Literature, Electronic Document Preparation and Management, Food and Nutrition, Geography, Industrial Technology, Information Technology, Office Administration, Physical Education and Sport, Physics, Principles of Accounts, Principles of Business, Religious Education, Social Studies, Technical Drawing.

27. The job descriptions of Teacher IIs and IIIs for Industrial Arts, Home Economics, Integrated Science, Arts/Music/Drama and Agricultural Science and the Head of Department state that Teachers have the authority to “Determine School-Based Assessment Projects in consultation with Head of Department and in accordance with Ministry of Education guidelines.” This, the Claimants contend, is referable to the process by which teachers determine the specifications, test questions, keys, rubrics and SBA tasks, which process may take place in consultation with their superiors or Head of Department and is not referable to the marking or scoring of SBAs.

28. The Claimants contend that before the signing of the job descriptions in 2000, TTUTA raised the issue of whether the duties of Teachers included the marking or scoring of CXC SBAs with the Permanent Secretary of the MOE. At that time CXC only administered CSEC

examinations. TTUTA was of the view that CSEC SBAs form part of an examination created by CXC, not the Employer; CXC pays Teachers who mark the CSEC external examinations; the marking of SBAs was not part of the duties of teachers and if they were required to mark SBAs, they should be remunerated.

29. At the time the subjects examined by CXC which had an SBA component were: Principles of Accounts, Principles of Business, Biology, Chemistry, Physics, Integrated Science, Agricultural Science, Caribbean History, Geography, Social Studies, Clothing and Textiles, Family and Resource Management, Food, Nutrition and Health, Music, Art and Craft, Electronic Technology, Mechanical Engineering Technology, Building Technology, Information Technology and Technical Drawing.

30. Physical Education, Mathematics, English Language and Literature had no SBA component (SBAs for Mathematics, English Language and Literature were not introduced for CSEC until 2016). Spanish and French, then and to date, had oral examinations but no SBA component. Teachers who conduct oral examinations for CXC are paid by CXC.

31. The Claimants contend that the omission in the job descriptions of any duty to score or mark CXC SBAs or any CXC examinations was deliberate and reflective of the intention of the parties and the role and duty of CXC under the Agreement Establishing the Caribbean Examinations Council (the CXC Agreement) to conduct examinations. Therefore, any reliance on the job descriptions to assert that all Teachers are obliged to mark or score CXC SBAs must be misguided because:

(i) Article III of the CXC Agreement provides that it is CXC that shall conduct such examinations as it shall think appropriate. The conduct of CXC examinations, which include SBAs, by persons other than CXC (in this case Teachers not employed by CXC) is no consistent with the CXC agreement.

(ii) The job descriptions that exist for Mathematics and Physical Education make no mention of SBAs.

(iii) There are several subjects for which no job descriptions exist for example at CSEC: English Language, Electronic Document Preparation and Management, Industrial

Technology, Information Technology, Office Administration. At CAPE: Electrical Technology, Environmental Science, Food and Nutrition, Geometrical and Mechanical Engineering, Information Technology.

(iv) CXC did not introduce the CAPE examinations (taught at Form 6) until in or around 2004. The General Certificate of Education Advanced Level Examinations were marked on the basis of external examinations only and did not contain any component similar to SBAs. Therefore, the agreed job descriptions cannot be construed as imposing any requirement on Teachers to mark SBAs for CXC CAPE examinations.

32. With respect to these job descriptions, however, the evidence of Beverly Roseman, the Human Resource Advisor III (Acting) of the Defendant, makes it clear that these job descriptions were not designed to deal with the specifics or minutiae of the teachers duties as in other areas of the public service. It is deliberately written in broad, unspecified language to capture the vagaries of the job and to avoid the burdens of re-designing job descriptions to capture the dynamics of the job of teaching. In her evidence she notes at paragraphs 12 and 14:

“12.The practice in the CPO in establishing duties and responsibilities in the JDs is that these are usually written using broad statements primarily because:

- a) It allows for coverage of a number of tasks or sub-duties which if written in detail, may render the job document an exceptionally long and cumbersome one.
- b) Generic job descriptions are also much easier to maintain because they don't have to be modified for changes in tasks which do not affect the scope of the job. They can be used to cover employees performing the same functions in different departments/schools.
- c) Some specific process for e.g processing tax exemption forms as in the case of an Immigration Officer may become irrelevant, however the officer could be required to process a replacement form or utilize an online method in place of

that particular form without a job description having to be adjusted. The task of reviewing and amending JDs for an organization every time such changes occur may not be an efficient process and prove to be quite costly to the organisation. Hence the reason for writing the JDs in this particular format.

14. It should be noted that the requirement to have position description depends on the Performance Management system utilized. While the Civil Service utilizes position descriptions the Teaching Service does not. The Service Commission asked the CPO to treat with the Performance Management System of civil servants but the Teaching Service Commission has retained for itself responsibility for the Performance Management System for teachers. Accordingly the JDs in the teaching service do not have a position description.”
33. Since 2000, TTUTA has made representations to the MOE and senior personnel in the MOE that the duties of Teachers do not include the marking of SBA’s and that either the MOE or CXC should pay Teachers who supply this service for CXC.
34. On 13th August 2018, the Minister of Education provided TTUTA with the CPO’s Memorandum dated 27th June 2018 (the CPO’s advice) in the which the CPO advised that:
- (i) An examination of the existing job descriptions for the offices of Teacher II; Teacher III; Dean; and Head of Department which were signed off by TTUTA, revealed that one (1) of the duties and responsibilities of these officers include preparing, administering and marking tests, projects and assignments to evaluate students’ progress and maintaining records of students’ attainment in the curriculum over a designated period.
 - (ii) Although the words “*School Based Assessments*” were not specifically written in the existing job descriptions for teachers, it is encapsulated in the current descriptions. In this connection, the “*Guidelines for Managing School Based Assessments in Trinidad and Tobago*” issued by the Ministry of Education (Curriculum, Planning and Development Division) defined School Based Assessments as “*a project or assignment*” which is done by an examination

candidate as a contribution to his/her final exist grade. This definition would align with the duties of the current job description as outlined in (i). The SAB is a part of the teaching and learning process and is internal to the school in which the teacher functions.

(iii) Teachers do not necessarily have to mark SBAs at home since the teaching curriculum at secondary schools are designed in such a way that allows teachers twenty-five percent (25%) non-contact time to be utilised in lesson planning marking and other related activities.

(iv) The practice of marking SBAs without additional pay has been in existence for the past twenty seven (27) years, and therefore it is subsumed in the duties of the teachers on the basis of it being settled custom and practice.

(v) Teachers with the Caribbean region and other jurisdictions where SBAs form part of the syllabi, such a Hong Kong, Malaysia and African countries, are not paid for the marking of SBAs.

(vi) TTUTA has failed to put adequate justification or solid basis for its request.”

35. There were several lengthy affidavits filed in these proceedings¹¹. I briefly summarise the main evidence captured by each deponent and those in reply.

Lynsley Doodhai

36. Mr. Doodhai is the President of TTUTA. His evidence sets out the overall interaction with the MOE and exhibited the important documents of some of the Job Descriptions, CXC’s Handbook for Teachers, CXCs 2013 Guidelines for Candidates Writing Examinations Offered

¹¹ **Claimants’ affidavits filed 24th January 2019**- Affidavit of Lynsley Doodhai, Affidavit of Candice Bharat, Affidavit of Yema Jaikaran, Affidavit of Nigel Phagoo, Affidavit of Davanand Sinanan, Affidavit of Emelene Hassanally.

Defendant’s Affidavits filed 3rd June 2019- Affidavit of Mala Morton-Gittens, Affidavit of Ingrid Kemchand, Affidavit of Farishazad Nagir, Affidavit of Nicole Harris-Knudsen, Affidavit of Dianne Boochoon, Affidavit of Beverly Roseman, Affidavit of Karen Ramdahin-Nandaram, Affidavit of Anna-Meenawattee Singh, Affidavit of Lawrence Jaggassar.

Claimants’ affidavits in reply filed 28th June 2019- Affidavit of Nigel Phagoo, Affidavit of Kevina Ramsook, Affidavit of Emelene Hassanally, Affidavit of Yema Jaikaran, Affidavit of Davanand Sinanan.

by CXC, CXC's Handbooks for Principals, the Proposed Resolution of TTUTA Conference of Delegates, the CPO Memorandum, the Teachers' Work Load-Secondary School

37. He noted that the issue of whether the duties of secondary school teachers include the scoring and marking of CXC SBAs for the CSEC and the CAPE examinations have always been one of the subjects of discussion at Caribbean Union Teachers (CUT) of which TTUTA is a member. CUT'S position is that this is not part of the duties of teachers.

38. He is aware that the Government of Jamaica has agreed to pay teachers for marking CXC SBAs. As part of the Heads of Agreement between the Government of Jamaica and the Jamaica Teachers' Association signed 16th May 2018, the Jamaican Ministry of Education agreed to pay teachers three hundred Jamaican dollars for the marking of each SBA script. This will be paid in June of each year commencing in 2019.

Ingrid Kemchand (in reply to Lynsley Doodhai)

39. Ms. Kemchand is Curriculum Co-ordinator of the Curriculum Planning and Development Division of the MOE.

40. She contends that there are two types of assessments within the curriculum prescribed by CXC. These are formative and summative. Formative assessment refers to developmental assessment which requires feedback to improve skills developed over the course of the programme being implemented. The SBA forms part of the formative assessment. Summative assessment refers to those assessments that are conducted at the end of a period and it has no developmental purpose but is simply to examine the skills learnt over the period. This includes the CXC exams and the modern language orals and practical exams for PE and Theatre Arts. The job descriptions for all teachers II and IIIs state under duties and responsibilities "prepares, administers and marks tests projects and assignments to evaluate student's progress and maintains records of student's attainment in the curriculum over a designated period and prepares and delivers instructions and gives guidance to improve student's performance in the relevant subject area/s where progress is below standard."

41. She contends that SBAs constitute a part of formative assessment and therefore falls within

the duties and responsibilities in the job descriptions.

42. She explains that CXC recruits and pays teachers contracted to be markers of written exams which are the final summative examinations administered at the end of the programme. This is a separate and different contract with CXC for teachers and other qualified individuals for which individuals apply as a private concern and are hired to so engage with CXC. It therefore has no bearing on the job descriptions.
43. Further, it is the duty of the school administrator to ensure relative equity in teacher's workload. The Principal determines the teacher's workload using three criteria: grade range, school level at which subject is taught and type of subject. Therefore, any inequity is created at the school level and not by the MOE.
44. She notes that TTUTA has expressed concerns in the past about marking SBAs but such marking has been a consistent feature of teaching in this country for decades and has been the basis upon which both the MOE and the teaching service has operated. The marking of SBAs has been a decade long practice in this country. The MOE and the GORTT has consistently maintained a policy that this function falls generally within the duties and responsibilities of all teachers as part of their general function and as part of the assessment of the curriculum.
45. She further contends that job descriptions are not intended to show all the terms and conditions or duties of any particular position but to provide adequate reference to the general nature of the job from which specifics may be derived. There is also reference made to other related duties which may be subsumed a range of possibilities that may arise at the school and which are often directed by memos and circulars issued by the MOE or agreed to and registered as collective agreements.
46. CXC has no authority to act in any capacity without the consent and permission of the MOE. It is the MOE that has to agree to any programme and assessment developed by CXC before it is implemented in Trinidad and Tobago.
47. Moderation is an exam function implemented by CXC to ensure that the marking by teachers are fair and accurate.

Emelene Hassanally

48. Ms. Hassanally holds the post of Head of Department (Secondary) in the Teaching Service of Trinidad and Tobago (Teaching Service) and is assigned to the Morvant Laventille Secondary School (MLSS) as Acting Principal. Her evidence is important with respect to the duties of Head of Department and Principal. She has also given evidence on the relevant SBAs for the syllabus for Agricultural Science.

49. Her responsibilities as Head of Department and as Acting Principal according to the relevant Job Descriptions are:

a) As Head of Department (Secondary) inter alia:

- (i) Guiding and assessing the performance of teaching staff attached to the department;
- (ii) Preparing and evaluating the department's work plans and timetables;
- (iii) Planning a programme of learning to develop the knowledge skills and attitudes of students in Forms 1 to 6.

b) As to Principal (Secondary) inter alia:

- (i) Planning and administration of a programme of teaching;
- (ii) Preparing and co-ordinating the school's timetable;
- (iii) Ensuring an adequate level of supervision and instructions for students;
- (iv) Supervising and co-ordinating the work of Heads of Departments and Deans including the formulation, development, oversight the implementation of a system of monitoring the academic performance of students; supervising the system for monitoring students' academic performance by co-ordinating and supervising the activities of Form Teachers;
- (v) Counselling teachers and making recommendations for disciplinary action;
- (vi) Appraising staff performance.

50. Point Fortin Secondary School (PFSS) where she began teaching in 1994 had five Agricultural

Science classes and she taught on average two of those classes. Each of those classes had around twenty five students. PFSS operated on forty period teaching weeks on a 5 day teaching cycle. She had 26 or 27 teaching periods in accordance with the workload memorandum, while the Teachers of non-practical subject at PFSS had thirty teaching periods. The timetables were created by a timetable committee under the office of the Vice Principal and sanctioned by the Principal. Most of her non-contact time at PFSS was spent carrying out her responsibilities as a Form Teacher.

51. For the Agricultural Science SBA, she contends that the preparation and execution of work for the production reports is time extensive and can be challenging for students. For the crop report, the land has to be prepared, seeds planted, seedlings nurtured and then extensive monitoring of the plant to cultivation. Students when doing the animal report have to monitor the animal from infancy to maturity.

52. She contends that she could not mark production reports during the day at school because:

- Every teacher at the school is a Form Teacher save for the Dean. Being a Form Teacher involves meeting students and sometimes parents and dealing with issues at school. She would utilize two periods a week at a minimum to do so.
- Her teaching duties both for classes with SBAs and other classes required her to use non-contact time to plan her material for class.
- The school had internal end of term assessments which she also had to prepare and mark.
- Dealing with disciplinary issues and involvement in co-curricular activities also took place either during non-contact time or during break or lunch time.

53. She had to use her personal time usually at home to mark SBAs because it could not been done during the school day.

54. At the school where she is Acting Principal, there are 640 students and 46 teachers. Out of the 46 teachers, 6 teachers do not have SBA responsibilities and these are: the three Spanish teachers, one dance teacher, one music teacher and the physical education

teacher.

55. The school gives the same non-contact time depending on the category of the subject area and no special consideration is given to whether a teacher has SBA responsibilities.

Mala Morton-Gittens (in reply to Emelene Hassanally)

56. Ms. Morton-Gittens is the Curriculum Coordinator of the Curriculum Planning and Development Division of the MOE. Her relevant evidence in response to Ms. Hassanally can be summarised briefly:

57. Principals as administrators are not required to perform teaching duties. The feedback to students is a natural part of the teaching and learning process. Before a skill can be assessed it must first have been taught and attempts made by the student to master that skill. Learning is an iterative process. The syllabus presents the SBA as formative assessment, which allows a student to have opportunities to refine skills, before being allotted a final score. The time required for assessing an entire class depends on the number of students to be assessed.

58. On site moderation of practical skills being assessed by the teacher is a good practice globally. It ensures standardisation across schools and districts, provides an element of quality control and supports adherence to the syllabus. Moderation determines accuracy of marking so no student has an unfair advantage or is treated unfairly because of teacher error.

59. Teaching is synonymous with learner support. Care and time must be taken with each learner to support his/her skills development.

60. The marking of a student's final draft of the SBA should not take 30 minutes because a teacher has the responsibility of effectively managing his/her time during the work day and if constructive feedback is given along the process of developing the production report, the teacher would be aware of the content of each iteration of the report submitted. Good time management is required for all teachers.

61. Teaching is a continuous activity as is formative assessment (SBA). Constructive feedback to

students is part of the teaching process. SBAs are formative in nature, complement the subject content and skills required for the summative papers. SBAs build student confidence and competence through teacher feedback and opportunities to refine their responses. It is not intended to negatively affect teacher efficiency and teaching quality but facilitates efficiency and quality.

62. The Principal is expected to use the workload memorandum to determine the appropriate workload which is standardised across all schools. If a teacher has SBAs to assess, this is treated as continuous/formative assessment which is a natural complement to teaching.

Karen Ramdahin-Nandaram (in reply to Emelene Hassanally)

63. Ms. Ramdahin-Nandaram is a Curriculum Officer (Agricultural Science) of the Curriculum Planning and Development Division, MOE.

64. She contends that the term “time consuming” is a subjective one. The assessment of skills is conducted in the field and is done during contact teaching time. The final skill assessment can be timetabled as part of the school’s end of term examinations.

65. The term “time intensive” is also a subjective one. The preparation and execution of the work for the Investigative Projects and the other associated reports are done during contact teaching time under the guidance of the teacher.

66. The term “demanding” is a subjective one. During contact teaching time, an agricultural science teacher is expected to implement the content in the agricultural science syllabus which includes teaching and assessing skills as well as providing feedback on the Investigations/projects as each section is completed. Non-contact teaching time may be utilized for the marking of the investigations/projects.

67. Ms. Hasannally in her reply noted that Ms. Ramdahin-Nandaram did not take into account the fact of the literacy and numeracy issues of many students at MLSS and the fact that a great deal of individual attention is required in order to complete SBAs. She also does not take into account that teachers teach multiple classes and have form teacher duties in proffering her opinion that the time required to prepare, conduct and mark SBAs for

Agricultural Science can be completed during non-contact hours.

68. In response to Mala Morton-Gittens, Ms. Hassanally contends that the teachers can plan for the workday but the school and classrooms are unpredictable environments where students bring their various issues from home and their communities, therefore, unplanned situations arise that require immediate attention.
69. Ms. Hassanally contends that the statement made by Ms. Anna Meenawattee Singh (Curriculum Officer Science)¹² that the administering and marking of the SBA is no different from administering and marking continuous assessment such as coursework is incorrect. This is so because when she prepares course work it is not for an external examination body that can place financial burdens on the school for uploading grades late nor is she compelled to comply with detailed rubrics and criteria or be subject to a moderation process imposed by a third party. Course work is developed by the teacher to meet the needs of the students within the classroom setting.
70. She contends there is no feedback given after the final grade is assigned so there is no formative element in the marking of SBAs.

Davanand Sinanan

71. Mr. Sinanan like Ms. Hassanally is a principal. He is the principal of Palo Seco Secondary School. He contends that the correction and marking of SBAs by teachers is a highly time consuming process that is disruptive of the administration and function of the school. It eats into the time available for teaching students. If a student fails the SBA portion of the CSEC examination then it is unlikely that child will attain an overall passing grade and extremely unlikely that he or she will attain good overall good marks. If a student does not do the SBA component of the particular CSEC subject he will not be graded.
72. Teachers work beyond their designated work hours due to the time consuming process of marking SBAs. The non-contact time allotted to Teachers in the workload memorandum is not sufficient to allow teachers to mark SBAs during their working hours.

¹² Summarised later in this judgment at pages 34-35

73. Teachers spend a great deal of individual time with students. Given class sizes, the amount of time required for students and the rigidity of the conduct and marking of SBAs, it limits the time available and puts a strain on the Teachers' capacity to complete the theoretical aspect of the syllabus.
74. Non-contact time is used by Teachers to engage in planning lessons, attend departmental meetings, prepare for classes, prepare for labs, mark tests, deal with disciplinary matters, get involved in co-curricular activities at the school and set and mark tests for internal assessments. The non-contact time of teachers at the school who do not teach subjects with SBA components is expended and occupied by doing these things. Therefore, the teachers assigned with subjects with SBA components do not have the time during the school day to mark SBAs.
75. He contends that the rigours of conducting, marking and supplying SBA scores to CXC lowers the quality of education.

Nicole Harris-Knudsen (in reply to Davanand Sinanan)

76. Ms. Harris-Knudsen is the Acting Curriculum Co-ordinator of the Curriculum Planning and Development Division, MOE.
77. She contends that the conduct of the SBA within 5 terms or approximately 6 weeks in Forms 4 and 5 varies according to the subject. The variations in the SBA requirements across subjects affect the number of SBAs the teacher is required to mark, regardless of the fact that class sizes may be equal.
78. She contends that teaching, the conduct of assessments and the marking of assessments are mutually exclusive tasks. Teaching and the conduct of assessments take place during contact teaching time while the marking of assessments take place during non-contact time. Teachers cannot be timetabled simultaneously for teaching and the marking of assessments. Non-contact time needs to be effectively managed by the teacher and monitored by the school's administration since teachers are required to fulfil other duties and responsibilities that are delegated apart from teaching.

79. She explains that school calendars which assist with time management are the responsibility of the school's administration and can guide teachers as they develop the timeline for the roll-out of the SBA. Effective planning would allow teachers to fulfil all responsibilities during their work hours. School curriculum committees are expected to collaborate and to set deadlines which coordinate the assessments done by students across all subjects. This collaboration must take into consideration the enforcement of set deadlines which all teachers sufficient time for providing timely feedback to their students in advance of students' submissions and then for marking the SBA.
80. She contends that taking labs home is a personal choice of the teacher and is avoidable if there is proper planning and management. However, there is provision for teachers who face an increase in their workload over the optimal workload recommended. The MOE Circular Memo No 57 Subject: Teachers' Workload- Secondary School (July 2009) it is stated "If however there are any special circumstances that may warrant a change in any teacher's work load, principals are advised to submit relevant proposal to the Chief Education Officer through their respective Schools Supervisors III."
81. She contends that the administration, completion and marking of SBAs form part of curriculum implementation.
82. The CXC and the MOE have also provided comprehensive guidelines to teachers on the administration of the SBA component for the variety of CSEC subjects to assist them in implementing the SBA as part of the curriculum.
83. With regard to the moderation process, if a teacher applied the mark scheme correctly in assessing the student's skill, then the student's mark will not be affected during the moderation exercise. There is no evidence the moderation process has any psychological impact on the individual who is marking the SBA. The consistent application of the mark scheme provided by CXC promotes time saving.
84. The administration of the SBA which constitutes a part of classroom instruction is seamlessly integrated into the performance of the teacher's duties and responsibilities.
85. The activities for the SBA are linked to the syllabus and should form part of the learning

activities to enable the student to achieve the objectives of the syllabus.

86. She contends that the timelines for the administration of the SBA should be factored into the school's calendar of events as well as the teacher's scheme of work and a standard amount of time to upload SBA scores should be stipulated subsequent to the opening of the ORS. It is the Principal's responsibility to ensure that the necessary facilities exist to allow the effective upload of all SBA data including students' scores and samples to the CXC's ORS. The Chief function of the principal is to provide instructional leadership, therefore if teaching quality is being compromised the principal would be expected to address the matter with expediency through the HOD via clinical supervision or any other means necessary.
87. Further, the marking of the SBAs are to be done during teachers' non-contact time for which teachers are already being remunerated.
88. Mr. Sinanan in his reply contends that it is necessary to be in the school environment on a day to day basis to appreciate how large class sizes, student behaviour and other factors affect the delivery of the syllabus. Ms. Knudsen does not depose to having any teaching experience and therefore cannot have an accurate grasp of the time taken in practice and the time available to deliver the syllabus and to conduct and mark SBAs.
89. He contends that the marking of SBAs is not part of the process of evaluating students' progress. It is summative in nature because it measures performance at the end of an instructional period. Marking SBAs and supplying them to CXC for the students' final grades is not in the nature of a formative assessment, which is the assessment of students' progress by the teacher and the provision of feedback to help students in making further progress towards achieving the intended outcomes. The final marks obtained in SBAs do not monitor the progress of the student but they are part of the student's final CSEC grade for that subject.

Nigel Phagoo

90. Mr. Phagoo is a teacher and a Dean (Secondary) (Grade V). He currently teaches Chemistry at CAPE for Lower and Upper 6 at Hillview College. In addition to teaching, his duties as

Dean include:

- (i) Assisting in the formulation and development and overseeing the implementation of a system of monitoring the academic performance for a group of students within Forms 1 to 6;
- (ii) Supervising the system for monitoring students' academic performance by:
 - a) Co-ordinating and supervising the activities of Form Teachers;
 - b) Monitoring the academic performance and development of students.
- (iii) Ensuring that records are maintained accurately and completed within the timeframe and manner stipulated by the school administration;
- (iv) Ensuring that teaching activities conform to the requirements of the approved curriculum and are completed within specified time period.

91. The timetabling of Teachers' contact and non-contact time roughly follows the workload memorandum. Of the 48 teachers at the school, approximately 40% are allocated contact time in excess of that recommended by the workload memorandum.

92. He contends that given the number of students, the volume of SBA material, CXC's detailed marking rubric, the moderation of Teacher marks carried out by CXC and the significant importance of SBAs to the final grade, he has never completed marking SBAs during his non-contact time and has always had to use his personal time to do so.

93. For his Lower 6 class for the 2017-2018 academic year he had to conduct 18 labs to sufficiently test all the skills prescribed by CXC. In the labs, he had to investigate chemical phenomena with the students following the CAPE curriculum. The preparation and making of the labs are very time consuming and takes away from the time available to teach the actual curriculum to the students.

94. Between February and March, CXC sends a representative to the school to conduct CXC's on site moderation for Chemistry where the moderator reviews all the scripts and identifies what changes need to be made to the marking system. The representative has in the past advised in writing that if the changes in the marking scheme are not made they may be

forced to fail students or even fail the whole form for that subject. After getting the moderator's feedback, he must then review all the scripts and make the changes advised.

95. In September 2018, the CAPE Chemistry, Physics and Biology syllabi was amended to include the requirement of an investigative project. The investigative reports are done in groups of up to six students. He is engaged in the process of marking 8 reports in all. It takes 15 to 20 mins to go through each draft for each report. He has no time during the school day to complete it so he carries out the marking process at home. This is in addition to the requirement to do labs.

Farishazad Nagir (in reply to Nigel Phagoo)

96. Mr. Nagir is the Curriculum Co-ordinator in the Science Unit of the Curriculum Planning and Development Division of the MOE.

97. CXC CAPE requires 8 labs for assessing 4 skills in each of the academic year. CXC provides a minimum number of labs to acquire the necessary experimental skills which is 8 labs required for SBA over two school terms at the CAPE level. At CSEC level 6 SBA labs are required over 3 terms in Form 4 and 6 SBA labs in 2 terms in Form 5.

98. A few years ago, CXC instructed that students can write up a practical form the date, aim, apparatus, materials and method prior to conducting the lab in an effort to save time in the practical and to complete same.

99. Teachers are not allowed to keep doing the SBA over and over again. Rather the teachers are supposed to teach the students the experimental skills and when satisfied then give the SBA for that skill.

100. Mr. Phagoo in his reply contends that Ms. Nagir does not take into consideration the realities of the unpredictable nature of the classroom and the developmental work that goes into preparing students for their SBA and final examinations.

101. Further, doing 8 labs would amount to doing what is only barely adequate and can have serious adverse consequences for students.

102. He contends the teacher still has the responsibility to design and execute the practical

activities to be undertaken in the lab from external sources such a textbook, papers and from materials of other examining bodies.

Candice Bharat

103. Ms. Bharat teaches CSEC subjects English A and English B to Forms 1 to 5 at St. James Secondary School. Her evidence sets out the nature of her work as a teacher with SBAs. She has two SBA classes.
104. Before the introduction of SBA for English in 2016, her assigned non-contact time was already occupied with duties relating to teaching and other activities relating to the life of the school such as marking coursework, supervision of other classes, preparing lesson plans, meeting with students and documenting the work covered in class, attending weekly departmental meetings, meeting with parents and dealing with disciplinary problems.
105. The conduct of the SBA required individualized attention to each student as well as to individual groups. The syllabus suggests at page 50 that “the teacher works with one group per period to give them help in reading or completing an assignment and spends time with each group in the week.”
106. The marking process for the SBA is time consuming. The teacher must use a rating scale to assess the student’s participation. The syllabus says that “This scale should be completed by the student in discussion with the teacher on two different occasions. After the first assessment, discussion should take place and feedback should be given to the student to allow for improvement. The second assessment should produce the final mark out of five agreed on by the student and teacher.”
107. The detailed and different marking criteria for each SBA task demands a high degree of attention and concentration. It is challenging to manage the time needed to teach the syllabus and to carry out SBA tasks since she has a shorter time to teach the rest of the syllabus. At least 30% of the class time is devoted either to teaching skills required to do the SBA or actually conducting the SBA.

Laurence Jaggassar (in reply to Candice Bharat)

108. Mr. Jaggassar is the Acting Curriculum Co-ordinator of the Curriculum Planning and Development Division, MOE.
109. He contends that according to the workload memorandum, the MOE recommends that teachers be assigned to 75% teaching periods or contact time and 25% non-teaching periods or non-contact time. Therefore out of a possible 40 periods it is recommended that teachers be assigned 30 teaching periods.
110. From information provided by the Principal of St. James Secondary School, it was noted that for the year 2019, Ms. Bharat has been assigned 19 periods of teaching time which is 47.5% of the teaching workload. She has been assigned one class each of Form 1, 3, 4, and 5. This would mean that Ms. Bharat has an allocated of non-contact time of 52.5% or 21 periods.
111. He contends that if teachers properly manage their contact and non-contact time there should be no need for them to resort to the use of their personal time to conduct their duties. Further, teachers should raise any workload related issues with their Principal who is responsible for managing their workload.
112. The English SBA is a formative assessment which is implemented over time. While opportunities should be given for students to improve their submissions over time, it is ultimately the teacher's responsibility to comfortably fit that option into a manageable schedule.
113. The conduct and marking of the SBA do not come at the expense of teaching duties. Managing the SBA process is subsumed in the overall development of skills required for the syllabus. The SBA can start at an appropriate time that would allow comfortable completion, indicated in a flexible time determined by the school, guided by the work plan recommended by the Curriculum Division and based on the SBA deadlines for submission.

Yema Jaikaran

114. Ms. Jaikaran is another teacher giving her views on the SBA workload. She teaches

Geography from Forms 1 to 6, Social Studies from Forms 1 to 3 and Caribbean Studies at Upper 6 at Hillview College. Her workload is therefore heavy for the academic year. She teacher three classes with SBA duties and responsibilities.

115. For the Geography SBA, the SBA begins with each student submitted a strategy sheet that identifies and defines the area for field study. While the students are dealing with the strategy sheet, she teaches research methods and the reporting and writing skills required to complete the SBA alongside the content that has to be covered in the syllabus. She stays after school hours and sometimes leave the school after 5pm in order to prepare students for this field study.

116. CXC mandates that Teachers are to have a strong supervisory and advisory role in the conduct of the CSEC Geography SBA. The CSEC Geography syllabus at page 33 states that Teachers must:

- (i) Advise students of the areas suitable for research;
- (ii) Assist in the refinement of the research question;
- (iii) Approve students' research question and plants;
- (iv) Advise students about the deadlines for completing and submitting the interim drafts and the final report;
- (v) Advise students of the nature of the task and the scope and depth of research required;
- (vi) Advise students on the availability of resource material;
- (vii) Monitor students' progress by advising them on the quality of their works in progress and suggesting ways to improve quality;
- (viii) Employ appropriate techniques to establish authenticity of their work. These techniques may include oral questioning and review of students' progress reports and preliminary drafts;
- (ix) Mark the research reports submitted by students;

(x) Keep a record of students' mark and submit these together with samples of work as requested by CXC;

(xi) Attach the research proposal to each sample script submitted.

117. The detailed nature of the field study results in Geography Teachers having a packed review and/or marking schedule. The need for the Teacher to review and mark each portion of the tasks required for the CSEC Geography SBA is discussed in the CSEC Geography syllabus which gives a timetable of the tasks that a CSEC Geography teacher must undertake over the course of Forms 4 and 5.

118. For the CAPE Caribbean Studies is worth 40% of the final grade and consists of a research project which enables the student to demonstrate skills and competencies developed from the syllabus. Page 34 of the syllabus states "The teacher is expected to provide guidance at all stages of the project by, for example, assisting students in selecting an appropriate topic, forms of data presentations, methods of data analysis suggesting sources of information and ensuring clarity in the writing of the research report."

119. She contends that marking CSEC Geography and CCS SBAs requires considerable attention to detail and concentration and there is little time during the work day during assigned non-contact time to do this. Her non-contact time is already used preparing lesson plans, marking assignments, designing worksheets, sourcing materials like maps to use in class, prepping online work for students to do as a follow up to the classes and meeting with students one on one. While she does get the chance to mark some parts of the SBAs during assigned non-contact time, 80% of SBA marking occurs during her personal time and not at school.

120. Due to the pressure of the SBAs, she and other teachers at the school try to complete teaching by December so that they can concentrate on the SBAs for the January to March period. She also holds classes in the Christmas break, sometimes on weekend and depending on time available during the Easter break.

Dianne Boochoon (in reply to Yema Jaikaran)

121. Ms. Boochoon is the Curriculum Officer in the Social Sciences Unit of the Curriculum Planning and Development Division in the MOE.
122. She contends that since SBA is part of the preparation of students for the examination there is no stipend or honorarium or increment or other payment for implementing this component of the syllabus. The SBA is intended to equip the student with the recommended knowledge, skills and attitudes of the subject areas.
123. The CSEC Geography syllabus recommends that the SBA Field Study Report be manageable and no more than 1000 words excluding the bibliography, illustrations and appendices. Guidelines are presented on the content, presentation and the role of the teacher in managing the SBA. Examples of SBA are presented and the teachers are expected to guide and monitor progress and score the finished product. A recommended timeline is provided to ensure the activity is completed in a timely manner and not onerous on teacher and student.
124. The Geography syllabus promotes an integrated approach where the teacher is expected not to develop geographical content and skills in isolation. The effective administration of the SBA does not require teachers to work with each student individually; students may work in groups on the same or different aspects of the chosen topic. In most instances, the entire class may do a similar research topic.
125. Teachers may use a variety of strategies to complete the marking exercise during their non-contact teaching time. The marking of the SBA at the school is a continuous process which begins at the form four level. It is intended that if proper feedback is offered and attention is given to the details at the early stages that the task of marking is not time consuming towards the end.
126. Ms. Jaikaran in her reply contends that in Geography, the subject matter and skills meant to be attained in doing the SBA are not testing in the final examination. However, if persons who mark final examinations are paid and if SBAs are an integral part of the examination then teachers ought to be paid for marking SBAs.

Further evidence of the Defendant

Beverly Roseman

127. Ms. Roseman, the Human Resource Advisor III (Acting) of the Personnel Department, Office of the Chief Personnel Officer, contends that the issue of marking SBAs despite having been a long standing duty of teachers in the public service. From the records of the CPO, she claims that this issue has not been raised as a statutory dispute with the office of the CPO in any negotiations with TTUTA and consequently does not appear in any negotiated memorandum of agreement with TTUTA nor has it been ruled upon by the Special Tribunal. She makes mention of some notes of some of the meetings with TTUTA where the question of the SBA was dealt with by the MOE as part of the schools' curriculum.

128. She explains that there is no written contract of employment that is formally entered into with members of the teaching service which sets out all the relevant terms and conditions of employment. The terms and conditions of public officers including teachers are not found in one exclusive location but are woven together from statute, circulars, memoranda of agreement, job descriptions, custom and practice.

129. The job descriptions that do exist for the position which is equivalent will be used as a guide for those positions which do not have a JD.

130. The job descriptions in the teaching service do not have a position description there it is not consistent with the policy and approach of the CPO to job descriptions to conclude that the absence of a specific reference to the marking of SBAs in any particular job description was because of any intention to exclude the undertaking of such work from the terms and conditions of teachers.

Anna Meenawattee Singh

131. Ms. Singh is the Curriculum Officer Science, acting as Curriculum Co-ordinator of the MOE.

132. She explains that since the SBA forms part of the curriculum taught, the teacher has

autonomy to choose from the topics taught and prepare the SBA question/project using the CXC SBA guidelines and mark the SBA product or performance accordingly.

133. The SBA serves a dual function of assessing each student at a point in the programme as well as supporting teachers in the development of assessment competencies in the specific subject area.
134. The term “SBA” need not be expressly stated since SBAs form part of the continuous/formative assessment in relation to any subject. Continuous/formative assessment is provided for in the job description of all teachers. Formative assessment is considered a critical and essential component of every education programme at all levels, including those in Trinidad and Tobago.
135. The SBA component is different from the summative examinations such as orals, written papers or practicals administered by the CXC. This is because with the SBA component, teachers exercise full autonomy over the design, implementation and marking to the extent that decide the topic, they most often create the problem question, they select the applicable marking criteria, they assign the marks and they determine the scheduling of tasks. Teachers are most suitable to administer the SBA since they are best positioned to monitor student’s performance and progress.
136. She contends that the SBA is a more structured and systematic approach to assessment and improves teacher’s ability to complete the syllabus and mark tests. The SBA provides a methodology for doing what teachers normally do by way of assessment. The introduction of SBAs is not designed to increase the workload but instead to improve efficiency and ensure standardization and quality across all schools. The requirements stipulated for marking should be no different from what is expected from the marking of regular course work.
137. Teachers who mark SBAs are not given an additional duty over other teachers who are also required to engage in the continuous assessment of their students. Therefore it would be inequitable to distinguish between teachers whose subjects have an SBA component and those who don’t.

Summary of complaints made by the Claimants

138. The main complaints of the teachers have been neatly summarised by the Defendant in its submissions.

- a) Increasing class size.¹³
- b) The different job requirements of some teachers have many SBAs and others less.¹⁴
- c) That non-contact time is being used up in other demanding elements of teaching and is not sufficient to be used for marking SBAs.¹⁵

¹³ There has been a continuous increase in the number of students and an increase in subjects at CSEC that require assessment by way of SBAs. In the past, CXC examinations began early in May but now they begin around the middle of April which has reduced the available teaching time. As a result, Teachers use even more of their personal time to mark SBAs.

¹⁴ •By marking SBAs, teachers are carrying out CXC's function of conducting a CXC examination without reasonable compensation.

•CXC pays teachers who mark the written component of CSEC and CAPE. Teachers who administer and mark practical or oral portion of the examination of Spanish and French at CSEC and CAPE are also paid by CXC. For assessments created by the MOE such as the National Certificate of Secondary Education, the National test (previously administered in Primary Schools) and the Secondary Entrance Assessment, the State remunerates teachers for the marking of these examinations. Therefore, it could not have been the intention of the parties that marking SBAs without remuneration would be part of the lawful duties of Teachers.

•The marking and scoring of SBAs in some cases also includes designing the assessment criteria for SBAs. In the CXC SBA Handbook for Teachers, under "Role of the Teacher", a teacher must, in addition to marking SBAs: "Analyse the task selected and develop detailed criteria for assessing the selected task using the example given in the syllabus as a guide.

Examine the mark scheme given in the syllabus and if this is different (for example, in the sciences) construct a mark scheme which can be used accurately and consistently.....

Develop guidelines for selecting the content for the portfolio (used in SBAs)

Develop assessment rubric-criteria for judging the quality of the portfolio."

•At MLSS, Hillview College, St James Secondary School and other secondary schools in Trinidad and Tobago, Teachers are assigned varying numbers of classes with SBAs. Some teachers may have one class doing an SBA subject while some teachers may have two. In some cases, such as Teachers of CSEC Spanish and French, there is no SBA component or examination at all. Nonetheless, teachers are paid the same wage for varying hours of intensive work. This, the Claimants contend, is productive of inequality in duties and responsibilities as well as the remuneration of teachers.

¹⁵ •The Claimants contend that the syllabus is not designed in such a way to allow teacher 25% non contact time as stated in the CPO's memorandum. Due to the consuming nature of the administration and marking of SBAs, it can only be completed outside of working hours.

•The CPO's reference to "non-contact time" is derived from the 6th July 2009 Memorandum of the Chief Education Officer on the subject of "Teachers' Work Load- Secondary School" (the workload memorandum). It states that the Principals of Secondary Schools are "to be guided in the preparation of the school timetable by the OPTIMAL work load for different categories of teaching staff" and the typical weekly timetable comprises forty (40) teaching periods of forty (40) minutes duration and should be distributed in the following manner inter alia:

(i) Deans/Head of Department: 50% or 20% out of 40 teaching periods;

(ii) Teachers- Practical Subjects: Forms 1 to 5: 66 2/3% or 27 out of 40 teaching periods;

(iii) Teachers- Non-Practical Subjects: 75% or 30 out of 40 teaching periods;

(iv) Teachers: Form 6: 66 2/3 % or 27 out of 40 teaching periods.

• The non-contact time of Teachers is already exhausted by duties that do not pertain to the preparation and marking of SBAs. For instance:

(i) At MLSS, Hillview Colleges, St James Secondary and other secondary schools in Trinidad and Tobago, increasing student numbers have required a reduction in the non-contact time stipulated by the workload memorandum. In other words, Teachers must take on more classes. At Hillview College, approximately 40% of the Teachers are allocated teaching hours above the recommended non-contact time;

(ii) Teachers are routinely assigned supervision of classes (because of teacher absences for example) during their non-contact time;

(iii) Many teachers are also form teachers with responsibilities for guidance of a form. Most Form Teachers devote at least one weekly period of non-contact time for this purpose;

(iv) The time taken to discharge duties relating to preparation of classes, formulation and marking of tests and coursework for internal assessment, documenting the work covered for administrative purposes, involvement in student extra-curricular activities/functions, attendance at weekly Department meetings, meeting with parents and students.

• Further the marking of SBAs is an ongoing process:

-**English Language:** English Language is compulsory for all students. The duties associated with teaching this subject already necessitated using the personal time of Teachers to complete the syllabus and mark tests set by the Teachers. The introduction of an SBA component (in 2016) increased the workload and amount of personal time required to spend on teaching duties. The English language SBA accounts for 21% of the final grade and comprises several parts:

(i) The SBA is done by each student working as an individual and as part of a small group of 4-5 students. The group selects a general topic eg. Crime. Individual Students select a sub-topic. Eg Kidnapping.

(ii) Each student creates an individual portfolio comprising a Plan of Investigation.

(iii) The group must select three pieces of prose, poetry or a multimedia piece on the topic which is to form the basis of group work activities;

(iv) Each student must produce three written reflections on their sub-topic and the material selected by them:

(v) Each student must submit a written report for the processes, procedures and outcomes of research as well as the reasons for the selection of material;

(vi) Each student must do an oral presentation for 3-5 minutes of their personal response to the issue/topic.

The Claimants contend that the marking process is onerous and time consuming which demand a high degree of attention and concentration. This together with large class sizes, recalcitrant students and volume of material make it impossible to carry out the marking during non-contact time or school hours and as such, teachers regularly take home SBA material.

-**Chemistry:** The SBA component of Chemistry (and Physics, Biology and Integrated Science) both at CSEC and CAPE consists of practical exercises or labs and test certain skills. Each skill must be assessed at least three times over the course of Forms 4 and 5. This means that SBA labs must be conducted on a weekly basis.

After the completion of labs, students reduce their conduct of and observations of the lab into writing in their practical workbook. This is submitted to the Teacher and it is then marked.

Form 5 students must also undertake an Investigative Project usually relating to a daily phenomenon and the design and conduct of an experiment to investigate and explain it.

The introduction of CAPE in 2004 for Chemistry included an SBA component worth 20% of the grade. The SBA for CAPE Chemistry comprises a series of practical exercises (labs) to be designed by the Teacher. The Teacher conducts about 18 labs during the lower 6 period.

The preparation and marking of labs is time consuming.

-**Agricultural Science (Single Award):** The SBA for this subject consists of two components each worth 20% of the final grades. The first is a practical assessment by the Teacher of various skills in the fields. The second is the completion of a Portfolio by students which comprises documentation on the performance of the various skills in the field and two investigation reports, one crop production and one in animal production. The crop investigation report documents all activities associated with cultivating a crop from the planning stage to the marketing of the

- d) Issues relating to marking of SBAs have become exacerbated due to:
- (i) Increasing class sizes
 - (ii) Shifting of examination time table
- e) Since 2012 the system of uploading SBA marks to CXC has become onerous.¹⁶
- f) Marking SBAs is disruptive to the administration and functioning of the school.
- g) Administration and completion of the SBA process takes away from the delivery of the rest of the curriculum.
- h) It is difficult to concentrate on marking SBAs during non-contact time at school because there are distractions and so some teachers prefer to do it at home.
- i) Marking SBAs has become more difficult over the years as the requirements have changed.

crop including cultural practices, harvesting and post-harvesting techniques and marketing. The animal production report documents the process of rearing broiler chicks from a day old to their slaughter.

The conduct of the SBA is time consuming since the practical skills component has to be assessed on a one on one basis. The syllabus also makes provision for teachers to repeat the assessment with students who perform poorly after their first attempt.

The preparation and execution of work for the reports is time intensive.

-Geography: The Geography SBA is an individual assignment that requires students to conduct a scientific study on a geographical topic and requires students to conduct a field study over their Form 4 and 5 years. The SBA requires students to use skills that they were not previously taught between forms 1 and 3. Teachers spend the form 4 year preparing the students to conduct the field study and use the Form 5 year for data collection and analysis.

Teachers have to spend a substantial time of form 4 teaching students the hypothetico-deductive scientific method of research. Teachers also have to assist students in completing a strategy sheet.

The MOE does not consider Geography to be a practical subject under the workload memorandum. A Geography teacher is allocated less contact-time to prepare for and mark SBAs.

- The moderation of SBAs by CXC is a time consuming element of SBA administration. It results in Teachers spending time preparing students for the on-site moderation by external teachers. Moderators have the power to adjust the grades of the students after moderation which can lead to students being adversely affected by receiving lower grades. To prevent this, Teachers spend non-contact time preparing students and the laboratory area for moderation.

¹⁶ •Since in or around 2012, CXC has required SBA marks to be provided to CXC by uploading same to the Online Registration System (ORS). There is an unavoidable rush every year to get all marks and scripts uploaded to the ORS. Many schools in Trinidad and Tobago do not have the facilities capable of supporting the high traffic of uploading. SBA scores may only be submitted after the deadline date upon the payment of a fee to CXC and the MOE does not provide any funding for the payment of these fees which must be paid out of schools' budgets.

- In practice, Teachers have to sacrifice time available to devote to students to ensure that SBA scores are provided to CXC.

Summary of Submissions and Issues

139. I am grateful for Senior Counsels' comprehensive submissions and the efficiency with which the proceedings were managed by the respective legal teams. I summarise their main submissions briefly with no disrespect to their effort in providing their assistance to this Court.
140. The Claimants submitted that SBAs are part and parcel of CXC Examinations. They contend that guiding students in the SBA (a function which is formative in nature and part of the teaching function) and assessing SBAs by marking them (summative in nature or a final examination function) are distinct tasks. The Defendant and CXC agreed that it is CXC's duty to conduct examinations according to the CXC Agreement. The natural and ordinary meaning of the job descriptions would lead to the conclusion that teachers are not obliged to mark SBAs. Further, CXC is responsible for marking CXC examinations and is already involved in the marking of SBAs via the moderation process. As a matter of business common sense it must therefore be interpreted to mean that CXC's responsibility is to mark SBAs.
141. The Defendant submitted that there are specialised machinery established by Parliament for the resolution of disputes such as those raised in these proceedings. Even if there was a limited duplicate jurisdiction in the High Court to consider the issues, the High Court should in the exercise of its discretion decline to hear these claims because the Claimants have a clear and inexplicably and unjustifiably ignored specialised alternative forum to resolve these matters in a binding and collective manner that is more effective to consider the multifactorial polycentric nature of wider collective bargaining in the context of industrial relations as a whole domestically. The statutory underpinning of the Special Tribunal and the Industrial Court mandates that decisions are to be taken having regard to wider principles such as industrial relations practice and the interest of the community as a whole. These are not elements which form part of determinations of the High Court and which were intended and expressly mandated by Parliament to form part of adjudication in this area.

142. The Defendant contends that the marking of SBAs is a historically well established and logical component of public service teaching. If there are complaints as to changing workloads, these concerns are constitutionally ill suited for the broad brush declaratory relief and can only effectively and sensibly be resolved through a proper collective bargaining process which will address management responsibilities in assigning duties and if necessary impose limits and restrictions. Further, there has been a long standing acceptance of the marking of SBAs as part of the constituent responsibilities of being in the teaching service.

143. The following main issues fall for determination:

- (a) Is the main complaint of the Claimants appropriately to be determined by this Court or by the Special Tribunal?
- (b) Whether the job descriptions represent the contract of the parties and set out the terms and conditions of employment of teachers with respect to SBAs.
- (c) Do those terms and conditions require teachers to mark SBAs as distinct from facilitating the assessment?

144. As indicated earlier in this judgment a determination of (c) does not arise having regard to my opinion on the jurisdiction of the Court and the evidence in relation to the nature of the contract.

The Jurisdiction Issue

145. The question of jurisdiction is raised in the context of disputes over terms and conditions of employment for teachers in the teaching service which are matters which can be referred as a dispute to the Special Tribunal under section 69 of the Education Act Chapter 39:01. The Special Tribunal exercises the same powers as that of the Industrial Court and dispenses a unique brand of industrial relations jurisprudence well suited for the management of our labour disputes in the teaching service in this jurisdiction. The compelling question that must be answered by the Claimants is why did they not invoke this process? Their simple answer is that it has a right to approach this Court to interpret the

question asked and it is a fundamental feature of our administration of justice that these litigants ought not to be shut out empty handed simply on the basis that there is some parallel process available.

146. An important authority used to buttress the Claimants' approach to the Court is that of **Attorney General v Dumas** [2017] UKPC 12. In that case the Respondent, Mr. Dumas sought a determination of the meaning of the phrase "qualified and experienced" in section 122(3) of the Constitution. The appeal concerned the question of the jurisdiction of the High Court to hear an application by a citizen for the Court to interpret a provision of the Constitution. It was held that only the Courts of Trinidad and Tobago can give a binding legal judgment on the interpretation of the Constitution. The Board agreed with the Court of Appeal where Justice Jamadar (as he then was) stated at paragraph 133 of his judgment:

"In our opinion, barring any specific legislative prohibition, the court, in the exercise of its supervisory jurisdiction and as guardian of the Constitution, is entitled to entertain public interest litigation for constitutional review of alleged non-Bill of Rights unlawful constitutional action; provided the litigation is bona fide, arguable with sufficient merit to have a real and not fanciful prospect of success, grounded in a legitimate and concrete public interest, capable of being reasonably and effectively disposed of, and provided further that such actions are not frivolous, vexatious or otherwise an abuse of the court's process."

147. The Claimants also rely heavily on **Nottinghamshire and City of Nottinghamshire Fire and Rescue Authority and Lincolnshire County Council v Fire Brigades Union and Ors** [2007] EWCA Civ. 240 as an example of a Court ruling on a question of interpreting the contract of employees notwithstanding that there existed a labour dispute which may be justiciable in another forum. It is important, however, to understand these cases in their context.

148. In **Fire Brigades** the Claimant sought a declaration that firefighters were contractually obliged to respond to emergencies in cases where the ambulance service was called but was unable to reach the victims speedily which were known as co-responding duties. The

employees maintained that such duties were outside the scope of their contractual duties. The employees' contracts expressly incorporated the relevant parts of a national agreement known as the Grey Book and various role maps which set out the duties of firefighters and other employees. While the documents did not expressly mention co-responding duties, they detail the role of firefighters in saving and preserving endangered lives, which included providing treatment to casualties. There was a clear contractual text.

149. The appeal was dismissed and it was held that the judge had been right to find that the contracts did not require the employees to undertake co-responding duties. Buxton LJ stated that the Court was not concerned with the industrial relations aspects of the dispute with an issue that arise out of the proper construction of the current contract between the fire fighters and their employers. This is a logical conclusion where the contractual text is easily ascertained divorced from any relations context.

150. In **Fire Brigades** it is easy to see how the Court assumed jurisdiction over an interpretation of a contract which was also a labour issue. First, no point was argued that the Court had no jurisdiction. Both parties dealt with the matter frontally in adducing evidence to assist in interpreting the contractual text. Second, there was an agreed contractual text for interpretation as the contract of employment. In this case the contract of employment is in dispute. That is the Claimants rely on the job descriptions as the contractual document. The Defendants contend that the contract extends beyond simply the job description. Third, the applicants in that case were clearly engaged in a job to be performed by another type of worker. In this case, there is no one other than teachers who can perform duties in relation to SBAs, the only question that legitimately arises is whether they should receive extra remuneration for marking it.

151. **Dumas** is an important case on the interpretation of our Fundamental Law, the Constitution. This clearly is not the case here where one considers the interpretation of ordinary contracts of employment although imbued with public law elements and equally a public interest dispute process. There could not be any logical suggestion that a public law Court is not seised of a question which impacts upon the constitutional rights of citizens in **Dumas**. It is not the same for this employer/teacher dispute. In this case, a labour question

is being referred to this Court albeit clothed as a contractual dispute but quintessentially and equally a matter which can and usually engages the Special Tribunal. In **Dumas** there was a fine distinction being argued by the Respondents between access to the High Court in its public law jurisdiction of judicial review as distinct from an interpretation summons. In either case no question of approaching the High Court itself was deemed inappropriate. It was a matter of dissecting what turned out to be an artificial distinction between matters which are justiciable in public law. In this case, the conundrum clearly arises when labour disputes are brought before this Court. To this extent, the principles to guide a Court's discretion in granting any declaratory relief when such labour questions can be effectively answered elsewhere are correctly engaged¹⁷.

152. While the Defendant relies on **Attorney General v Chaman Algoo** CA 47 of 1984 (unreported), Davis JA's judgment is not directly relevant to this dispute. In that case the ratio clearly sets out the exclusive jurisdiction of the Industrial Court to interpret collective agreements. That much cannot be in dispute. However, in this case there is no contention by the Claimants that a collective agreement falls for interpretation as none was provided to the Court or that the Court's jurisdiction is "ousted" by a statutory enactment. **Chaman Algoo** is helpful in explaining the importance placed by our Courts and the deference given to the expertise of the Industrial Court or in this case the Special Tribunal engaged in dispensing industrial relations jurisprudence. To this extent, I agree with the Defendant that the parties' resources would have been better engaged in pursuing the collective bargaining route or disputes route which would have been referred to the Special Tribunal. CJ Archie recently explained the Industrial Relations Act Chapter 88:01 implementation of the comprehensive and exclusive regime for augmented workers' rights and collective bargaining. In **Petroleum Company of Trinidad and Tobago Limited v Oilfield's Workers Trade Union** Civil Appeal No. P320 Of 2018 he noted at paragraphs 15-16 and 20:

"15. With regard to the historical context, due consideration must be given to the evolution of industrial relations and employment law over the last two centuries. The modern principles of collective bargaining were unknown to the common law. Indeed,

¹⁷ See Zamir and Woolf, *the Declaratory Judgment, Alternate Remedies*, 4th Edition, page 219

at one time combinations to force wage increases by withholding of labour were punishable as conspiracies in restraint of trade. Employers had no obligation in law to meet and treat with trade unions. The 5 year period immediately preceding the passage of the ISA was characterised by tumult and instability in the industrial relations landscape. There were over 230 strikes with a loss of over 800,000 man-days. An important objective of the ISA, as its long title stated was: "...to provide for the compulsory recognition by employers of trade unions and organisations representative of a majority of workers... and...for the constitution of a court to regulate matters relating to the forgoing and incidental thereto"

16. The ISA was only partly successful, in part because the Industrial Court lacked effective coercive powers. The introduction of the IRA in 1972, (which was passed with a special majority in recognition of its deviation from previously understood rights), therefore represented a conscious attempt to free the Industrial Court from the strictures of the common law. Among the important developments introduced was the power in certain specified circumstances to grant injunctive relief. However the Legislature went further by the passage of section 4 of the IRA. Section 4, which established the Industrial Court, at Section 4(1) reads as follows:

For the purposes of this Act, there is hereby established an Industrial Court which shall be a superior Court of record and shall have in addition to the jurisdiction and powers conferred on it by this Act all the powers inherent in such a Court. [my emphasis]"

20. It is significant that sections 4 (1) and 7(1) at the outset indicate that the Industrial Court is a superior court of record, having all the powers inherent in such a court, in addition to the powers prescribed by the Act. By way of analogy, the Supreme Court, which comprises the High Court and the Court of Appeal, is a superior court, and as such, no matter is deemed to be beyond its jurisdiction, unless it is expressly shown to be so. Superior Courts have an inherent jurisdiction which gives them the power to regulate their own procedures, provided that the exercise of this power is not inconsistent with statute or statutory rules. Halsbury's Laws of England, summarised the

principle thus:

“inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of the law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them””

153. I turn to a brief explanation of the special statutory framework to resolve this dispute.

154. The Teaching Service is established by section 53 of the Education Act Chapter 39:01 falling under the purview of the Teaching Service Commission (TSC). See **Public Service Appeal Board v Maraj** [2010] UKPC 29.

155. The Teaching Service is provided with an extensive, long standing and specialised statutory regime, insulated from Executive influence to address all aspects of industrial relations, collective bargaining and matters of discipline. The TSC is responsible for disciplinary control of members of the Teaching Service¹⁸.

156. **Jhagroo v The Teaching Service Commission** [2002] 61 WIR 510 is an important decision for the teaching service. The Privy Council observed at paragraph 5:

“[5] Members of the Teaching Service are therefore (subject to the power of delegation mentioned below) appointed and removed by the TSC, but they are paid by the Government, which is in the position of their employer. The constitutional reason for conferring these powers on the TSC (and for conferring similar powers on other service commissions such as the Police Service Commission) was explained by Lord Diplock, giving the advice of the Board in *Thomas v Attorney-General* (1981) 32 WIR 375 at 381, as being to insulate members of the Civil Service, the Teaching Service and the Police

¹⁸ Section 125 of the Constitution provides:

“125. Subject to the provisions of this Constitution, power to appoint persons to hold or act in public offices in the Teaching Service established under the Education Act, including power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices and to enforce standards of conduct on such officers shall vest in the Teaching Service Commission.

Service in Trinidad and Tobago from political influence exercised directly on them by the Government of the day.”

157. Discipline and disciplinary proceedings in respect of the Teaching Service are the subject of extensive statutory regulation and fall under the exclusive purview of the TSC (subject to delegation of that power to the relevant Permanent Secretary under the Teaching Service Commission (Delegation of Powers) Order). Chapter VIII of the Public Service Commission Regulations sets out the statutory regime under which the Permanent Secretary may establish a tribunal (in accordance with Regulation 85) in respect of delegated powers and by the TSC in respect of other matters (Regulation 90). Regulation 90 provides for a detailed regime for investigation and Regulation 95 provides for the establishment of a Disciplinary Tribunal. The Disciplinary Tribunal adopts a rigorous and formalized procedure and thereafter presents its report for the consideration of the TSC. Upon receipt of the report, the TSC is able to make a determination as to the sanction, if any, which should be imposed¹⁹. There is a right of appeal to the Public Service Appeal Board under section 130 of the Constitution.²⁰

158. In the context of industrial relations law, TTUTA as the statutorily recognised association for teachers has the exclusive authority to engage in the process of collective bargaining²¹

¹⁹ Section 106 of the Public Service Commission Regulations provides:

106. (1) The Commission on consideration of the report under regulation 102 may either exonerate the officer or impose the penalty specified in regulation 110(l)(f) or (g). (2) The Commission shall, as soon as possible after the hearing of the charge, inform the officer in writing of its findings and of the penalty imposed on him, of his right to apply for an appeal to the Public Service Appeal Board and of the time specified in the Public Service Appeal Board Regulations for making such an application.

²⁰ Section 130 of the Constitution provides:

“130. (1) There shall be a Public Service Appeal Board (hereinafter referred to as “the Appeal Board”) to which appeals shall lie from such decisions against public officers as are specified in section 132.

(2) The Appeal Board shall consist of a Chairman, appointed by the President after consultation with the Chief Justice and two other members appointed by the President after consultation with the Prime Minister and the Leader of the Opposition.

(2A) The Chairman shall be a Judge or former Judge or a citizen of Trinidad and Tobago who has held office as a judge of a Court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a Court having jurisdiction in appeals from any such Court.

(3) One member of the Appeal Board shall be a retired public officer.”

²¹ Section 2 of the Education Act states:

“association” means (a) an organisation or a trade union whose membership consists wholly or mainly of teachers; or

as well as to consult and report a dispute in relation to terms and conditions of employment. The development of the principles of collective bargaining and good industrial relations practice is a matter of significant historical importance in this jurisdiction.

159. Section 65 of the Education Act provides for the authorisation of the Personnel Department to consult with TTUTA and section 68 provides for the entering of binding agreements following the collective bargaining.²²

160. Section 63 sets out the duties of the Personnel Department in relation to the Teaching Service which includes to keep under review the remuneration payable to members of that Service and to provide for and establish procedures for consultation and negotiation between the Department and TTUTA; grievances and termination of employment; and the terms and conditions of employment.

161. TTUTA is entitled to request consultation and where there is no agreement a report of a dispute may be made.

“66. Where the Personnel Department consults and negotiates with representatives of the appropriate recognised association with respect to matters specified in section 63 at the request of such representatives, and the Personnel Department and the appropriate recognised association are, within twenty-one days of the commencement of such

(b) a trade union whose membership consists of teachers together with public officers and officers in the service of a statutory authority as defined in section 2 of the Statutory Authorities Act, and in either case is an organisation or a trade union formed for purposes that include the regulation of relations between the teachers and the Minister of Finance in respect of the matters specified in section 63(1)”

²² “65. The Personnel Department shall, from time to time, consult with representatives of the appropriate recognised association with respect to the matters specified in section 63, at the request of such representatives or whenever in the opinion of the Minister of Finance such consultation is necessary or desirable.

68. (1) Where the Personnel Department and the appropriate recognised association reach agreement on any of the matters specified in section 63 after consultation and negotiation in accordance with section 66 or 67, the agreement shall be recorded in writing and shall be signed by the Chief Personnel Officer on behalf of the Minister of Finance and by a person designated by the appropriate recognised association on behalf of the association. However, where there is pending before the Board an application for certification of recognition with respect to a bargaining unit or a petition for a variation of a bargaining unit, the Chief Personnel Officer shall not sign any agreement with any association relating to any of the matters specified in section 63(1) or any other matters concerning the members of the Teaching Service.

(2) Any agreement recorded and signed in accordance with subsection (1) shall be binding upon the Government and the members of the Teaching Service to whom the agreement relates.”

consultation and negotiation, or within such further period as may be agreed upon, unable to reach agreement on any matter, the Personnel Department or the appropriate recognised association shall report the matter on which no agreement has been reached to the Minister of Finance and on such report being made a dispute shall be deemed to exist as to such matter.”

162. Where a dispute exists, provision is made for expeditious reference thereof to the Special Tribunal:

“69. (1) Where a dispute is deemed to exist under section 66 or 67, the Minister shall refer the dispute for settlement to the Special Tribunal within twenty-one days from the date on which the dispute was reported to him.

(2) Where the Minister fails to refer the dispute to the Special Tribunal within the time specified in subsection (1) the appropriate recognised association that is a party to the dispute shall do so within twenty-one days from the date of the expiration of the time specified in subsection (1).

(3) For the purposes of this Act the parties to a dispute shall be the Chief Personnel Officer and the appropriate recognised association.”

163. The Special Tribunal is a specialised body comprised of members of the Industrial Court. Section 21 of the Civil Service Act Chapter 23:01 provides:

“21. (1) There shall be established a Special Tribunal which shall consist of the Chairman of the Essential Services Division of the Industrial Court and two other members of that Division selected by him.

(2) In this section the expression “the Industrial Court” means the Court established under the Industrial Relations Act.

(3) The Special Tribunal shall hear and determine any dispute referred to it under section 20 and shall make an award on the dispute.

(4) An award made by the Special Tribunal shall be final.

(5) The Special Tribunal may provide its own procedure for the hearing and

determination of any dispute referred to it.

(6) In addition to taking into account any submissions, arguments and evidence presented or tendered by or on behalf of the appropriate recognised association and the Chief Personnel Officer, the Special Tribunal in its judgment shall be guided by the considerations set out in section 20(2)(a) to (f) of the Industrial Relations Act.

164. The Special Tribunal consists of the Chairman of the Essential Services Division and two other members of that Division selected by him. It hears and determine disputes arising in the Teaching Service as if those disputes arose in essential services.²³

165. Section 7 sets out a wide and exclusive jurisdiction of the Industrial Court exercised by the Special Tribunal.²⁴

²³ See Section 4(2C) of the Industrial Relations Act

²⁴ Section 7 of the Industrial Relations Act provides:

““7. (1) In addition to the powers inherent in it as a superior Court of record, the Court shall have jurisdiction—

(a) to hear and determine trade disputes;

(b) to register collective agreements and to hear and determine matters relating to the registration of such agreements;

(c) to enjoin a trade union or other organisation or workers or other persons or an employer from taking or continuing industrial action;

(d) to hear and determine proceedings for industrial relations offences under this Act;

(e) to hear and determine any other matter brought before it, pursuant to the provisions of this Act.

(2) The Court shall have the same power to punish contempts of the Court as is possessed by the High Court of Justice.

(3) Subject to subsection (6), the jurisdiction of the Court in any matter before it may be exercised by one or more members, either assigned from his own Division by the Chairman of the Division before which the matter falls to be heard or invited by him from the other Division.

(4) In exercising such jurisdiction, the President, the Vice-President, or a member, of the Court, or a Division thereof, may sit at such places as the President of the Court may consider necessary for the despatch of the business of the Court.

(5) Where in any proceedings before two or more members of the Court a vacancy occurs in the membership in relation to such proceedings by reason of the inability from any cause of any member to continue to function, the remaining member or members may, subject to subsection (6), continue to hear and determine those proceedings notwithstanding such vacancy, and no act, proceedings or determination of the Court shall be called in question or invalidated by reason of such vacancy.

(6) The jurisdiction of the Court to punish a contempt of the Court committed in the face or hearing of the Court, when constituted by a single member, may be exercised by that member; in any other case, the jurisdiction of the Court to punish a contempt of the Court shall be exercised by at least two members of the Court sitting together, of whom one shall be the President, the Vice-President or the Chairman of a Division.

(7) In addition to any other action which the Court may take for contempt for non-compliance with or non-observance of its orders or awards the Court may impose fines for a contempt consisting of a failure to comply with its orders or awards.

166. Rulings of the Special Tribunal are required to take into account wider considerations than those of the High Court. It takes into account sectoral and national interests. See section 10(3) and section 20(2) of the Industrial Relations Act.²⁵

167. The practice of collective bargaining in the teaching service is set out in Beverly Roseman's affidavit:

"The collective bargaining process begins every three years or so (which is the typical life span of a collective/memorandum of agreement). This process permits both sides (being the recognised trade union and the State/Employer) the opportunity to raise

(8) For the purposes of the foregoing provisions of this section a trade union and the holders of office in a trade union or other organisation shall be deemed to be guilty of a breach of an order or award (including an order made under section 65) by which the union or the other organisation is bound, if a worker or other person who is a member of that union or other organisation, respectively, commits that breach by the direction or with the concurrence of any holder of an office in that trade union or other organisation.

(9) All matters brought before two or more members of the Court shall be determined by a majority of those members and where those members are equally divided, the Court shall order a rehearing of the matter, but so however that no member previously concerned in a matter shall sit on the rehearing thereof.

(10) Subject to section 4(2C), where a dispute involving a bargaining unit comprising workers in essential services as well as workers in services other than essential services is referred to the Court by the Minister, then, where the Minister advises in writing that the dispute arose in an essential service the dispute shall be heard by the Essential Services Division; in every other case the dispute shall be heard by the General Services Division."

²⁵ Section 10(3) and section 20(2) of the Industrial Relations Act provides:

"10(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall— (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole; (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.

20(2) Upon any intervention by the Attorney General under subsection (1) it shall be open to him to submit that the Court, in addition to taking into account any submissions, arguments and evidence presented or tendered by or on behalf of the employers concerned and the workers concerned, be guided by the following considerations:

- (a) the necessity to maintain and expand the level of employment;
 - (b) the necessity to ensure to workers a fair share of increases in productivity in enterprises;
 - (c) the necessity for the establishment and maintenance of reasonable differentials in rewards between different categories of skills;
 - (d) the necessity to maintain and improve the standard of living of workers;
 - (e) the necessity to preserve and promote the competitive position of products of Trinidad and Tobago in the domestic market as well as in overseas markets;
 - (f) the need to ensure the continued ability of the Government of Trinidad and Tobago to finance development programmes in the public sector,
- and the Court may take such matters into consideration."

matters pertaining to the terms and conditions of employment. The established practice which is therefore adopted in order to engage in public service collective/bargaining is generally as follows:

- a) The Union/Association submits a proposal to the CPO;
- b) The CPO will review and analyse the proposal and if necessary, obtain clarification;
- c) The CPO will then liaise with the Principal (Minister of Finance) who will provide guidance with respect to any proposed changes to terms and conditions as to the salaries and allowances to be negotiated and the financial inner and outer limits of any proposal or counter offer;
- d) Following consultations with the Principal, the CPO will then conduct negotiations with the relevant union/association and offer a response to the proposal;
- e) After extensive negotiations and meetings an agreement may be reached with the union/association;
- f) If an agreement is arrived a document outlining the terms and conditions agreed to is signed off by both parties in accordance with the mandate of the Principal;
- g) A note to Cabinet is then prepared and submitted to ratify the agreement made between the CPO and the union/association; and
- h) Upon obtaining Cabinet approval, an implementation circular is issued to all relevant Ministries/Department outlining the guidelines for implementation of the terms and conditions of employment covered in the Collective Agreement.
- i) Where no agreement is arrived at, the matter may be placed before the Special Tribunal for its determination.”

168. Further, I accept the Defendant’s submission that the machinery available in the Industrial Court:

- a) Is easily available at low or no cost as opposed to the indulgent use of expensive high court proceedings;
- b) Is the only forum in which mandatory labour arbitration and collective bargaining rights may be exercised;
- c) Is better equipped in terms of its machinery to address collective bargaining issues (such as disputes about the reasonableness of duties etc);
- d) Is better equipped than the High Court to address the political, social and economic questions which frequently dominate in labour disputes.
- e) Provides a panoply of legislative facilities such as conciliation officers, specialised Union representatives, original and contextual industry benchmarks for comparative jobs in the public service and the ability to not merely grant declarations but also to make binding Orders as to terms and conditions;
- f) Is able to resolve conflicts of fact in a manner generally unavailable in proceedings commenced by affidavit;
- g) Is best placed to interpret trade and industry practice in Trinidad and Tobago and is exclusively placed to interpret collective agreements and to arbitrate the terms of any new collective agreement;
- h) Has the power and legitimacy to properly resolve all matters relevant to a dispute by imposing terms in an enforceable collective agreement;
- i) Is still subject to the oversight of the Judicature through the Court of Appeal, although its specialised opinion will properly be deferred to by the appellate courts in general.
- j) Is statutorily required when acting in the special tribunal to act with expedition to resolve disputes.

169. In my opinion, therefore, in the context of this extensive statutory scheme, the High Court would be ill advised to make a determination as to the scope of the employment of members of the teaching service in this dispute.

170. If there is a parallel remedy such that the Court has jurisdiction to make a determination

as to what the contractual obligations of members the teaching service are, the Courts will not do so unless there are exceptional circumstances justifying the failure to utilise the specific statutory regime as an alternative remedy. In **Zamir and Woolf 4th Edition, The Declaratory Judgment “Alternative Remedies”** it is stated:

“4-225 In cases in which a specific remedy provided by legislation, it will usually be presumed that even though the legislature has not expressly excluded the power of the High Court to grant declaratory relief, if it intends that normally the prescribed remedy and no other should be pursued. Naturally the Courts will attach importance to this indication given by Parliament. This is particularly so where the issuer is assigned to a tribunal rather than the High Court. Where a particular tribunal is set up to deal with the dispute in question, there are likely to be obvious advantages in encouraging litigants to use that tribunal to resolve disputes: it is likely to have greater expertise on the particular subject and its procedures should be designed to deal effectively with the issues raised. The composition of its members, as in the case of employment tribunals, may mean that it possesses first hand experience which is not available to the ordinary courts and although disputes may ultimately go from the tribunal to the courts on appeal, it is clearly valuable that there should be some expert input before the appeal is considered by the Courts. Resort to a tribunal will also relieve the pressure on the courts.

4.226 If a litigant who has a statutory procedure available to him seeks judicial review, the court will scrutinise with particular care his reasons for not pursuing his statutory remedies.”²⁶

171. The reluctance of the Court to deal with labour disputes is set out in **Reference Re Public Service Employee Relations Act (Alberta)** [1987] 1 SCR 313 referred to by the Defendant which deserves repeating:

“Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time. Labour legislation has

²⁶ See also **Regina (Watch Tower Bible and Tract Society of Britain and others) v Charity Commission** [2016] 1 WLR 2625

recognized this fact and has created other procedures and other tribunals for the more expeditious and efficient settlement of labour problems. Problems arising in labour matters frequently involve more than legal questions. Political, social, and economic questions frequently dominate in labour disputes. The legislative creation of conciliation officers, conciliation boards, labour relations boards, and labour dispute-resolving tribunals, has gone far in meeting needs not attainable in the court system. The nature of labour disputes and grievances and the other problems arising in labour matters dictates that special procedures outside the ordinary court system must be employed in their resolution. Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems. The courts will generally not be furnished in labour cases, if past experience is to guide us, with an evidentiary base upon which full resolution of the dispute may be made. In my view, it is scarcely contested that specialized labour tribunals are better suited than courts for resolving labour problems, except for the resolution of purely legal questions. If the right to strike is constitutionalized, then its application, its extent, and any questions of its legality, become matters of law. This would inevitably throw the courts back into the field of labour relations and much of the value of specialized labour tribunals would be lost. This point has been commented upon by Professor J.M. Weiler in an article, "The Regulation of Strikes and Picketing Under the Charter" in *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), at pp. 226-27:

The doctrine of exclusive representation is but one of hundreds of critical policy choices made by our legislatures in the evolution of the current system of collective bargaining law in Canada. Others include restrictions of employer and employee free speech, prohibition of strikes during the term of a collective agreement, compulsory grievance arbitration, and 72 hours' notice before a strike or lockout. All these ingredients of collective bargaining law could be attacked as unjustified restrictions of collective bargaining rights. There are examples in many other jurisdictions in Canada and in other democratic industrialized countries where these restrictive aspects of collective bargaining law do not exist. How will a judge determine whether these meet the

standards of a free and democratic society?

I won't belabour this point any further. I believe our current system of collective bargaining law regulating the relations between workers and employers is too complicated and sophisticated a field to be put under the scrutiny of a judge in a contest between two litigants arguing vague notions such as "reasonable" and "justifiable" in a free and democratic society. I have no confidence that our adversary court system is capable of arriving at a proper balance between the competing political, democratic and economic interests that are the stuff of labour legislation.

If collective bargaining were constitutionalized under section 2(d), my worry is that judges might be flooded with arguments from litigants who are unhappy with the current tilt in the balance of power between unions, employers, and individual employees in collective bargaining legislation. These litigants will challenge a particular aspect of collective bargaining law, citing vague arguments of democratic, associational, economic, or political rights that will only serve to confuse the judge. Other parties whose interests will be affected by the decision may not receive intervenor status or may not even be aware of the case. It is unlikely that the necessary evidential base to decide the policy issue will be provided. When we consider that collective bargaining law is polycentric in nature, adjustments to the delicate industrial relations balance in one part of the system might have unanticipated and unfortunate effects in another.

The lessons of the evolution of our labour law regime in the past 50 years display very clearly that the legislatures are far better equipped than the courts to strike the appropriate balance between the interests of the individual employee, the union, the employer and the public. For 20 years the direction of labour law reform in Canada has been to limit excessive judicial review of specialized labour boards because of the problems that result from absentee management by the judges. At the same time, more original jurisdiction has been provided to labour boards to regulate economic disputes between workers and their employers. For the same reasons that the courts have been increasingly excluded from the role of umpiring collective bargaining disputes, they should not be re-entering the mainstream of labour law development in their capacity

as interpreters of concepts such as "freedom of association" in section 2(d) of the Charter. The courtroom is not the place to be developing collective bargaining policy."

172. This question of determining the entirety of the scope of the contractual obligations is more suitable for the Special Tribunal to assess where there has been in this case a sharp conflict of the facts. The Defendant usefully set out in tabular form some of the critical conflict on the facts pointing out correctly that this would be an inappropriate forum to resolve the question raised against the backdrop of the wide and extensive powers of the Special Tribunal.

173. In my view, the submission that this Court should decline jurisdiction to deal with this matter is well placed. I am further fortified in this view having regard to the complexities of the contractual issues which makes it suitable for determination by the Special Tribunal.

The Contract Issue

174. The Claimants have relied on the job descriptions as the contractual document that must be interpreted. They have helpfully summarised the law on the interpretation of contractual terms. **Harvey on Industrial Relations and Employment Law** at paragraph 23 states:

"Terms expressly agreed between the parties are paramount unless overridden by law. An express term may be rendered void if it seeks to take away certain statutory rights (ERA 1996 s 203) or it may be avoided by the common law if it is deemed contrary to public policy...It is trite law to say that the parties should ensure that the express terms of their contract set out accurately what they intend to be the legal regime between them into the future, to avoid future disputes. In relation to relatively precise terms such as holiday and sick pay entitlements, that largely means getting the wording and any necessary calculations correct. However, there may also be express terms covering wider issues which establish a contractual basis for the right/obligation in question but leave its application as a matter of interpretation. Here, there may well be a conflict of interest between the employer who wants to incorporate an element of managerial discretion into the term and the employee who wants to make his or her perceived right

clear. One particular area where this tension has arisen in case law is in relation to contractual job descriptions.”

175. In **Halsbury’s Laws of England Volume 22** it is stated at paragraph 358:

“The basic principle is that interpretation is ‘the ascertainment of the meaning which the document would convey to a reasonable person having all the knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract’, or which is ‘reasonably available to the person or class of persons to whom the document is addressed’. It is clear from this that the document setting out the parties’ agreement is to be interpreted objectively. The knowledge reasonably available to the reasonable person is referred to as the ‘background’ or the ‘matrix of facts.’”

176. In **Arnold v Britton** [2015] AC 1619 Lord Hodge noted at paragraph 77 that the exercise of construction is a process by which “each of the rival meanings against other provisions of the document and investigating its commercial consequences.” Lord Clarke in **Rainy Sky v Kookmin Bank** [2011] 1 WLR 2900 observed at paragraph 21 “If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.”

177. The difficulty with the Claimants’ case is that it is premised on a “simple task” of interpreting a job description. They feel fortified in taking that approach based on the CPOs advice which relies on the job descriptions of teachers. However, this is not a claim to judicially review the reasonableness or rationality of that decision. This is a claim to construe a contract. The Claimants’ task was to put before this Court the entirety of the teachers’ contract of employment. To simply rely on the job descriptions for some teachers for some syllabi is not enough. There is no exclusive written contract to construe. In **Carmichael v National Power PLC** [1999] ICR 1226, Lord Hoffman recognised that in many employment cases the parties do not intend the whole bargain to be contained purely in the documentation and in such cases it may be necessary look for the whole agreement to several sources such a letters, oral exchanges or even the conduct. He stated at 1233:

“But I think that the Court of Appeal pushed the rule about the construction of documents too far. It applies in cases in which the parties intend all the terms of their contract (apart from any implied by law) to be contained in a document or documents. On the other hand, it does not apply when the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct. In the latter case, the terms of the contract are a question of fact. And of course the question of whether the parties intended a document or documents to be the exclusive record of the terms of their agreement is also a question of fact.”

178. A job description is not in itself a contract but evidence of the terms of the contract. In **Robertson and Jackson v British Gas Corporation** [1983] IRLR 302 it was noted:

“The statement of the law by Browne-Wilkinson J in *System Floors (UK) Ltd v Daniel* [1981] IRLR 475 that the statutory statement is neither the contract nor conclusive evidence of the contract was correct. Nor could the statutory statement be used as an aid to the interpretation of the contract. There is no principle that permits an employer's statement years after the contract was made of his understanding of what the contract means, as being admissible evidence for the interpretation of the contract itself.”

179. **Caimaw v Paccar** [1989] 2 R.C.S. 983 highlights the fluid and ongoing relation of the Union, employers and employees:

“I can see no reason why this finding should be restricted to those cases where the collective agreement continues in existence. The operative factor, it seems to me, is the ongoing duty on the parties to bargain collectively and in good faith. So long as that obligation remains, then the tripartite relationship of union, employer and employee brought about by the Code displaces common law concepts. The termination of the collective agreement has no effect on the obligation of the parties to bargain in good faith imposed by s. 6. The union retains its certification as the representative of the employees whether a collective agreement is in force or not. The scheme of the Labour Code, requiring the union and the employer to bargain collectively as the expiry of a

collective agreement approaches (ss. 62 and 63) does not leave any room for the operation of common law principles. To the extent the decision of the Court of Appeal relied on them in holding the decision of the Labour Relations Board to be unreasonable, I am of the opinion that the court erred.”

180. Job descriptions are therefore not intended to be a contract but are merely a description of the duties which form part of the responsibilities of the person employed in a particular position. In this case the nature of a contract of employment includes a wide category of duties which are not always specified. It may well be left to be ascertained by conduct and performance.

181. Further, the obligations of marking SBAs may well be accepted through long standing custom and practice. In **Harveys on Industrial Relations** it is stated:

“Taking the matter one step further, if a term is regularly adopted in a particular trade or industry or in a particular area, then it may be possible to assert that the term has become customary and falls to be implied into every contract in that trade or industry or area.”

182. Interestingly, it seems that the teachers’ complaint of marking SBAs implicitly accepts, in the absence of job descriptions in most cases, that they are required to perform an aspect of the SBA assessment. To that extent, the evidence demonstrates that the SBA itself as distinct from its marking has been a longstanding uncontroversial aspect of the teachers practice.

183. In a case like this where the marking of SBAs has formed part of the duties of various members for many years it may well be the case that the parties should sensibly negotiate terms to take into account the demands of the teacher’s workload with SBAs. In that case, collective agreement may then address the issue of marking of SBAs and if so, how and in what manner.

184. The Claimants’ complaints about the difficulty of the workload is challenged by the Defendant but there has been no cross examination by the deponents of the Defendant and no expert evidence has been adduced to show what is a reasonable workload or what might

be expected of a teacher teaching in a hypothetical class. Interestingly, the Claimants have relied upon what can be considered expert evidence of Professor Stafford A. Griffith, former Pro Registrar of CXC. While in the form of an article²⁷ and while not being relied upon as expert evidence by the Claimants, there are some important aspects of the article which clearly outlines the teachers role in the SBAs in both formative and summative assessment. Essentially, if the Claimants reflect on their evidence, while the question asked is whether marking SBAs form part of their contract of job descriptions, a significant portion of their evidence relates to the workload of SBAs generally not only in marking them. If it therefore accepts a long standing practice of the teaching service to conduct SBAs with its intimate student teacher relationship, it is reasonable to also embrace the marking of them. However, as I have indicated this is a question better resolved by the Special Tribunal.

Conclusion

185. The claim is therefore misconceived and is ill suited for determination by this Court. The matters of workloads and reasonableness of expectations are to be addressed formally in the collective bargaining process and by the Special Tribunal. The question of discipline would be a matter for that tribunal ultimately to determine. In light of the long standing practice, it is difficult to determine in the face of the conflicting evidence that the marking of SBAs do not feature as a component of the responsibility of the teacher.

186. There is, however, the problem of the Defendant's conduct in failing to respond to the pre-action letter. It is even more so egregious as it has succeeded on essentially a preliminary question. It is clear that the pre-action protocols were designed for this very purpose to alert the opposing side of any potential preliminary matters that may give cause for the Claimants to reflect on their approach. Ultimately, the Defendant failed to do so and instead silently awaited the filing of proceedings to then assert that either of them could have made this matter one subject to the collective bargaining process and ultimately determination by the Special Tribunal. Such conduct not only in my view ought to deprive the Defendant of its costs in defending the claim but gives rise to the question whether they

²⁷ The Philosophical Underpinnings of CXC's School Based Assessment (SBA) (Caribbean Examiner, a publication of CXC, Vol. 16 No. 2 October 2017.

should in fact pay a portion or all of it.²⁸

187. On the question of costs, unless there are written submissions filed by the parties within fourteen (14) days of the date of this judgment, the order for costs shall be that the Defendant do pay to the Claimants 50% of their costs of these proceedings to be assessed in default of agreement.

Vasheist Kokaram
Judge

²⁸ See Rule 66.6 of the CPR