

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. CV2017-03607

BETWEEN

HAYDEN OCHOA

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Date of Delivery: November 29, 2019

Before the Honourable Madam Justice Margaret Y Mohammed

Appearances

Mr Farai Hove Masaisai instructed by Mr Issa Jones Attorneys at law for the Claimant.

Ms Mary Davis instructed by Ms Anala Mohan and Mr Nairobi Smart Attorneys at law for the Defendant.

JUDGMENT

1. The issues, which have arisen to be determined in this matter, are not new. This matter concerns the nature of the terms and conditions of employment by members of the Trinidad and Tobago Defence Force ("the TTDF"). The Claimant has filed the instant action against the Defendant for damages for breach of contract and wrongful and/or unfair dismissal.

THE CLAIM

2. The Claimant was enlisted in the TTDF on the 20 November, 1996 and he was issued with Regimental Number 9506. On the 13 April, 2006 the Claimant was appointed to

the rank of Lance Corporal and was promoted to the rank of Full Corporal on the 30 June, 2011.

3. During the period 1999 to 2012, the Claimant received various awards, certificates and commendations. The Claimant claims that in 2015, an incident occurred involving one of his superior officers, Sergeant Trotman ("Sgt. Trotman") wherein the Claimant was accused of having an affair with Sgt. Trotman's wife.
4. In or about mid-2016 the Claimant was placed on resettlement training. This was interrupted on the 31 August 2016 when the TTDF selected the Claimant to pursue the Senior Officers Professional Development Course (SNPDC). The Claimant was of the view that if he successfully completed the promotional course, he would be promoted to the rank of Sergeant.
5. The Claimant asserted that he was informed by his seniors who coordinated the course that upon completion of the SNPDC he would be promoted to the rank of Sergeant. In support the Claimant relied on a letter dated the 3 October, 2016 from the Chief Instructor of the SNPDC to the Arthur Lok Jack School of Business, requesting a deferral of the semester due to his involvement in the SNPDC. Based on this, the Claimant asserted that he had a legitimate expectation that he would have been promoted to the rank of Sergeant before his forty-fifth birthday and thus he would have been allowed an additional two years in the TTDF before attaining the age of retirement for Sergeants, that is, 47 years.
6. The Claimant successfully completed the SNPDC but he was not recommended for promotion to the rank of Sergeant by Lt. Col. Millington, his Commanding Officer. The non-recommendation for promotion was due to the aforesaid incident concerning Sgt. Trotman and the Claimant. The Claimant contended that he followed all chain of command in addressing his grievance but the Defendant did not give him an audience.
7. The Claimant claimed that he served 20 years colour service at the TTDF. This, he calculated amounted to three periods and a half colour service, each period being 6

years. He claimed that in the fourth period, his contract was unlawfully terminated after he had only completed half of his colour service in that period. Consequently, his claim is that there were no proper grounds to discharge him as he was in the third year of his fourth period of colour service.

8. The Claimant alleged that he was contracted to serve a six-year contract, which ought to have ended in 2020. The Claimant claimed that he was unfairly or wrongfully dismissed prior to the completion of the said 6-year contract. This breach of his employment contract caused him to suffer loss of prospects of promotion and salaries he would have gotten had he completed his 22 years colour service.

THE DEFENCE

9. The Defendant denied that the Claimant had a cause of action in breach of contract, unfair dismissal or wrongful dismissal against the Defendant/the TTDF. The Defendant stated that the Claimant was at all material times a military serviceman who had no contractual right to salary or other emolument as his employment was at the State's grace. The Defendant's position was as follows.
10. The Defendant contended that, as a Corporal in the TTTDF, the Claimant was mandated to be separated from service upon attaining the age of 45 as that was the mandatory age of retirement for corporals. The Claimant's forty-fifth Birthday was the 31 March, 2017 and would be struck of strength on that date.
11. According to Defendant's Defence, the Claimant's service with the colours spanned from the 20 November, 1996 to the 30 March, 2017, when he attained the age of 45. His service to the TTDF represented one period of 20 years and 131 days. The TTDF granted approval to the Claimant to be engaged with the TTDF until the 19 November, 2019, subject to the general conditions of engagement, which are stipulated in the **Defence Act**¹. One of those conditions was that the officer must retire upon attaining the mandatory age of retirement for his rank.

¹ Chapter 14:01

12. The Defendant's position was that the Claimant was placed on resettlement training, which is designed to prepare the soldier for integration into civilian life in preparation for his retirement upon attaining the age of 45. The sum of \$24,000.00 was paid by the TTDF towards the Claimant's resettlement training in Events Management at the Arthur Lok Jack School of Business.
13. The Claimant sought a deferral of his semester in the Events Management Programme but his resettlement training was not suspended. As monies were already expended by the TTDF to place the Claimant on resettlement training, only the Chief of Defence Staff ("the CDS") could approve the suspension of his resettlement training. As no approval of the CDS was sought and obtained, the Claimant's resettlement training could not be suspended.
14. The Defendant also contended that whilst on resettlement training, the Claimant was listed as a nominee to do the SNPDC, the promotional course for promotion to the rank of Sergeant. However, the list of nominees stated that all nominees were required to be on contract for at least 6 months after completion of the course, which was initially carded, for completion in November, 2016. The Claimant was only on contract, until the 30 March, 2017, as he would be struck of strength upon attaining the age of 45. As such, he was not on contract for at least 6 months after completion of the course.
15. In any event, the Defendant's position was that completion of the SNPDC did not guarantee promotion to the rank of Sergeant, to the Claimant or any other person, since the other criteria to be met included seniority, efficiency and qualifications. In relation to efficiency, a recommendation from the soldier's Unit Commander is necessary. In the case of the Claimant, his Unit Commander, Lt. Col. Collin Millington did not recommend him for promotion due to a report of an allegation of an affair with Sgt. Trotman's wife and the Claimant. In this regard, Lt. Col. Millington had sufficient evidence to verify the truth of the allegation. As such, the Claimant could not be promoted before his mandatory retirement on the 30 March, 2017.

16. The Defendant therefore asserted that the Claimant was not promoted to Sergeant before attaining the age of 45, neither was he entitled contractually or otherwise to be so promoted. Further, all chain of command was not followed by the Claimant in addressing his grievances and he was lawfully discharged from the TTDF.

THE ISSUES

17. The issues to be determined are:
- a. Did the Defendant breach the Claimant's contract of employment in wrongfully discharging him?
 - b. Was the Claimant contractually entitled to be promoted to the rank of Sergeant before his retirement?
 - c. Can the Claimant succeed in his claim for legitimate expectation and unfair treatment in the instant matter?
 - d. Did the Claimant as a former member of the TTDF have a reasonable cause of action against the Defendant for damages in private law?
 - e. If the Defendant is liable, what relief is the Claimant entitled to?

DID THE DEFENDANT BREACH THE CLAIMANT'S CONTRACT OF EMPLOYMENT IN WRONGLY DISCHARGING HIM?

18. It was submitted on behalf of the Claimant that he had a contract of employment with the TTDF pursuant to section 20(2) of the Defence Act, which was for service for a period of 6 years subject to renewal and/or engagement. As such, there was no proper grounds to discharge him as he was in his third year of his fourth period of Colour of Service to complete the contract of 6 years and a total of 22 years of colour service. His position was that he was wrongfully dismissed before the end of his contract, which ought to have ended in 2020. He asserted that his complaint concerning Sgt. Trotman visiting his home and speaking to his common law wife was never dealt with which amounts to a breach of the terms and conditions of the relationship between the Claimant and the TTDF.
19. Counsel for the Defendant argued that the TTDF did not breach the Claimant's contract of employment in discharging him. Counsel argued that the terms and

conditions of the Claimant's employment with the TTDF are contained in the Defence Act wherein it is stipulated that the compulsory age of retirement for Corporals is 45. Further, the Claimant failed to provide any evidence of any practice of the TTDF to derogate from applying the compulsory retirement age for Corporals. The Claimant was therefore lawfully discharged by the Defendant in accordance with the Defence Act on the ground of completion of service.

20. The terms and conditions of the Claimant's contract of employment with the TTDF was governed by the Defence Act and its Regulations.

21. Section 20 of the Defence Act deals with the terms and conditions of service for persons enlisted in the TTDF. Subsection 2 states that:

“(2) Where a person enlisting has attained the age of eighteen years the said term is –

- (a) such term not exceeding six years as may be prescribed, being a term of colour service; or
- (b) such term not exceeding twelve years as may be prescribed, being as to such part thereof as may be prescribed, a term of colour service and as to the remainder a term of service in the reserve.”

22. The **Regulation 7(1) (a) of the Defence (Enlistment and Service) Regulations** deals with the Terms of Enlistment in accordance with section 20(2) of the Defence Act. It states that for persons who have attained the age of 18 may be enlisted for a term of six months, 1, 2, 3, 4, 5, or 6 years of colour service.

23. Section 21(1) of the Defence Act deals with the Re-Engagement and Extension of Service. It provides:

“21. (1) Any other rank of good character who at any time has completed or is within two years before completing the term of his colour service may with the approval of the competent military authority re-engage for such period or periods of colour service and in the reserve as may be prescribed, but such further period or periods of colour service and in the reserve as may

be prescribed, but such further period or periods of colour service together with the original period of colour service, shall not, except as provided by subsection (2), exceed a total continuous period of twenty-two years' colour service from the date of the other rank's original attestation or the date upon which he attained the age of eighteen years, whichever is the later.

(2) Any other rank who has completed a period of twenty-two years' colour service may, if he so desires and with the approval of the competent military authority, continue to serve from year to year in all respects as if his term of colour service was still unexpired except that he may claim discharge at the expiration of any period of three months after he has given notice to the officer under whose command he is serving of his wish to be discharged.

22. Any other rank whose term of colour service expires during a state of war, insurrection, hostilities or public emergency may be retained in the Force and his service prolonged for such further period as the competent military authority, with the approval of the Council, may direct."

24. The Claimant stated in his witness statement that he was first enlisted in the Trinidad and Tobago Regiment ("the Regiment") which is a Unit of the TTDF as an Ordinary Soldier on 20 November, 1996. He attained the rank of Lance Corporal in 2006 and he was awarded an Attestation Commando Certificate. On 30 June, 2011, he was promoted to the rank of Full Corporal and he was dismissed on 30 March, 2017.
25. The Claimant also stated that he had a contract of employment with the TTDF pursuant to section 20(2) of the Defence Act and under that section his terms and conditions for service was for a period of 6 years subject to renewal and/or engagement. According to the Claimant, he served a total of 20 years' service and 3 ½ periods of Colour Service and he was into his fourth period which was due to expire in 2020 when he was dismissed. He said that he completed his last 6 year contract in March 2014 and he had entered a new 6 year engagement in March 2014 to be expired

in March 2020 and that at all times he was hired by the TTDF on a 6 year term and no less than 4 times it had been renewed. He also testified that there was no proper grounds to discharge him and that he was in his third year of his fourth period of colour service to complete the contract of 6 years and a total of 22 years' service of colour.

26. In cross-examination, the Claimant testified that he had been a soldier for 21 years and a couple of months. He accepted that as a soldier, he was governed by the Defence Act, and many important aspects of his employment as a soldier were contained in the Defence Act including the length of his employment. He agreed that he was first enlisted in the Regiment for a period of 6 years. He stated that he signed a contract for 6 years when he was enlisted but it was not attached to his witness statement.
27. The Claimant also stated in cross-examination that there are different ages of retirement for different ranks in the TTDF and he was aware that there is a compulsory date of retirement for Corporals, which was 45 years unless a certain rank is attained. He agreed the age of retirement for Corporals is stated in the Defence Act but he said it was not always adhered to. He indicated that the age of retirement was not a condition of his employment.
28. The Claimant further stated in cross-examination that he signed a contract every 6 years, but due to administrative issues, it is never on time. He insisted that he signed a contract around 2014, but he admitted that he did not attach it to his witness statement. However, he recalled in 2014 he signed a re-engagement certificate but he did not recall signing a re-engagement certificate on 20 April, 2016. After the Claimant was shown the Re-Engagement Certificate, which was in the Trial Bundle² he admitted that his signature was on it but he still could not remember signing it in 2016. He agreed that Part I of the Re-Engagement Certificate stated that he was re-engaged until the 19 November 2017 subject to general conditions of engagement. He also agreed that Part IV of the Re-Engagement Certificate stated that his re-engagement was approved until the 19 November 2017 and that based on this Re-Engagement

² Page 29 of Trial Bundle 3

Certificate he was re-engaged until 19 November 2017 and not until 2020. He accepted that based on this Re-Engagement Certificate he was re-engaged until 19 November 2017. Yet he disagreed that his engagement was subject to his retirement age as a Corporal.

29. The Claimant admitted in cross-examination that he was preparing to go on resettlement training from 2014. He also admitted to signing an application for his resettlement training. He was unable to recall that he stated in his application for resettlement training that his compulsory retirement date was 30 March, 2017. After the Claimant was shown his application for resettlement training where it stated his date of compulsory retirement as 30 March, 2017 he agreed that he knew this was his date of compulsory retirement.
30. The Claimant disagreed in cross-examination that when he was discharged on the 30 March, 2017 it was based on retirement. He said he did not retire on 30 March, 2017 but he accepted that he was provided with a certificate of retirement dated 30 March, 2017. He also accepted that since 2014 he was aware of his retirement age as a Corporal.
31. Major Kester Francis ("Major Francis") was one of the Defendant's witnesses. In his witness statement, he stated that from April 2016 to July 2018, his appointment was at the Regiment Headquarters and his roles and responsibilities include custodian of all records for the Regiment.
32. According to Major Francis, the Claimant was approved to be re-engaged with the Regiment until 19 November 2017 based on the Certificate of Re-Engagement. He stated that the Claimant was discharged on 30 March, 2017 on the ground of "completion of service" as shown in the Discharge Form. According to Major Francis, the sole reason for the Claimant's discharge from the Regiment was because the Claimant had attained the age of 45 on the 31 March, 2017. In the Claimant's application for Resettlement Training dated 20 October, 2014 the Claimant

acknowledged that his date of compulsory retirement was 30 March, 2017 and the Claimant's resettlement training was approved by the Chief of Defence Staff.

33. In my opinion the Claimant's position that he had a contract of employment until 2020 and that he was wrongfully dismissed on the 30 March, 2017 must fail for the following reasons.
34. Firstly, the Certificate of Re-Engagement was clear that the Claimant was only re-engaged until November 2017 and not 2020. The Claimant did not challenge the truth of the information set out in the Certificate of Re-Engagement.
35. Secondly, the Claimant's own evidence in cross-examination was that he knew that his compulsory age of retirement as a Corporal was upon him being 45 years and that for him this was 31 March, 2017. He also knew that in 2014 when he signed his application for resettlement training he was due to retire in March 2017. Further, he knew that he signed a re-engagement certificate in April 2016 until 19 November, 2017 but it was subject to general conditions of engagement. The document, which the Claimant relied on to prove that he was discharged and that he did not retire from the TTDF on the face of it undermined his own assertion and instead supported the Defendant's position. The Claimant attached as "H.O 1" a copy of his discharge certificate. "H.O 1" was entitled "Certificate of Retirement". It stated " **MR HAYDEN OCHOA CORPORAL** HAVING SERVED FAITHFULLY AND HONOURABLY WAS RETIRED FROM THE TRINIDAD AND TOBAGO REGIMENT ON THE 30 DAY MARCH TWO THOUSAND AND SEVENTEEN AFTER 20 YEARS AND 131 DAYS OF MERITORIOUS SERVICE FROM 20 NOVEMBER 1996 TO 30 MARCH 2017 IN THE TRINIDAD AND TOBAGO REGIMENT."
36. The issue of mandatory retirement upon attaining a prescribed age was addressed by the House of Lords in **Waite v Government Communications Headquarters**³. In **Waite**, Colonel Waite became a "temporary" civil servant on his retirement from the armed forces in 1961. He became "established" in March 1967. On 30 April 1978, after he

³ [1983] 2 A.C. 714

had reached age 60, Colonel Waite's employment as a senior executive officer was terminated and he was re-employed as a clerical officer. Colonel Waite subsequently made a complaint of unfair dismissal in respect of the termination of his senior executive officer post.

37. The Respondents argued that the Industrial Tribunal had no jurisdiction to entertain the application because before his employment was terminated, Colonel Waite had attained the normal retiring age for an employee holding the position, which he held. When Colonel Waite accepted appointment to a permanent post in the Civil Service in 1967, argued the Respondents, he became subject to the regulations contained in the Civil Service Pay and Conditions of Service Code ("the Estacode") which provide for a minimum retiring age of 60. Colonel Waite contended that when he first joined the Civil Service in 1961, the terms of the interview and the letter offering him the appointment made it clear that he was to be employed up to the age of 65. It was argued on his behalf that to impose on him a retirement age of 60 was a variation to his contract, which the respondents were not competent to make.
38. The Industrial Tribunal held that Colonel Waite was barred by the provisions of s.64 (1) (b) of the Employment Protection (Consolidation) Act 1978⁴ from complaining of unfair dismissal. They found that he had understood the implications of becoming an established civil servant and, in particular, that he would thereafter become subject to the Estacode.
39. The decision was appealed all the way up to the House of Lords where Mr Waite was not successful. The House of Lords found that the contractual retiring age laid down in the employee's terms and conditions of employment did not conclusively fix the 'normal retiring age' for the purposes of para 10 of Sch 1 to the 1974 Act. The Court also found that although there was a contractual retiring age applicable to nearly all the employees holding the position, which the appellant held, a rebuttable presumption arose that the contractual retiring age was the normal retiring age for

⁴ This section re-enacted para 10(b) Trade Union and Labour Relations Act 1974

the group. In determining what was the normal retiring age the proper test was to ascertain what would be the reasonable expectation or understanding of the employees holding the position of the appellant at the relevant time. However, the evidence did not establish that there was any practice whereby, such employees were permitted to retain their office after attaining the minimum retiring age of 60 and since the provision in the Civil Service Code, that employees who had not completed the full period of pensionable service ,should be allowed to continue was merely discretionary and did not give an employee any right to be kept on, it followed that the minimum retirement age and the contractual retiring age of officers such as the appellant was the age of 60.

40. Thirdly, the Claimant failed to provide any evidence that the TTDF did not comply with the terms of his contract of employment. In **R v Lord Chancellor's Department, ex parte Nangle**⁵, Nangle was accused of assaulting and sexually harassing a fellow employee. Following an oral hearing, he was transferred to another department with a reduction in pay. His internal appeal against the transfer was rejected. Nangle applied for judicial review on the grounds that the decisions were in breach of the rules of natural justice and that there was procedural impropriety. The employer opposed his claim on the ground that the application of disciplinary procedures to a Crown servant was not a matter of public law. Nangle relied on the provisions of the Civil Service Pay and Conditions of Service Code.
41. The Court dismissed the application for a judicial review on the basis that Nangle was employed by the Crown under a contract of service since his employment was intended to create legal relations, and therefore the matter was not suitable for public law. The relevant document showed that the parties entered into a business relationship involving rights, obligations and entitlements on both sides and there was therefore a prima-facie intention to create legal relations. Although Nangle had no remedy in public law, he might have a remedy in private law if he could establish that his employer had failed to comply with its disciplinary code.

⁵ [1992] 1 All ER 897

42. There was no evidence that the Claimant had a written contract with the TTDF for the period 2016 to 2020. His evidence was that he was due to retire in March 2017 and he was re-engaged until November 2017 subject to conditions.
43. In my opinion, the conjoint effect of section 20(2) and Regulation 7(1)(a) aforesaid is that the initial term of engagement upon enlistment of a soldier who is 18 years old is the maximum of 6 years of Colour Service. The effect of section 21(1) of the Defence Act is that a Corporal can be re-engaged to continue in the service of the TTDF for additional periods of colour of service but such total period of service including his original period of Colour of Service is not to exceed a continuous period of 22 years colours of service from the time the soldier was first engaged or the date which he attained the age of 18 years whichever is the latter.
44. Therefore the Claimant could not have been engaged until 2020 since his total continuous term of Colour Service would have been 24 years (being the years since his original attestation in 1996) and this would have been in breach of section 21(1) of the Defence Act which stipulates that the full term of colour service for any other rank (such as Corporals) should not exceed 22 years.

WAS THE CLAIMANT CONTRACTUALLY ENTITLED TO BE PROMOTED TO THE RANK OF SERGEANT BEFORE HIS RETIREMENT?

45. The Claimant asserted that he was given an assurance by his seniors that upon completion of the SNPDC promotional course, he would be promoted to the rank of Sergeant before his forty-fifth birthday.
46. The Defendant argued the Claimant was not promoted since he did not meet the criteria to be promoted to Sergeant.
47. Lt. Col. Collin Millington stated in his witness statement that between July 2014 to October 2017, he held the appointment of Commanding Officer, First Infantry Battalion and since March 2018, he has held the rank of Colonel. According to Lt. Col.

Millington in order for a soldier to be promoted, four basic criteria must be met namely:

- (1) He must have completed the requisite course;
- (2) Must be in good standing;
- (3) Must have passed a recent fitness test; and
- (4) Must have a recommendation from his Commanding Officer.

48. As the Claimant's Commanding Officer, he stated he was scheduled to meet with the Claimant on 22 March, 2017 for Discharge Orders. At the interview, the Claimant raised the matter of outstanding seniority, which he listened to prior to discharge. Two interview notes were produced for that meeting; one in relation to the Adjustment of the Claimant's seniority and the other in relation to the Claimant's Discharge on the Grounds of Completion of Service.
49. Lt. Col. Millington stated that at the meeting, he informed the Claimant that he would not be recommended for promotion based on the outstanding report by Sgt. Trotman, as it would not be in the best interest of the Force to do so. He then advised the Claimant that if he felt aggrieved he could make a complaint to the Commanding Officer of the Trinidad and Tobago Regiment.
50. According to Lt. Col. Millington, he could not recommend the Claimant for promotion, as he was not in good standing due to the Report against him by Sgt. Trotman. He stated that the Report by Sgt. Trotman was brought to his attention at the promotion conference. The promotion conference entailed 4 Officers Commanding, the Adjunct (Staff Officer to the Commanding officer), Regimental Sergeant Major (Advisor to the Commanding Officer) and the Commanding Officer. He stated that in his non-recommendation for promotion he outlined the reasons for his decision namely the Claimant had questionable conduct and morals with specific reference to the Claimant's extra-marital relationship with the wife of a serving member. He stated that behaviour of a corrosive nature has the potential to have an explosive and deleterious effect on effectiveness and efficiency within the Force with disastrous

results. He stated that his non-recommendation had nothing to do with the Claimant's discharge.

51. In cross-examination, Lt. Col. Millington stated a Corporal in the TTDF is struck off strength at the age of 45 years. He explained that he was not aware of the circumstances when the incident between Sgt. Trotman and the Claimant was initially reported in March 2015 but that it was brought to his attention in March 2017 when there was a sitting for a promotional conference and in going through the possible persons to fill vacancies the Claimant's name came up. It was brought to his attention that there was a pending matter in relation to the Claimant.
52. Lt. Col. Millington was referred to the report from WO 1 Mc Clean dated the 24 March, 2017. He stated that he received the report from WO 1 Mc Clean in 2017. He agreed that the Claimant was never given the opportunity to respond to this report. He stated that it was not unfair to use the allegations in the report against recommending the Claimant for promotion.
53. Lt. Col. Millington explained in cross-examination that he conducted both the promotional meeting and the discharge interview with the Claimant. He stated that the meeting for promotion took place prior to the conference for the discharge and they were 1 week apart. He stated that on the day the Claimant was due to be discharged, the Claimant brought up an issue in relation to an adjustment of seniority, which was different from the issue with Sgt. Trotman. He disagreed that the Claimant was dismissed at the meeting on the 22 March, 2017.
54. Lt. Col. Millington also explained how an investigation is conducted in the TTDF. He stated that when an offence is committed a report is submitted and the matter is then investigated. Once the investigation is completed, a report is submitted to the Commanding Officer of the individual. Charges are then proffered and a summary trial is convened with the person going before the summary trial. The award is fixed after the outcome. If the person is not happy with the decision, there is a grievance process pursuant to section 195 of the Defence Act.

55. Major Francis stated in his witness statement that from the records at the TTDF the Chief of Defence Staff approved the Claimant's resettlement training. He knows that while the Claimant was undergoing resettlement training, he was selected to attend the SNPDC, which is the requisite course for promotion to the rank of Sergeant.
56. Major Francis also stated that in order to attend the SNPDC, the Claimant had to suspend his resettlement training which meant he had to obtain approval of the Chief of Defence Staff. The Claimant did not obtain any approval of the Chief of Defence Staff to put a hold on the resettlement training. Therefore, the Chief of Defence Staff did not authorise the interruption of the Claimant's resettlement training to attend the SNPDC.
57. According to Major Francis, all persons selected to undergo the SNPDC were required to be on contract for a period of at least 6 months after the completion of same, which was scheduled for the period September-November 2016. He stated this in his letter dated 31 August, 2016. The Claimant was required to retire on the 30 March, 2017 and in any event, he was not going to be on contract for at least 6 months after completion of the SNPDC. He stated that the purpose of the SNPDC is to fulfil one of the fundamental requirements for consideration for promotion to a higher rank and there are other requirements, which must be fulfilled. The Claimant could not be promoted to the rank of Sergeant before he retired since he did not meet the criteria for promotion.
58. Major Francis stated that The Trinidad and Tobago Regiment Standing Orders, Section 12 stipulates the criteria for promotion within the Regiment. Under Paragraph 1206 of the Standing Orders the criteria to be promoted to an Acting rank is seniority, efficiency and qualifications under Paragraph 1214. The criteria for promotion to a higher rank can be simplified as follows:
- (1) The soldier must have successfully completed the appropriate course;
 - (2) Must be in good standing (i.e. that the soldier's disciplinary records and evaluation reports must not have any adverse writing in it);
 - (3) The soldier must have passed a recent APFT (Army Physical Fitness Test); and

(4) Must have a recommendation from his Commanding Officer.

59. The Claimant stated in his witness statement that on 27 November, 2015 he wrote to his Detachment Sergeant Major (DSM) about an incident involving Sgt. Trotman who entered his home unannounced in March 2015 and informed the Claimant's common law wife that the Claimant was having an affair with Sgt. Trotman's wife. He stated that to date the DSM had not investigated the report.
60. According to the Claimant in mid-2016, he was placed on a resettlement programme to study for his Associate Degree in Events Management at the Arthur Lok Jack Graduate School of Business. On 31 August, 2016 he was listed as No. 35 on a list of names for the SNPDC, which was scheduled for September 2016 to December 2016. The SNPDC was carded for Corporals who upon completion would be promoted to the rank of Sergeant. The SNPDC was not however completed until February 2017. On 3 October 2016, Major A. Hinkson the Chief Instructor of the SNPDC wrote to the Team Leader of the Arthur Lok Jack Business School requesting a deferral of the semester for the Claimant. The Claimant was in communication with Ms Lisa Ramrattan of the Arthur Lok Jak Graduate School of Business in relation to the course schedule and deferral. Ms Ramrattan indicated that the Defendant needed to indicate in writing the reasons for the delay in the training of the Claimant for the continuation of the course. However, the Defendant has failed to do so and this resulted in him being unable to complete the Events Management Degree without engaging in the full cost of repeating the entire course.
61. The Claimant also stated that on 22 March, 2017 he made enquiries from Lt. Col. Millington on the status and promotion of SNPDC. Lt. Col. Millington was reluctant to recommend him for promotion because he had the report from Sgt. Trotman.
62. The Claimant admitted in cross-examination, that the TTDF paid the full cost of his tuition at the Arthur Lok Jack School of Business. He also admitted that based on the letter written by Major Hinkson, he was given an extension until the 31 March, 2017 to submit his portfolio, which was the final portion of the Course. He stated that he

was unable to complete his portfolio and hence complete the Course since he did not have enough time. The Claimant admitted that he had chosen to do a portfolio which was very time consuming and which was impossible to complete in five months. After Major Hinkson's letter, he was given an extension but further extensions were required due to his inability to complete the portfolio.

63. The Claimant disagreed that he said he was to be promoted to Sergeant on completion of the SNPDC, but rather it was his employer that indicated this. He said his expectation was to be promoted to Sergeant once he successfully completed the SNPDC.
64. The Claimant also indicated in cross-examination that he did not recall that the list of nominees for the SNPDC course stated that all candidates must be on contract for at least 6 months. He admitted that if the SNPDC was carded to finish in November 2016, he would not have been on contract for 6 months. He accepted that when the list of nominees for the SNPDC course was distributed on 31 August, 2016 he was aware that he was going to be struck off strength on 30 March, 2017 and he was not going to be in the TTDF for a period of 6 months after the SNPDC was completed. Yet he stated that it was reasonable for him to expect to be promoted after completion of the SNPDC.
65. The Claimant stated in cross-examination that he knew there are other requirements to be promoted to Sergeant including that he must have a recommendation from his Commanding Officer and that the soldier must be in good standing. He accepted that good standing meant that his record must not have anything adverse or unsatisfactory on it.
66. The Claimant indicated that he was aware that Sgt. Trotman made a report against him and he was questioned by WO 1 Mc Clean on the report. He accepted that he told Sgt. Mc Clean that Sgt. Trotman's wife visited his home to make scented candles and massage oils.

67. The Claimant elaborated in cross-examination that Sgt. Trotman visited his home and told his wife that he was having an affair with Sgt. Trotman's wife. He was asked if he had stated in the report that he said that Sgt. Trotman's wife asked him to engage in sexual relations. He responded that he had received such a text message from Sgt. Trotman's wife but he knew that it was not her since they never had any conversation of this nature so he responded, "have sex". He agreed that such conversations were not appropriate between a soldier and another soldier's wife and that such conduct could lead to a breakdown of trust.
68. It was common ground that the Defence Act and the Regulations are silent on the promotion of other ranks. The provisions, which deal with the promotion of officers in the TTDF, are contained in the Defence Act and the Trinidad and Tobago Regiment Standing Orders.
69. Sections 11 and 12 of the Defence Act deals with the respective body, which is responsible for promotion of officers of different rank in the TTDF. Section 11 provides:
- "11. The Board shall advise the President through the Minister on appointments to commissions and promotions in the Force up to the rank of Major/Lieutenant Commander"
70. Section 12 provides:
- "12. The Minister, after consultation with the Prime Minister, shall advise the President on appointments to commissions and promotions in the Force above the rank referred to in section 11."
71. Section 14 of the Defence Act sets out the procedure for an officer who is aggrieved on the issue of promotion. It states:
- "14. (1) A member of the Force who is aggrieved by the failure of the Board to recommend him for an appointment to a commission or a promotion may appeal to the Council through the Board.

(2) The Board shall act in conformity with any finding or determination of the Council in respect of an appeal.”

72. Paragraphs 1206 and 1209 of The Trinidad and Tobago Regiment Standing Orders details the criteria to be considered for promotion. Paragraph 1206 states that:
- a. All initial promotion (except promotion governed by time) will be to acting rank.
 - b. Selection for acting rank will be made by the Commanding Officer and will be based on:
 - i. Seniority
 - ii. Efficiency
 - iii. Qualifications under paragraph 1214.
73. Paragraph 1209 states that promotion to the substantive rank will be made by the Commanding Officer after a qualifying period in the acting rank; provided the necessary qualifications as laid down in paragraph 1214 are held and the promotion will be made within the establishment.
74. Paragraph 1214 deals with local rank and appointments. It states that :
- “1214. a. Local rank will NOT be granted except when the Commanding Officer deems it necessary to exceed temporarily, for purposes of training or prestige, the number of ranks or appointments authorised or to provide a higher rank than that allow.
- b. Local rank will carry NO entitlement to pay, allowances or pension rights.
 - c. LCpl will be appointed by the Commanding Officer in accordance with the establishment. Under normal circumstances soldiers will NOT be appointed LCpl until they have passed a Junior NCOs Cadre.”
75. In my opinion, the provisions of the Defence Act and the Trinidad and Tobago Regiment Standing Orders do not make promotion by the other ranks as automatic. The Claimant by his own admissions in cross-examination was well aware that it was within the discretion of his Commanding Officer to recommend an officer of other

rank for promotion once certain criteria had been met. The Claimant was also aware of the criteria. Therefore, Lt. Col. Millington had the proper authority to exercise his discretion in determining whether to recommend the Claimant for promotion.

76. The Claimant alleged that Lt. Col. Millington had no basis for not recommending him for promotion as he was in good standing with the Defence Force. The Claimant claimed that if he were not in good standing he would not have been selected to undergo the SNPDC.
77. Based on the Claimant's evidence in cross-examination, I have concluded that Lt. Col. Millington had sufficient evidence not to recommend the Claimant for promotion since he had a duty to act in the best interest of the TTDF. In any event, the Claimant admitted that he was permitted to respond to enquiries, which WO1. Mc Clean made with respect to the report, by Sgt. Trotman. If the incident remained unresolved, the duty was on the Claimant, who knew that his struck of strength date was approaching to take steps to have it resolved.

CAN THE CLAIMANT SUCCEED IN HIS CLAIM BASED ON LEGITIMATE EXPECTATION AND UNFAIR TREATMENT?

78. The Claimant pleaded that his resettlement training was interrupted by the TTDF when he was given the opportunity to undergo the SNPDC to become a Sergeant and therefore by this conduct he had a legitimate expectation to be promoted to the position of Sergeant.
79. The Claimant also submitted that he was not treated fairly when compared to other officers who were similarly circumstanced as him.
80. Counsel for the Defendant argued that the Claimant's claim based on legitimate expectation and unfair treatment are of limited relevance, if any, in a private law claim for breach of contract and would be more appropriately raised in public law proceedings. Counsel also argued that in any event, the Claimant would be barred from relief in judicial review as he has an alternative remedy under Section 14 of the

Defence Act and that there was no evidence by the Claimant to demonstrate that he was treated unfairly.

81. In the text **Judicial Review Principles and Procedure** by Auburn, Moffett and Sharland the authors described legitimate expectation at paragraph 19.02 as:

“A legitimate expectation may arise where a public body has a discretionary power and it represents that it will exercise that power in a particular way. Such representations may be express, in the form of an explicit promise or statement, or they may be implicit, in the form, of for example a consistent past exercise.”

82. It must be noted that the aforesaid learning was in the context of judicial review matters, which are in the realm of public law and not private law as the instant action, which is grounded in breach of contract.

83. The Court of Appeal judgment in **Ameena Ali v The NWRHA et al**⁶ is useful in appreciating the distinction whether a claim should be grounded in public or private law. One of the issues, which the Court of Appeal had to determine in Ameena Ali, was whether Ms. Ali's claims were in private law or public law. At paragraphs 36 and 37 the Court of Appeal stated that in considering the actual factual application of the decision in question, it was clear that it was not a simple issue of breach of contract by the decision-maker carrying out an employment function. The Court of Appeal found that the matter concerned the rights and obligations of the parties in light of the statutory provision in question, i.e. the Regional Health Authorities Act, the lawfulness of the NWRHA's decision and whether in the circumstances of that case, Ms Ali enjoyed a legitimate expectation of a substantive or procedural benefit and should be compensated for same. The Court concluded that in that case, there was a sufficient element of public law and therefore, judicial review was the appropriate means to challenge the decision of the NWRHA.

⁶ Civ Appeal No 14 of 2005

84. In the instant case, Counsel for the Claimant at paragraph 28 of his submission in reply⁷ submitted that the Claimant was entitled to the reliefs he claimed even though he had a contract with the Defendant since he was performing a public function. In my opinion if this was the position of Counsel for the Claimant then he ought to have grounded his claim as a public law action and not a private law claim, which he has done in the instant action.
85. In my opinion, the Claimant's challenge of the decision by the TTDF for failing to promote him ought to have been grounded in public law and not as the enforcement of private law rights and as such his assertion that he is entitled to his reliefs based on his legitimate expectation must fail.
86. Even if his claim was grounded in judicial review, the Claimant has failed to put forward any evidence to account for his delay in making his claim within 3 months after the decision not to promote him or promptly. He was aware of the decision since March 2017 and he only instituted the instant action in October 2017, some 6 months thereafter. Therefore based on the evidence before this Court, any claim in judicial review would fail at the permission stage due to unaccounted reasons for the delay in the Claimant instituting such proceedings and failing to use alternative relief under section 14 of the Defence Act.
87. In **Ronnie Lesaldo v The Chief of Defence Staff**⁸ the Claimant instituted judicial review proceedings, i.e. public law action challenging the decision or practice of the Intended Respondent to promote members of other ranks of the Trinidad and Tobago Regiment and the failure and/or omission and /or refusal to recommend him for promotion to the rank of Sergeant. He questioned the failure and omission of the Intended Respondent through the Commanding officer to recommend members of the other ranks to the Defence Board for promotion. He further challenged the failure to recommend him to the Commission's Board or such other competent authority for

⁷ Filed on the 8 November 2019

⁸ CV 2013-05238

promotion to the rank of Sergeant and alternatively the failure of the Intended Respondent to promote him to the position of Sergeant.

88. In refusing to grant the Claimant permission to review the aforesaid decisions, Boodoosingh J found on the facts of that matter that there was delay by the Claimant in seeking the review of the decisions. More importantly, the Court found that the remedy to address a promotion grievance was contained in Section 11 of the Defence Act, which provides that the Board set up by section 10 shall advise the President through the Minister on promotions in the Defence Force up to the rank of Major or Lieutenant Commander. At section 14 of the Defence Act, a Member of the Defence Force who is aggrieved by the failure of the Board to recommend him for a promotion may appeal to the Council through the Board. The Board shall act in conformity with any finding or determination of the Council in respect of an Appeal.
89. In any event, the Claimant's assertion that he was treated unfairly since other persons who were similarly circumstanced as him were promoted must also fail for the following reasons. Firstly, the Claimant did not plead that he was treated differently from any other person including his own witness Sergeant Teemal Managaroo ("Sgt. Managaroo").
90. Secondly, the unfair treatment as alleged by the Claimant must be grounded in a public law claim and not a private law action as the instant claim.
91. Thirdly, even if this was a public law claim (which it is not), the evidence adduced by the Claimant did not support his assertion of unfair treatment. The Claimant relied on the evidence of Sgt. Mangaroo. Sgt Mangaroo stated in his witness statement that whilst he was on resettlement training, he was selected to undergo the promotional course as well. At the end of the course, he, unlike the Claimant was promoted to the rank of Sergeant.

92. In cross-examination, Sgt. Mangaroo admitted that he was in the service for more than six months from the posting of the list of nominees for the SNPDC. As such, he was able to complete the course as well as his resettlement training.
93. In my opinion, Sgt. Mangaroo was not similarly circumstanced to the Claimant for the purpose of promotion to the rank of Sergeant because his struck of strength date was later than the Claimant's.

DID THE CLAIMANT AS A FORMER MEMBER OF THE TTDF HAVE A REASONABLE CAUSE OF ACTION AGAINST THE DEFENDANT FOR DAMAGES IN PRIVATE LAW?

94. It was submitted on behalf of the Claimant that he is entitled to the reliefs claimed as even though he has a contract with the Defendant he was performing a public function and therefore ought to be able to rely on such remedies.
95. Counsel for the Defendant submitted that the Claimant as a former member of the Defence Force is employed at the State's grace and cannot sue for breach of contract. Counsel also argued that military persons are not public servants and are subject to a code of conduct and discipline unique to the military. Likewise, their employment status is not akin to that of civil servants.
96. Kokaram J in **Aaron Samuel v The Attorney General of Trinidad and Tobago**⁹ addressed this issue. In **Aaron Samuel**, the Claimant was enlisted as an ordinary soldier and/or private in the TTDF on the 10 December, 2008. He was enlisted on a contract of employment for 6 years also known as a colour of Service pursuant to section 20(2) (a) of the Defence Act. Upon his father's death on 5 June, 2010 Mr Samuel was granted bereavement leave for 10 days. On the 20 October, 2010 he was placed on a list of amongst 21 soldiers to a construction project for 201 days. Around November 2011, after reporting to the Company Sergeant Major ("CSM") in the construction department, instructions were issued by the CSM that Mr Samuel would be on call out duties. In February 2012, Mr Samuel was placed in a holding cell in the

⁹ CV2016-00258

First Engineering Battalion Unit. He was charged for being Absent Without Leave (AWOL) for 111 days from 5 November 2011 to 22 February 2012. He was taken out of the cell on 1 March 2012 and deemed unfit for detention and he was granted 14 days sick leave away from the detention camp. His salary was withheld from March 2012 to June 2013. In July 2015, he received lump sum payments but monies were taken out to pay the instalments he owed to other financial institutions.

97. Mr Samuel instituted a claim in private law for damages for wrongful dismissal and breach of contract that his contract was not renewed at the end of his first 6 year period. He claimed that on the 2 July, 2015 he was wrongfully dismissed without any charge, hearing or tribunal contrary to the Defence Act.
98. The Defendant contended that the Claimant did not have a second contract of employment nor a renewed period of engagement but that he was lawfully discharged from his duties.
99. At paragraphs 12 and 13 Kokaram J stated:

“12. In my view, Mr. Samuel does not have a reasonable cause of action against the Defendant for damages in common law for breach of contract. In **Leaman v The King** [1920] 3 K.B. 663 the Court considered the contention that a soldier enters into a contract with the Crown with reference to the Army Act (1881) and Army Discipline and Regulation Act (1879). As stated in the Manual of Military Law, chap. x., para. 18, p. 189, it is stated that: “The enlistment of the soldier is a species of contract between the Sovereign and the soldier”. This however, does not vest in the soldier the right to enforce proceedings in a Court of law for the payment of the sum to which he is claimed to be entitled to in respect of his services. Such engagements were considered voluntary on the part of the Crown and did not give occasion for an action in respect of contract. In public law proceedings, such an officer would not have any property rights which may have been infringed by a wrongful discharge.

13. Of course, the State's power to dismiss such officers and soldiers are circumscribed by the Defence Act as recognised in **Russel Joseph v Chief of Defence Staff and the Attorney General** H.C.A. 1500 of 1997. It would be wrong to say that there is no contract made between the parties since clearly the terms of the engagement and terms governing the Claimant's service are outlined in the Defence Act. I considered the cases of **Thomas v The Attorney General** [1982] AC 113 and **Kevin John v Attorney General of Trinidad and Tobago** CV 2011-02678 where Madame Justice Dean-Armorer held that dismissal at pleasure was inconsistent with the detailed provisions in the Defence Act. However, in matters such as these, Mr. Samuel should have utilised the route of public law to vindicate his rights as his service with his employer is underpinned by statute. See **R v Lord Chancellor's Department ex parte Nangle** [1992] 1 All ER 897 and **Thomas v The Attorney General** [1982] AC 113. His contract is one recognisable in public law or put another way his claims give rise to public law rights and not in private law. There is no evidence advanced in this case to demonstrate why Mr. Samuel failed to apply for leave for judicial review."

100. There was no evidence presented by the Claimant that his employment with the TTDF was any different from that in **Aaron Samuel**. In my opinion, the Claimant in the instant action does not have a reasonable cause of action against the Defendant in damages in private law.

IF THE DEFENDANT IS LIABLE, WHAT RELIEF IS THE CLAIMANT ENTITLED TO?

101. Having found that the Defendant is not liable, this issue does not arise.

ORDER

102. The Claimant's action is dismissed.

103. The Claimant to pay the Defendant's costs to be assessed by the Registrar in default of agreement.

Margaret Y. Mohammed
Judge