

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2016-02280

BETWEEN

FAUST SMITH

Claimant

AND

CARIBBEAN AIRLINES LIMITED

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: March 10, 2020.

Appearances:

Claimant: Ms. A. Mohammed

Defendant: Ms. V. Gopaul instructed by Ms. K. Wilson.

JUDGMENT

1. The claimant has brought a claim for breach of contract/wrongful dismissal, unfair dismissal, breach of statutory duty and damages, including exemplary for the breach of the contract and unlawful termination. The claimant was at the time a commercial pilot (First Officer) in the employ of the defendant having been so employed to fly what was then the new ATR fleet of airplanes acquired by the defendant for inter island travel. The claimant alleges that he was discriminated against during the course of his employment, in particular during his training to fly the said aircraft and that his alleged failure to meet the required standard as set out in the Defence was not the true reason for his dismissal.
2. The claimant was employed from January 25, 2012 under a contract that provided for a probationary period of 6 months, which he completed successfully. By written notice dated July 5, 2012 the claimant was summarily dismissed from his employment. The date of the termination is in dispute as the claimant claims that he was dismissed on July 31, 2012.

THE CLAIM

3. The claimant has claimed firstly that the defendant terminated the contract without giving him the necessary period of notice.
4. The claimant also claimed that his indoctrination training was not completed before he commenced his line training.¹ Further that the

¹ See para 10 and exhibit "E", Indoctrination Questionnaire attached to the Amended Statement of Case.

defendant's approach to training the claimant was in contravention of Section 33 (2) (c) of the Civil Aviation Act Chap. 49:03 ("CAA"), [(No. 3) Air Operator Certification and Administration] Regulations² which mandates that the air operator ensure that the operations personnel know their duties and responsibilities.

5. As such, the claimant claims:
 - a) Damages for breach of contract of employment made in writing between the claimant and the defendant dated February 6, 2012 but effective January 25, 2012;
 - b) A declaration that the termination of the claimant's employment with immediate effect was illegal and in breach of the contract.
 - c) A declaration that the purported termination of the claimant's employment with immediate effect was not subject to any misconduct on the part of the claimant. (there is no allegation of misconduct in this claim so this is not an issue).
 - d) A declaration that the action of the defendant to terminate the employment of the claimant and failure to give one month's notice or payment in lieu of the notice was in breach of clause 18.2, an express term of the contract of employment;
 - e) A declaration that the defendant has subjected the claimant to unequal treatment pursuant to the law;

² Section (33 (2) (c) reads, "In ensuring safe and efficient Flight Operations Management an air operator shall make provision for the following areas: - (c) personnel training".

- f) Special damages in the sum of Eleven Thousand Four Hundred and Forty-Three Dollars (\$11,443.00);
- g) Exemplary damages.

THE DEFENCE

- 6. The defendant denied liability, as well as the losses claimed.
- 7. By its Defence, it denied wrongful dismissal and pleaded justification by the fact that the claimant failed to meet the required standard during his probation period.

ISSUE ON THE CLAIM

- 8. The claim raises a number of issues. The issues for determination are as follows:
 - i. Whether the claim for unfair dismissal can be determined by this court;
 - ii. Whether the claimant was wrongly dismissed by way of the defendant acting in breach of a statutory duty under the Civil Aviation Act and/or in breach of the terms of the contract.

THE CASE FOR THE CLAIMANT

9. The claimant gave evidence and called one witness, Mr Winston Baptiste, an expert witness.

Faust Smith

10. The claimant's professional certification demonstrates that before he was employed with CAL, he accumulated 5,634 hours flying experience, 4,000 plus hours Multi-Engine and 2,500 plus hours Turbine. He has flown the following aircraft types, de Havilland Dash-6, Britten Norman-Islander, Piper-Seneca turbocharged, Cessna- 206, Cessna- 172, Beech-Baron, Piper-Tomahawk and Piper-Appache.³
11. On August 24, 2010, the claimant was interviewed in Trinidad by Chief Pilot Jagmohan Singh, Line Captain and training officer Michael Bento and a female employee whom he did not know on behalf of the defendant. At that time the claimant was resident in Suriname although he is a citizen of Trinidad and Tobago.
12. On January 20, 2012, some two years after, the claimant was visiting his parents in Trinidad and received an email from Singh who informed him that he was to report to for duty on January 23, 2012 which he did and was hired as a First Officer. He was almost immediately required to leave for France for ATR training. He was therefore provided with a letter dated January 24, 2012, addressed to the French Embassy to obtain his Schengen visa. That letter stated that the claimant commenced work on January 25, 2012 as a permanent employee. His written contract of employment of

³ see paragraphs 2 and 3 of his witness statement.

February 6, 2012 confirmed the date of assumption, however, it set out a probation period of 6 months from the effective date.

13. On January 25, 2012, the claimant reported for duties to Singh and met with the Fleet Manager of the defendant, Captain Raphael Rose. He was asked by Rose for his pilot licence, which he had left in Suriname as his visit to Trinidad had originally been on personal business. He was therefore provided with a non revenue seat on CAL for Suriname on an overnight flight and returned the following morning, January 26, 2012 with licence in hand.

INDOCTRINATION

14. On January 26, 2012, the claimant was called by Rose to report for indoctrination training and he informed Rose he had not slept because of the overnight flight and was not properly rested to attend the training. The claimant testified that, "I was not in a position to refuse a direction by the Captain and though very tired I reported to class". Also, it is his evidence that he found it very hard to concentrate and stay awake and his tiredness was not acknowledged by the instructor. Training ran from 10:30 a.m. to 3:00 p.m. with a one hour break for lunch. The claimant further testified that as a former instructor, he found it "odd" that the training went on, although he told the instructor he was tired.
15. According to the claimant, all the requirements for training are stated in section 38 of the CAA and are also to be found in the defendant's training pilot manual. According to the CAA, a person must complete the procedure of indoctrination training, and if not completed, the person cannot serve as a crew member or a flight operations officer. He was shown what

appeared to be a certificate by the defendant, issued upon completion of indoctrination training. However, the claimant denied that a certificate was issued to him as the indoctrination training was incomplete. He testified that he did not see the said certificate before these proceedings.

GROUND SCHOOL TRAINING, SIMULATOR TRAINING AND BASE TRAINING-FRANCE

16. On January 27, 2012 the claimant flew to France and commenced training to obtain his type-rating. There are no flight simulators in Trinidad, as such pilots are trained in France. Further, Pilots cannot train for the first time on an actual aircraft, therefore they are required to undergo simulated training.

17. The claimant testified that his training was intense and consisted of ground school training, simulation training and base training. Because the claimant was in the first batch for CAL for this type-rating (as it was a new aircraft) he did not train directly on the ATR-72-600 but trained on other older and smaller versions for some skills, namely the ATR-42-400 and the ATR 42-500. These aircrafts were somewhat different in respect of cockpit outlay and handling. However the commonality between the versions made first level training feasible. This training also involved engineering and mechanical understanding of the aircraft. Training in France was completed on March 10, 2012 by a performance check and he was issued an ATR type-rating by certificate dated March 14, 2012.

18. Ground school training was a fundamental aspect of training required before he was permitted to fly under supervision. He testified that the defendant was under an obligation to ensure that the necessary

fundamental training was provided⁴ and that full briefing and debriefings are essential.

19. According to the claimant, however, the defendant knew that he did not fly locally in Trinidad and the operating procedures differed from country to country and aircraft to aircraft, so that he was duty bound to be knowledgeable with and follow the operating manual for guidance, and if there were changes he would need to be trained on those operational changes.⁵

OTHER TRAINING

20. Upon his return from France, his training in Trinidad included courses on safety and emergency procedures, security, dangerous goods and aeromedical which are different to the actual operation of the aircraft. Also on one occasion, he thought that he was going to be trained in operating procedures as instructed by the director of flight operations. However, the instructor did not refer him to any videos or literature.

21. In his testimony, the claimant recalled the day he and the other trainee pilots were required to do the apron, which means to walk around the aircraft. However, he informed Captain Motie that he could not do the apron as he was not issued with a security pass. Sometime after, he received a security pass, but was not given the opportunity to do the apron for the remainder of his training.

⁴ A copy of the training pilot manual, section O, exhibited as "H" is attached to the Amended Statement of Case.

⁵ A copy of the document "Changes to ATR Operating Procedures" exhibited as "I" is attached to the Amended Statement of Case.

22. Having completed his training in France on March 12, 2012, the claimant was due to commence his line training under supervision within 21 days and if he could not have done so within the time period set out, he would have been required to return to France to simulator training to be recertified before doing line training. Line training can best be described as real life cockpit flying under the supervision of training pilots on actual flights with passengers.

23. The defendant commenced his line training under the supervision of Captain Rose on April 20, 2012 however, some eighteen (18) days after the expiration of time for so doing. As a former instructor, the claimant knew that recency training was important to a pilot. If too much time elapsed between simulator training and line training there would be a disconnect that can give rise to challenges for the pilot. It is his case that the failure of CAL to place him on line training within the prescribed time would have had a deleterious effect on his performance through no fault of his.

LINE TRAINING

24. On the first day of line training on April 20, 2012, he flew to Caracas with Captain Rose. He was unfamiliar with some of the abbreviations on the flight plan and asked Captain Rose the meaning but was ignored throughout the flight. He admitted that he was unable to log the information in a timely manner.

25. When they arrived in Caracas airspace, Captain Rose was reluctant to train him and it felt like Rose was deliberately not providing him with the relevant frequency to enable him to communicate with the ground and

provide the flight information. He continued to press Rose, who finally gave him the frequency.

26. He testified that having come from a different culture of flying, it being his first time flying under supervision he expected the training instructor and facilitator to support him.

27. He recalled his flight on June 22, 2012 with Captain Rose. On his return to Trinidad he landed the aircraft. Captain Rose gave him no guidance or feedback. On the said day, he flew from Piarco to ANR Robinson with Captain Motie, and the claimant considered this as another training flight. Again he was not guided by Captain Motie and admittedly used the entire length of the runway to land the aircraft. This is not a common occurrence as there is a threshold for touchdown which he appeared to have overshot. His prior experience with landing aircraft however was on short runways in the small islands of the Caribbean.

28. The claimant testified that he could not recall either of the Captains informing him of any shortcomings and reiterated that there were no briefings with him. The evidence of the defendant however is that at the end of each flight the claimant would be debriefed in the cockpit on his performance and corrective measures to be taken. Further, that a training report form would be filled out and the claimant provided with a copy.

29. The claimant referred to section 16 (17) (b) of CAA [(No. 9) Approved Training Organisation Regulations], which reads: "An applicant under regulation 5, that plans to conduct pilot flight training shall show that he has continuous use of a briefing area located at each airport at which training flights originate that is- (b) arranged and equipped for the conduct

of pilot briefings”. In that regard it was his evidence that he was never briefed before flights which is a mandatory requirement.

30. He recalled that he flew seven flights with the defendant, his last being the last week of July 2012 with Captain Nigel Ramnath.⁶ He also recalled that Captain Rose called him to attend a meeting on July 31, 2012. At the meeting, the acting chief pilot and a female manager were present. Captain Rose then informed him that his services were no longer required with immediate effect. He was not given any explanation or warning for his dismissal.

31. The claimant testified that he wrote to the defendant on numerous occasion to obtain the termination letter as well as his training records. Without his training records, he has been unable to seek employment since his dismissal as no airline would employ him with zero flying hours.

Cross examination

32. The claimant testified that he underwent ground school training in France in so far as the systems of their aircraft and their particular training requirements were relevant. He also underwent base training and simulated training. The base training took place in the ATR 42-500 with no passengers on board.

33. The claimant accepted that base training can take place in the simulator and also on an actual aircraft. He testified that he was trained in flight instruments and navigation systems and how to maintain attitude (relative

⁶ See exhibit “M” namely Line Training Records attached to the Amended Statement of Case.

position of the nose and wings on the natural horizon). Also, he accepted that he learnt how to utilize the aircraft's systems in normal conditions and crew ordination procedures.

34. He testified that he was trained in different stimulated environments which are controlled. He was referred to the ATR- type training records⁷ and accepted that this is the type of training he underwent in the simulator with another trainee pilot.

35. He confirmed that the issue for him was that the indoctrination training he underwent in Trinidad had not been completed before undergoing line training and this was considered a breach of the defendant's regulations. He did not accept that indoctrination training could take place throughout the training program.

36. During his line training, the claimant was trained by Captain Ramnath, Captain Motie and Captain Rose. However, the claimant testified that he was not taught how to deal with paper work applications, how to review flight plans, how to receive and obtain weather information and how to check for internal and external flight plans. He admitted, notwithstanding this, he learnt how to review a flight plan on his own. He further testified that the Captains did not have briefing sessions with him on what was required to operate and land the aircraft.

37. His line training was essentially a practical application of what he learnt in simulator training and base training. He agreed with Attorney for the defendant that all that he learnt in ground school training, simulator training and base training would be utilized when flying the defendant's

⁷ See exhibit "R.R.4" namely training records FTD 1 in the witness statement of Raphael Rose.

aircraft during line training. He testified that prior to his line training, he had to walk around the aircraft for himself, when the Captains were the ones that walked around the plane with the trainee.

38. The claimant accepted that the defendant made a substantial investment in his training when they sent him to France. Notwithstanding this, the claimant received no feedback from the training instructors or any of the Captains he trained with. As such, the claimant believed that “things were going normal”.

39. The claimant was referred to the training remarks of the Captains. He testified that after a flight with the Captains he would receive his training file which would contain their training remarks. However, he was not provided with all of the training remarks, namely the ones of April 19, 2012, April 20, 2012, June 12, 2012, June 16, 2012 and June 23, 2012 before the date of trial. He only saw the training remarks of May 5, 2012 and May 7, 2012.

40. According to the claimant, the defendant’s aircraft was unfamiliar to him and he was unaware of the frequency to be used. He was not aware that he had to read the defendant’s pilot’s manual to familiarize himself with the abbreviations, but admitted that he was required to read the manual.

41. The claimant maintained that the Captains were reluctant to assist him and he did not experience the said treatment with the other airlines with which he was employed. He testified that in France, he was provided with a schedule of training unlike in the case of the defendant who failed to provide him with such a schedule to enable him to familiarize himself with their timetable.

42. The claimant admitted that with 5,000 hours flying experience there were basic skills that he acquired namely the ability to control the speed of the aircraft and maintain the required attitude on approach. It is his testimony that the aircraft that he did his base training on in France was smaller than the aircraft used in his line training with the defendant and the French aircraft's instruments were not as sophisticated. He can also fly both visual and instrumental on smaller aircrafts but the procedural aspect of the operation of the defendant's aircraft was different.

43. He disagreed with the training remarks made by Rose in that he was unable to control the speed of the aircraft.⁸

44. He denied flying with Captain Ramnath on June 28, 2012 and testified that it was Motie. He also denied that he was assessed by Ramnath and if a progress check was taking place on that day he was unaware and there is also no provision for same in the pilot's manual.

45. According to the claimant, his last flight was on July 27, 2012 and he was terminated on July 31, 2012.

46. The claimant also admitted that he was a national of Trinidad and Tobago. The relevance of this evidence will become apparent later on in this judgment.

Winston Baptiste

47. Baptiste is a consultant in aviation training, an associate member of the Chartered Institute of Transport and a former Airline Pilot with Type

⁸ See exhibit "R.R.9" in the witness statement of Raphael Rose.

Ratings on the Hawker Siddelay HS 748, McDonnell Douglas DC, and the Lockheed L1011 500.⁹ The former are two jet planes of substantial size that are no longer in passenger service.

48. His analysis of the training process covered the Trinidad and Tobago Civil Aviation Authority (“TTCAA”) which is required to operate in accordance with the International Civil Aviation Organization (“ICAO”) recommendations. He prepared a report having examined the Amended Statement of Case and the Defence on whether the defendant’s training was conducted in accordance with the Operations Manual and the TTCAA Advisory Circulars. The TTCAA primary function is to foster the development and safety of aviation and they must comply with ICAO safety standards.

49. He likened indoctrination training as a conversion from one religion to another. Indoctrination training and line training are conducted by the defendant’s training officers. It is his testimony that if the training instructors failed to follow the relevant regulations, the training itself was flawed.

50. He testified that the claimant’s background and experience in “cross-country” (which is a visual flight rules environment), would have resulted in a potential culture clash. He referred to the collision of two flights on December 3, 1990 wherein the National Transportation Safety Board determined that the probable cause of the accident was a lack of proper coordination.¹⁰

⁹ See exhibit “W.B.14” namely the qualifications and experience of Winston Baptiste.

¹⁰ See paragraph 1 namely, Summary of Opinion in his witness statement.

51. As such, the defendant ought to have realized that the claimant was unsuitable for training as his case was unique and ought to have generated a Training Needs Assessment of the claimant. In other words, the usual form of training ought not have been tailored to the claimant having regard to his aviation history. He testified that if there was a Training Needs Assessment, same was ineffective and not properly managed. There was however no evidence of a Training Needs Assessment in this case.

52. It was also his opinion, that the failure of the defendant to allow the claimant to rest after his overnight flight from Suriname was a breach of duty that would have affected his performance.

53. He testified that it was possible that discrimination against the claimant was as a result of a buildup of anxiety that occurs in some pilots.¹¹ He referred to the defendant's Defence which averred that, "the claimant represented himself to be an experienced pilot with 5000 hours of training and as such, it was unreasonable for the claimant to expect the defendant to treat him as a new trainee". Baptiste concluded that the claimant was discriminated against.

54. He was perplexed by the fact that the claimant completed ninety percent of his training in France and failed to pass the progress check during line training in Trinidad. He examined the claimant's training in France and noted that during his six weeks Type Rating course, the claimant completed six landings, including full stop landings. He considered the Fleet manager responsible for ensuring that the claimant succeeds in his training and instructors play a critical role in promoting learning and

¹¹ See exhibits "W.B.6" which is a study conducted by the National Institute for Health and W.B.7" an article titled, The Fit to Fly Status of a Pilot, attached to his witness statement.

training effectiveness. To support his findings, he referred to Trinidad and Tobago Air Guard Selection Training.¹²

55. In relation to the claimant's inquiry on the meaning of the abbreviations on the flight plan, Baptiste referred to the note, Communications Processes and Decision Behaviour¹³ and testified that, "The importance of clear and unambiguous communication must be stressed in all training activities involving pilots, cabin crews, and aircraft dispatchers. There is a greater need for clear communication". As such, Baptiste testified that following the claimant's background, he would have been unfamiliar with the abbreviations. Therefore, in his opinion the threshold for the claimant's advancement to line training was not met.

56. He also testified that a flight plan can become challenging when the span of peripheral awareness required is very wide in an extremely complex aircraft. Further, the fact that the claimant used the entire runway to land, does not mean that he did not know where on the runway to land nor does it suggest that the pilot was incompetent.¹⁴

57. Baptiste testified on his personal experience as a training instructor and the importance of briefing and debriefing sessions. As an instructor, it was his responsibility to ensure that the pilots understood primary concepts. As such, negative feedback on training without proper briefing and debriefing sessions can cause the trainee pilot to underperform.¹⁵ In his opinion, the management tools provided by the defendant, was not

¹² Exhibited as "W.B.8" and attached to his witness statement and the note Accelerated Learning and Retention: Literature Review and Workshop Review exhibited as "W.B.10" and attached to his witness statement.

¹³ See paragraph 45 of his witness statement.

¹⁴ See paragraphs 63 and 64 of his witness statement.

¹⁵ See paragraph 69 of his witness statement.

sufficient to assess the claimant's knowledge and skill to meet the training objective and the learning process could have been made easier by other teaching methods.¹⁶

58. It was his opinion that acceleration training and retention are critical. Once the claimant flew under supervision later than the 21 days, refresher training was a means to compensate for the potential memory retention problem.

59. Baptiste concluded that the defendant did not comply with various TTCAA regulations in the training of the claimant. He referred to the defendant's termination letter which stated in part that:-

"It was a condition of your employment that you would meet CAL's technical standards for ATR operations. In particular, you understood that your ATR rating had to be certified by CAL after training and checking against CAL's policies and standard operating procedures".

".....after undergoing such training you failed to achieve the standard required to move forward. The Chief pilot and Fleet Manager ATR communicated their findings to you at the debriefing sessions on 05 July 2012".

60. Baptiste determined that the defendant's decision should have been balanced against its obligations to the TTCAA and ICAO.

¹⁶ See Civil Aviation (No. 3) Air Operator Certification and Administration, 2004 which mandates a national operator to train its pilots to proficiency on those manoeuvres and procedures that are prescribed by the Authority of a pilot to meet the requirements of each check.

Cross examination

61. Baptiste accepted that the CAA is required to examine the operator's manual before same is used by the defendant. However, he testified that although the operator's manual would meet the necessary requirement pursuant to the CAA, it was possible for an Authority to be non-compliant with ICAO.
62. He also accepted that the TTCAA has the authority to inspect a commercial airline every 12 months to ensure that the regulations are complied with and in default, the air operator's licence would be revoked. He testified that notwithstanding this, there may be an oversight in the defendant's training process.
63. He admitted that he was unfamiliar with the defendant's training policies and is familiar with ICAO requirements. As a signatory to the ICAO, the defendant can exceed those standards but not fall below them. He accepted that the defendant's training programs are approved by the TTCAA which required the claimant to undergo four types of training namely ground training, simulated training, base training and line training.
64. Baptiste testified that ground training involves a classroom setting and is divided into indoctrination and systems training. Simulated training is a practical aspect that trains the pilot on what to expect when he operates an actual aircraft. On the other hand, base training introduces the pilot to "abnormal" and the feel of an actual aircraft. However, this can be done in an advanced simulator or on an actual aircraft without any passengers. He accepted that base training on the simulator compared to base training on an aircraft (without passengers) is an additional step. Further, if there is no

simulator the training process, including base training would be undertaken on an aircraft.

65. Thereafter, line training is where the pilot is introduced to the actual operations of the aircraft online. He further testified that at the line training stage, the pilot would be competent to operate the aircraft and its technical operations. He agreed with Attorney for the Defendant that line training is essentially putting into practice all one learnt in ground, simulated and base training.

66. Baptiste was specific in his testimony that the claimant's experience and background would have enabled him to fly an aircraft. Further, a Type Rating qualification involves a pilot training to fly a new aircraft. As such, flying a different aircraft would have required the claimant to refamiliarize himself with their operating systems.

67. He accepted that the claimant's flying hours would give him some experience, but it would depend on the indoctrination training undertaken and the "culture" the claimant came from. He explained that the objective of the TTCAA Advisory Circular is to convert the claimant from his previous flying culture to the defendant's own.

68. According to Baptise, he formed the opinion that the claimant was not made aware of his shortcomings during his line training. He agreed with Attorney for the defendant that CAA now has authority to oversee and supervise training. He accepted that prior to line training, and after due process, a pilot is responsible for putting into practice the training he received in ground and simulated training.

69. He testified that the defendant failed to comply with the regulations in that they failed to comply with ICAO standards. He maintained that in his opinion, there must be effective indoctrination training to prepare the trainee pilot for line training. Although he accepted that indoctrination training can be done simultaneously with line training, the trainee pilot must at least be familiar with the navigation on the aircraft and the responsibility falls to the training instructor to ensure that the trainee pilot is ready for the transition to line training.

70. He disagreed with Attorney for the defendant that the claimant should have understood the abbreviations since he passed his simulated training. He testified that the abbreviations are computerized flight plans that project the aircraft's route, forecast wind conditions and project arrival times. However, abbreviations such as the estimated time of arrival ought to have been addressed in indoctrination training. As such, the claimant would have seen a flight plan during his line training and he could have familiarized himself with the abbreviations via the internet.

71. He testified that the claimant should have been treated as one with zero flying experience and maintained that the claimant's experience came from a different culture and different traffic system.

72. Attorney for the defendant referred to a training remarks that the claimant was unable to accurately follow the flight directions. Baptiste agreed that this is basically following instructions stated on a panel in the aircraft.

73. He also agreed that any pilot operating an aircraft should know how to maintain a certain safety speed. However, he referred to the Guyana (which has a short runway) incident where the aircraft landed 1700 feet

beyond the runway touchdown zone, and testified that anxiety and stress can contribute to variations in performance. In the Guyana incident the pilots were experienced, so in the case of the claimant, anxiety and stress may have caused him to pull back at an unsafe attitude. He further testified that, at the base training stage, a pilot is taught to understand the geometry of the runway and where the touchdown zone is generally on a runway.

THE CASE FOR THE DEFENDANT

74. The defendant called two witnesses; Raphael Rose and Devanand Motie.

Raphael Rose

75. Rose is a Captain employed as a Fleet Manager of the ATR fleet since 2012 and for the past 23 years has been the holder of an airline transport pilot Licence. He has experience with both the DASH-8 fleet (2010-2013) and ATR fleet (2012 to date).

76. He was one of the ATR check airmen who trained the claimant during his probationary period. He testified as to line training involving paperwork applications, reviewing flight plans, receiving weather information and doing external and internal pre-checks on the aircraft. He testified that briefings are done to determine the flight route and during the flight there would be training-oriented discussions with the trainee pilot on the requirements to operate the aircraft.

77. From his experience as a training instructor, it takes a trainee pilot with 250 hours of flying experience and an average of five to ten sessions of line

training to successfully complete their training. The trainee pilot is provided with a lot of details and given assistance during the first flight. If by the fifth or sixth flight the trainee pilot's progress is unacceptable, another Captain will fly with the trainee pilot and assess their performance. This is a progress check and a determination would be made on whether more training or termination is required.

78. Rose testified that line training was done with the claimant on three occasions. On April 19, 2012, he explained to the claimant the cockpit set up, the process of filling out the flight plan and briefed him on approach and arrival. He further testified that during the flight, he, Rose was unable to provide the meaning of the abbreviations to the claimant because of the nature of the task he, Rose was required to perform while flying the aircraft. It was according to him, simply not possible. It was his evidence that the abbreviations and their meanings are set out in the pilot's manual and the claimant was responsible for familiarizing himself with same, the inference being that the claimant failed so to do.

79. On June 20, 2012 he again flew with the claimant but the training was a non-handling sector which meant that the claimant observed while Rose operated the aircraft.

80. On another line training flight, this time a return from Piarco to Grenada on June 22, 2012, Rose demonstrated to the claimant the pre-departure procedures, take-off, climb, cruise, descent, arrival and landing. From Rose's observation, the claimant's speed control was poor. Poor speed control can result in an unsafe landing. The above comments were also recorded in the training form and Rose testified that these remarks were also placed in the claimant's training file.

81. On the said June 22, 2012, Rose recommended a progress check to be done on the claimant. The progress check involved three flights on June 28, 2012.
82. Thereafter, Rose received a memorandum from Captain Ramnath, who conducted the progress check. Ramnath made some observations and highlighted the errors made by the claimant.
83. Essentially, the end result was that the claimant was still unable to land the aircraft safely and the claimant's general handling of the aircraft was not up to an acceptable standard.
84. There appeared to be two issues. The first was that in relation to the claimant's ability to follow the flight director (an instrumental guidance system in the cockpit). This is a matter which would have been dealt with in simulator training where instructions on how to follow the flight director would have been provided. Failure to follow the said instructions could likely result in the aircraft being flown off course of off attitude.
85. The second had to do with the claimant's inability to control speed. During the simulator training, the claimant would have been trained to match the aircraft's safety speed with an automated feature called the speed bug and the claimant went below the safety speed during the progress check.
86. Rose referred to the claimant's training file and noted the training remarks of Ramnath on May 5, 2012, May 7, 2012 and June 16, 2012.¹⁷ Ramnath's remarks on the last two dates were similar in that the claimant needed to improve on his landings.

¹⁷ See exhibit "R.R.10", training remarks attached to his witness statement.

87. Rose testified that the claimant emailed him three years after his termination requesting the termination letter he alleged that he did not receive. In April 2015, Rose responded to the claimant and informed him that the said letter was mailed to his last registered address, but the latter failed to be delivered and was returned to the defendant.

88. He further testified that when he flew with the claimant, he did and demonstrated the apron process with the claimant before take-off. According to him, the claimant did not meet the required standard for a Check A and as such, he was replaced by other trainee pilots who demonstrated more skill.

Cross examination

89. Rose was not personally acquainted with the claimant and came to know of him when he was seeking employment prior to his contract of employment. He testified that the minimum required to be recruited by the defendant is 250 flying hours. However, an experienced pilot with more than the minimum flying hours was a stronger asset to the airline. The defendant only employs Trinidad and Tobago nationals for permanent employment.

90. Rose was unfamiliar with the term “culture clash” as testified by Baptiste.

91. Rose testified that he also trained in France and obtained his Type-Rating for the ATR sometime in 2011. That training cost an average of €35,000.00.

92. He was referred to the letter addressed to the French Embassy dated January 24, 2012 and the words, “.... and is currently employed in the

permanent position First Officer-ATR". He testified that the letter was only intended to assist the claimant to obtain his visa and he was hired and placed on probation.

93. Rose explained that during the simulated training in France, the claimant would have been trained in landing practice, which is base training. Further, zero flight time ("ZFT") training would allow the trainee pilot to move from simulated training directly to line training, however the defendant does not do this type of training.

94. He accepted that the claimant underwent non-technical ground school training on April 4, 10 and 12, 2012.¹⁸

95. He was referred to the comments of the training instructors in France. He testified that the comments of a training instructor, positive or negative had no bearing on whether the claimant passed his ATR training and was a reflection of what took place on the date of training.

96. Attorney for the claimant referred him to the document titled "Conversion Training Line Training Summary". He accepted that the claimant's line training started on April 20, 2012. He also accepted that he did not give him the meaning of the abbreviations. However, he testified that when the question was asked of him, his focus was on operating the aircraft and he may have answered the claimant during the flight or at the debriefing session.

¹⁸ See the defendant's bundle of documents, (12) Caribbean Airline Initial/Conversion Safety and Emergency Procedures Report- Faust Smith.

97. He testified that the inconsistency between the date the claimant commenced his line training was an error and he recorded the wrong date, April 20, 2012 instead of April 19, 2012.¹⁹ He further testified that he operated a flight on April 19, 2012 and Captain Devanand Motie operated the flight on April 20, 2012.

98. He testified that the defendant's operation manuals used for indoctrination training are approved by the TTCAA, and agreed it is a requirement that indoctrination training be completed before commencing to line training. He accepted that the claimant's indoctrination training was not completed, despite being issued a completion certificate. This of course could only mean that indoctrination was not completed prior to training in France.

99. He also accepted that the claimant informed him that on his return from Suriname on January 26, 2012, that he did not get sufficient rest. Also, it was important that the claimant was properly rested to understand what was being taught in indoctrination training.

100. Rose also testified that he could not give the claimant his training file or had the authority to do so after termination without going through the proper channels and informing the Human Resource department.

101. He was referred to his training remarks dated June 22, 2012:

"Aircraft and departure procedures discussed. Take off, climb, cruise, descent, arrival and landing has been discussed and demonstrated. For a pilot with 6000 hours he loses focus on what

¹⁹ See exhibit "R.R.8", Line Training Record (Non- Handling Sectors).

are the most important items to do first. Checklist, briefs take up too much of his focus. He was briefed on what to focus on. Approach and speed control poor. Again, was told to overcome his shortcomings”.

102. He testified that his comments were to guide the claimant. He did not record any comments that the claimant was unfamiliar with the abbreviations as he would have eventually provided him with the information or referred him to the relevant guidelines. Also, training remarks were not necessarily offered after every flight. He further testified that the failure to place his signature on the training remarks dated April 19, 2012 was an error.

103. He denied that the claimant flew eight flights, and maintained that he only flew seven. He also denied that the comments of Captain Ramnath were not made at a progress check despite the document not having the defendant’s letterhead. The decision to terminate the claimant was made on July 5, 2012.

Devanand Motie

104. Motie has 25 years experience as a pilot and 18 years as a Captain. He is currently employed by the defendant as a Check Airman. His duties as a Check Airman includes ensuring that new pilots are trained to the company’s standards.

105. The claimant’s line training was to ensure that he operated the particular aircraft and not intended to teach him how to fly. He testified that he did line training with the claimant on April 20, 2012 and June 23,

2012. On April 20, 2012, the claimant handled the flight and Motie observed that the claimant did not display proper control and general handling of the aircraft. On June 23, 2012 the claimant was with him on three flights and he allowed the claimant to fly from Tobago. He observed that the claimant did not handle the aircraft well, nor did he demonstrate airmanship to a satisfactory standard for someone with 5000 hours flying experience. Also, the claimant was nervous, required prompting to follow air traffic control instructions and was unable to stabilize the aircraft. In addition, he was not familiar with the training pilot manual.

106. On June 23, 2012 the claimant's seventh flight was carded and as such, it was expected that there would have been a little more familiar with landing, and as such, he should not have used the entire runway to land the aircraft. Line training did not involve where to land the aircraft, glide path or altitude and the claimant ought to have been aware of these procedures prior to his flying experience.

107. Motie testified that he conducted briefing and debriefing sessions each time he flew with the claimant.

Cross examination

108. Motie was not familiar with the phrase "culture" but accepted that training on another airline would involve different standard procedures. He testified that his job was to train the claimant to operate the aircraft to the defendant's requirements and policies. He denied that he conducted line training with the claimant on only one occasion and the records indicate that there were two flights from Grenada to Trinidad and three flights from Port of Spain to Tobago.

109. He recommended the claimant for a progress check because his handling of the aircraft and airmanship skills were poor. On the said June 23, 2012, he explained his findings to the claimant, wrote the remarks in his presence and informed him that he was recommending him for a progress check with Rose and the reasons for same. He testified that the date of the progress check was the same as the claimant's eight flight.

110. He testified that indoctrination training is taught on a pilot's return from France. He further testified that recency training depended on the availability of an aircraft and he is not aware of a time limit of 21 days.

111. Motie admitted that he erred by not signing his training remarks dated April 20, 2012.

THE COURT'S APPROACH

112. The burden of proof rests with the defendant to establish just cause for dismissal. This principle was set out by Popplewell J. in the case of **Cable and Wireless v Hill and others (1982) 30 WIR 120** at p. 129:

"the burden of proof was on the company to show 'just cause' for dismissing the employees and that since summary dismissal constituted a 'strong measure' the standard of proof should be strict, persuasive and convincing. Further, notwithstanding the fact that this is a matter of a civil nature requiring proof on the balance of probabilities, since the matters to be proved were of a grave and weighty nature, it would expect the evidence to be correspondingly cogent and weighty in nature and content".

113. Therefore, one burden is on the employer to prove particular facts to establish justification and the other on the employee to discharge the ultimate burden. The court does not however, understand the dicta above to be suggesting or laying down a principle that a standard that is higher than that of the civil standard of proof is required. To that end, this court is of the view that the use of the word convincing is misplaced. The burden in relation to justification remains with the defendant on a balance of probabilities.

114. The claimant's version as to whether the indoctrination training was completed and whether the defendant trained him pursuant to the Civil Aviation Act is diametrically opposed to the version given by the defendant.

115. In **Horace Reid v Dowling Charles and Percival Bain**²⁰, Lord Ackner delivering the judgment of the Board stated that where there is an acute conflict of evidence, the trial judge must check the impression that the evidence of the witnesses makes upon him against

(1) contemporaneous documents;

(2) the pleaded case; and

(3) the inherent probability or improbability of the rival contentions.

116. Upon analysis of the evidence, the court finds that the version of events given by the defendant's witnesses was more probable than that of the claimant. The defendant called two witness, Captain Rose and Captain Motie. In support of their version of events, the defendant's witnesses

²⁰ Privy Council Appeal No. 36 of 1897 at page 6

attached the claimant's training records, the training schedules and the training remarks. These demonstrate clearly that even if indoctrination training had not been completed prior to sending the claimant to France, it was certainly completed upon his return before his line training commenced and the court so finds.

ISSUE 1- WHETHER THE CLAIM FOR UNFAIR DISMISSAL CAN BE DETERMINED BY THIS COURT

117. At the outset, the defendant submitted that the claim for unfair dismissal is a statutory claim. A corollary issue to this is, whether the claim of discrimination is properly before this court. The court will deal with these in turn.

Unfair dismissal

118. The defendant submitted that the allegations in the claim in effect amount to a claim for unfair dismissal²¹ and referred to the decision in **Caroni (1975) Ltd v Association of Technical Administrative Supervisory Staff, Civ. App 87 of 1999** Per de la Bastide CJ at page 226, in which His Lordship held that it was the intention of Parliament that the Industrial Court should be the sole adjudicator of whether a dismissal was harsh, oppressive and not in accordance with the principles of good industrial relations practice.

119. The claimant however made no submissions on this issue.

²¹ See pages 30 and 31, Particulars of Wrongful Dismissal in the Amended Statement of Case.

120. The court understands the claimant's case on this issue to be that he was discriminated against and therefore not provided with the required training in an attempt to have him fail to achieve the required standard.

Law and Analysis

121. Wrongful dismissal is a common law cause of action based upon a breach of contract. The right not to be wrongfully dismissed, unlike the right not to be unfairly dismissed, is not one which depends upon statute. In essence, the claim for breach of the statute differs from a claim for breach of the common law in that in the case of the former claim the Industrial court is vested with the jurisdiction to review the reason for the dismissal. Section 10 (5) Industrial Relations Act 1976, Chapter 88:01.

122. In Trinidad & Tobago, the "fairness" of a dismissal is exclusively a matter of whether there has been a breach of the statute and is therefore an issue for the Industrial Court and ultimately the Court of Appeal: "... the legislature has provided overarching principles and has emphatically positioned the Industrial Court as guardian of the national standards of what constitutes good industrial relations principles and practices..." Per HH Thomas—Felix P in T&TNPC Ltd. v OWTU

Findings

123. The court therefore finds in light of the above that the issue of unfairness of the dismissal is not one for this court. It will nonetheless deal with the arguments on discrimination.

Sub issue- Discrimination

124. In further submission, the defendant argued that the claimant can seek recourse through the Equal Opportunity Act, Chapter 22:03 in his claim for discrimination. It relied on the decision of **Suratt v Attorney General, [2008] 1 AC 655** in which decision the State was ordered to implement the Equal Opportunity Act.

125. Alternatively, the defendant submitted that the evidence of Baptiste that the claimant was treated differently due to his flying hours is misconstrued on the law of discrimination. The claimant's relief for unequal treatment/discrimination cannot be sought against the defendant who is a corporate entity.

126. Further, the defendant argued that the allegation of unequal treatment/discrimination is in any event unsubstantiated as the claimant pleaded no particulars or testified to same.

127. The claimant's submission on this issue is that the failure of the defendant to properly train the claimant is separate and apart from the issue of discrimination that arises under the Equal Opportunity Act.

128. The claimant referred to the testimony of Baptiste at paragraph 37 of his witness statement as follows;

"A study conducted by National Institute for Health (NIH) has shown that:
"Discrimination may be intentional or unintentional, direct or indirect. Discrimination can come in the form of jokes and offhand comments that seem harmless to or even go unnoticed by the perpetrator. Employees

who have experienced discrimination have higher levels of psychological distress and health-related problems than employees who have not. In this case, discrimination could have lead to a build-up of anxiety, which is a medical condition that -at times during line training - could have rendered his pilot Licence temporarily invalid...”

Law and Analysis

129. The Equal Opportunity Act is unique in that it enables citizens to challenge certain kinds of discrimination before two bodies and the intention is to promote equality of opportunity. These bodies are the Equal Opportunity Commission (the EOC) and the Equal Opportunity Tribunal (the EOT or the Tribunal).

130. Section 9 reads:

- 9. An employer shall not discriminate against a person employed by him-*
- a) in the terms or conditions of employment that the employer affords the person;*
 - b) in the way the employer affords the person access to opportunities for promotion, transfer or training or to any other benefit, facility or service associated with employment, or by refusing or deliberately omitting to afford the person access to them; or*
 - c) by dismissing the person or subjecting the person to any other detriment.*

131. The leading authorities on discrimination in public law establish the requirement to show that the claimant has been treated differently to some similarly circumstanced person. In **Bhagwandeem v The Attorney**

General of Trinidad and Tobago, [2004] UKPC 21 Lord Carswell in delivering the decision of Their Lordships of the Privy Council set out at paragraph 18 what must be proved to constitute infringement of that right:

“A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] 2 All ER 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other”.

132. The court considers and accepts that although the authority above treats with constitutionally enshrined rights, the meaning of same and evidence required to prove same are in principle the same whether the issue is constitutional or one in private law. In that regard, the claimant has also asked for a declaration in relation to unequal treatment.

Findings

133. Firstly, on the pleaded case, discrimination has not been pleaded, whether under the EOA or otherwise. Therefore it is ought not to be an issue for determination for this court. The court will treat with it however, the claimant having made submissions thereon.

134. In that regard, the claimant attempted in a somewhat obscure manner to suggest that the officers of the defendant assumed he was a non national and perhaps this was the reason for discriminating against him. Two things are to be said about this. Firstly, Captain Rose accepted that one had to be a national to be hired on a permanent basis. That non nationals were hired on a temporary basis. In that regard the court did not understand Rose to be referring to employment under contracts for fixed periods as temporary employment although he used the word contract in his answer in cross examination. Secondly, there was no evidence that the claimant was considered to be a non national and no basis for so believing. He did not claim to be the holder of a passport of any other country, neither was he asked by any of the witnesses whether he was Trinidadian.

135. It follows that there could have been no discrimination on that basis. That being said the evidence of Baptiste on the issue of discrimination set out above while of much logic does not assuage the duty a court to determine whether there was a reasonable basis for discrimination and therefore whether it is more likely than not that discrimination in whatever form (including those set out by Baptiste) occurred. There must be a plausible basis for discrimination whether direct or indirect and there is none in this case.

136. The claim for unfair dismissal must therefore be dismissed. With specific reference to unequal treatment, the claimant has provided no comparators and so this must also be dismissed.

ISSUE 2- WHETHER THE CLAIMANT WAS WRONGLY DISMISSED

137. Despite the numerous and laborious issues raised in the pleadings of the claimant, the main issue to be determined is whether the termination of the claimant's contract of employment was wrongful.

138. The learned authors in **Halsbury's Laws of England, Volume 39 (2014), paragraph 825**, defines wrongful dismissal:

A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled, namely:

- i. the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and
- ii. his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily".

139. In addition, the learned authors in **Selwyn's Law of Employment Emir, A, 18th edition, OUP, p 79** state that the contract of employment "is a contract like any other contract, and in principle subject to the general contractual rules of the common law. The normal canons of legal construction must be applied".

140. The termination letter dated July, 5 2012 is reproduced in part *ad verbatim*, since it is crucial to the claim. The letter reads:

...“It was a condition of your employment that you would meet CAL’s technical standards for ATR operations. In particular, you understood that your ATR rating had to be certified by CAL after training and checking against CAL’s policies and standard operating procedures.

However, after undergoing such training you failed to achieve the standard required to move forward. The Chief Pilot and Fleet Manager, ATR communicated their findings to you at the debriefing sessions on 5th July 2012.

You were informed that your services would not be retained. Consequently, we therefore write to confirm that pursuant to clause 3 of the aforementioned contract; your service with Caribbean Airlines Limited was terminated with effect from 5th July 2012.”

THE ACTS COMPLAINED OF BY THE CLAIMANT TOWARDS PROOF OF BREACH

Indoctrination Training

Lack of Sleep

141. The claimant was adamant that his lack of rest on January 26, 2012 resulted in his lack of concentration and his performance during the his training.

142. Captain Rose acknowledged that rest is necessary for the best performance but the defendant was under no contractual obligation to ensure that the claimant had sufficient rest before he commenced indoctrination training. This was a matter for the claimant. The claimant also had the option to read up on the topics contained in the indoctrination schedule later on if he was unable to concentrate and absorb the information on the day of indoctrination training. In fact it would have been the prudent thing to do.

143. The claimant however submitted that this was a breach of the defendant's regulations by failing to acknowledge he was suffering from a lack of sleep.

144. This of course can be immediately dismissed as the claimant went on to continue indoctrination training after his return from France in any event so that the events of that day would have been ameliorated by subsequent events.

Completion of Indoctrination Training

145. There was some argument that the indoctrination training was not completed.

146. Section 229 of the CAA, [(No. 2) Operations} Regulations states:

(1) A person shall not serve and a national operator shall not use a person as a crew member or Flight Operations Officer unless that person has completed the company procedures indoctrination training programme approved by the Authority which shall include include a complete review of the Operations Manual procedures pertinent to the crew member or duties of the Flight Operations Officers and other items outlined on Part A of Schedule 9

(2) A national air operator shall provide a minimum of forty programmed hours of instruction for company procedures indoctrination training unless a reduction in the number of programmed hours is approved by the Authority.

147. The Flight Crew Company Procedures Indoctrination (TTCAR2:229)
reads:

The following items may not be accomplished as a stand alone course. All items will be completed and recorded as having been completed before the student is cleared to fly unsupervised. Indoctrination training shall be a minimum of 40 programmed hours of Instruction.

148. The claimant submitted that his indoctrination training was not completed in accordance with the Regulations and the company procedures.

149. The defendant argued that they were not required to accomplish this training as a stand alone course and there is no requirement that indoctrination training should be completed before commencing line training.

Analysis and Findings

150. The court notes that the Initial Indoctrination Schedule was incomplete and some training took place on January 26, 2012. On his return from France, the claimant compared his training in France in that he did not receive a training schedule to prepare himself, when he underwent his training in Trinidad.

151. However, in cross-examination, the claimant admitted that he underwent some indoctrination training after his return from France and his issue was that the indoctrination was not completed before he commenced his line training. However, the contemporaneous documents before the court highlights that the incomplete sections in the Initial

indoctrination schedule that were relevant prior to the commencement of the claimant's line training, were completed after the claimant's return from France.

152. There are also two indoctrination certificates before the court, a blank certificate pleaded by the claimant and a completed certificate pleaded by the defendant. The claimant testified that it was the first time he was seeing the completed certificated dated January 27, 2012 and he only received a blank certificate along with the Indoctrination questionnaire. The defendant has not presented any evidence to refute that the certificate was issued to the claimant on the said date.

153. Therefore, the court finds that on January 26, 2012, the indoctrination training was not complete. Although the indoctrination training may not have been completed at that point, it appeared to have been continued and completed after the claimant's return from France and before his line training began.

THE APRON

154. The claimant testified that the Captain did not do the apron with him and when he boarded the aircraft the Captain said nothing to him about landing or operating the aircraft. The Apron process is that of doing visual check around the entire aircraft prior to the next leg of flight.

155. Rose testified that he did the apron with the claimant after the issue with the security pass had been resolved. Further, the claimant later admitted that prior to the commencement of line training, that he did the apron himself, although not on the day of the training.

156. In any event, the court finds that there is no evidence of a requirement or rule that a Captain is the only one permitted to perform the apron so that it is more likely than not that the First Officer, the claimant, would have been required to do it as Rose testified. This was therefore also part of the training of the claimant.

KNOWLEDGE OF ABBREVIATIONS

157. The evidence of Baptiste is that the claimant would not have known the meaning of the abbreviations (for the computerized flight plans) as a training needs assessment was not done. His evidence is that indoctrination training would have introduced the claimant to the abbreviations, but without it he would only see a flight plan for the first time during line training.

158. When questioned by the court, Baptiste explained that the abbreviations would involve an estimated time of arrival (ETA) and navigation procedures. And although these are basic abbreviations, Baptiste was adamant that the abbreviations should have been addressed in indoctrination training.

159. The claimant admitted that he did not know the relevant frequency as the aircraft was unfamiliar to him. During cross-examination the claimant accepted that he was required to read the pilot's manual, but he was not provided with a schedule or timetable to assist him in preparing himself. The inference is that the relevant abbreviations are contained in the pilot's manual.

160. He accepted that Rose was operating the aircraft at the time he inquired into the meaning of the abbreviations, but he insisted that Rose could have assisted him as well. Rose testified that he was unable to assist the claimant with the abbreviations at the time as he was involved in flying the aircraft, but that he would have answered the claimant thereafter. It can therefore be reasonably inferred that it would have been highly impractical and dangerous to distract Rose for a lesson in abbreviations.

161. Therefore, the court finds that the onus was on the claimant to read and familiarize himself with the training manual prior to the flight and perhaps even during the flight. Even if the court were to accept that the claimant did not see the flight plan during his flight with Rose, (which it does not accept due to the inherent implausibility of such an omission) the remarks of the other Captains did not complain of this. As, such in any event such an omission if it did occur was not fatal to the quality of training provided and was not a breach of the regulations.

LINE TRAINING

162. It is undisputed that the claimant commenced his line training 36 days after his return from France.

163. The claimant relied on pilot manual indoctrination which provides:

Training ZFT

Where pilots qualify for Zero Flight Time Simulator training the following is intended as guidance in conducting the additional sector requirement.

Past experience has shown that the vast majority of pilots convert with little significant difficulty. Inevitably some pilots settle into

their new environment more readily than others. The following guidelines are intended to assist qualified Check Airman complete these supervised sectors”.

The Company’s policy is for candidates to fly within 21 days of completing the OPC in the Simulator. In the event of flight cancellation or sickness preventing the trainees meeting these requirements, Check Airmen must contact the Chief Pilot’s office without delay. Where necessary a further ZFT simulator exercise will be set up for recency training prior to commencement of the line sectors.

164. Rose testified that Training ZFT is applicable to where a pilot goes directly from simulator training to the commercial operation of the aircraft.

165. However, the claimant admitted that he underwent additional training with the defendant after his return from France and then on to line training in the right seat as a first officer under the supervision of the check airmen.

Analysis and Findings

166. The statutory requirement in section 260 of the CAA requires recurrent training. It reads:

(1) A national air operator shall ensure that –

(a) Each flight crew member undergoes recurrent training and checking and that all such training and checking are relevant to the type or variant of aircraft on which such flight crew member operates;

167. The defendant's policy in the Pilot's Training Manual set out above is merely a guideline approved by the CAA. Further, the 21 day requirement as appears in the words set out above also provides a discretion to the Chief Pilot on the recommendation of the check airmen to order another simulator exercise if the defendant company thinks it necessary. In this case it must be that the defendant did not think it necessary and in so doing they did not run afoul of the relevant provisions of the CAA.

168. In any event the claimant has not demonstrated that his movement from simulated training to line training 36 days after his proficiency check in France affected or was the cause of his performance. In that regard the documentary evidence of the records from France all demonstrate that the constant difficulty the claimant faced were the same as those he faced while flying. (See later on in this judgment).

169. The court therefore finds that there is no time frame under this statutory requirement for recurrent training and it is a matter of the defendant's policy.

BRIEFINGS AND DEBRIEFINGS

170. The claimant's contention is that he was not briefed on the flight route and takeoff or emergency procedure in a briefing room before he flew with the Captains. The evidence of the defendant's witnesses was there were briefings, the inference being that they occurred either in the cockpit or elsewhere.

171. Additionally, the evidence of the claimant was he was only provided with two of the training remarks after completion of the flight namely for May 5, 2012 and May 7, 2012.

Analysis and Findings

172. The court finds that there were briefings with the claimant. The court does not believe the incredible assertion that there would have been no briefings for flights with passengers for some two months of training on 7 or 8 flights. In that regard, in relation to the briefing not taking place in a separate room, the court also finds that the fact of the briefing was of considerably more importance than the place of the briefing having regard to the fact that the law required a briefing and that the safety and well being of the lives of both the passengers and crew dictated same. The court therefore finds there were briefings in the presence of the claimant.

173. Likewise the court also finds the assertion of the claimant that he was not provided with the remarks after training to be highly implausible. This assertion simply goes against the grant of the overwhelming weight of the oral testimony and the documentary evidence. It is implausible because certainly after having received remarks on two occasions in May as the claimant said, it is reasonable to find that he would have appreciated that he would have been provided with remarks in relation to the other 5 or 6 flights. But there is no evidence that he even asked for any of those remarks at the time of the flights or shortly thereafter. The only evidence of a request is that which he made long after his services were terminated. This tells the court that the claimant did not have cause to ask for the other

remarks because they had been provided to him at the end of the material flights.

MATTERS OF FLIGHT PLANS, NAVIGATION, AIR SPEED AND PROPER POSITIONING OF THE AIRCRAFT

174. Even if the court is wrong in its findings, it is nonetheless clear that the remarks of Captain Ramnath of May 5, 2012 reads, “Work in progress” and May, 7, 2012 reads, “Observed some level of improvement, needs to work on landings and manual flying”. This is a fundamental matter that would have required correction by the claimant so that when one looks at all of the remarks put before the court this is the gravamen of the complaint in relation to the claimant’s performance. These two documents set out the faults that required correction which the claimant had several opportunities to correct on several flights that were yet to come.

175. It is quite clear that the claimant’s skill in flying was deficient in that regard from early on. During his six week type rating course in France, the claimant was trained in Theoretical Knowledge Instruction for the ATR 42/72, Synthetic Flight Training and Flying Training.

For FTD (flight training devices), the comments of the instructor were:

Session 4, “try to classify your charts to find them faster and search a solution to have them in sight at each time. Attitude checks are very important for your safety; if you have any doubts, check once more” and by session 8 the comments were, “big mistakes in positioning due to bad NAV settings; probably due to insufficiently prepared checks....”

For FFS (full flight simulator), the comments of the instructor were:

Session 2, “.....as a PF, deal with aircraft position, contact with ATC to come back.....try to be more pragmatic. If you don’t fully understand why you have to do something, follow the C/L or ASK PF. Emphasize important things for the PF and go quickly through less important items”.

Session 3, “SOP’s are known but you need to train yourself to, prepare and execute briefings (weather, weight, settings), circling = mountain vision, TOP, maintain ALT with GP intersection, flame out...”

The instructor highlighted that the claimant “may need extra training does not improve”. The general comments read, “You seem a little bit tired due to lack of organization, prepare only what you need to perform the part- don’t hurry for the check lists- anticipate your next course/Altitude”.

176. The inference made by Baptiste in his evidence is that it is illogical that the claimant passed his training in France and performed poorly in Trinidad. This is however not the entire picture as the above remarks demonstrate. They show clearly that the claimant genuinely had a difficulty from the beginning with the same issues as he had in France while flying and operating the actual aircraft on line training.

PROGRESS CHECK

177. Throughout the claimant’s testimony, he maintained that no progress check took place and if there were any he was not aware of same.
178. He also denied flying with Captain Ramnath on June 28, 2012. The court examined the contemporaneous documents, namely the Line Training Summary and the Training Schedule-ATR and find that the

documents support the defendant's evidence that the claimant flew with Captain Ramnath on that date. Further, there is no evidence by the claimant that supports his testimony otherwise. The court must therefore act on the plausibility of the evidence before it when considered with the contemporaneous or supporting documents which confirm that there were eight flights being:

With Captain Rose-April 19, 2012 and June 22, 2012;

With Captain Motie- April 20, 2012 and June 23, 2012;

With Captain Ramnath- May 5, 2012, May, 7, 2012, June 16, 2012 and June 28, 2012.

179. It follows that at least one of those checks would have been a progress check as testified to by the defence.

ADVERSE INFERENCE

180. The claimant submitted that the court should not attach any weight to the memo/report of Captain Ramnath as he was not called as a witness. Further, that the memo/report was not printed on the defendant's letterhead.

181. The well-known principle is that in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. See **Wisniewski v Central Manchester Health Authority [1998] P.I.Q.R. p 324; Ramroop v Ganeias and others CV 2006-00075**

182. The issue of adverse inference does not arise in this case. The defendant filed a Hearsay Notice in relation to the memo/report of Captain Ramnath and the claimant did not file a Counter Notice. The court was called upon to rule on this issue prior to trial and the matter was ventilated. As such, on the date of trial, the court dismissed the claimant's objection. It therefore does not lie with the claimant to raise the same issue on submissions.

DATE OF TERMINATION

183. The parties dispute the date of termination. The defendant asserts that the claimant was terminated on July 5, 2012 and the claimant contends that he was dismissed on or around July 31, 2012. This issue is relevant to reckoning the claimant's probationary period and is discussed below. If the claimant was terminated outside of the probationary period, the parties also dispute whether Q.7 of the Training Pilot Manual supersedes the expressed terms of the employment contract.

184. The evidence shows that termination letter was properly sent to the claimant's registered address within the probationary period. Was the submission of the claimant as to the date of termination be correct, it would mean that his last flight with the defendant being June 28, 2012 he would have flown no other flights for over a month without enquiry, until the July 31, 2012. This in the court's view is very unlikely. In any event on the documentary evidence is clear that the claimant was terminated on July 5, 2012, within period of probation, same having been communicated to him by letter dispatched to his residential address and the court so finds.

WAS THE CLAIMANT TERMINATED IN BREACH OF THE TERMS OF HIS CONTRACT

185. It is the claimant's case that the defendant failed to invoke the procedural provision under Q.7.

186. The relevant clauses of the contract read:

3.2 If you do not complete your first recurrent simulator and Line checks to the required level, at the company's sole discretion this probationary period may be extended up to the date of completion of the second recurrent simulator and Line checks, at which time you must attain the required level. Failure to achieve the required standard will result in termination of employment without notice or payment in lieu of notice.

3.3 During the probationary period you are required to undergo and successfully complete the Type Training. If you fail any of the checks during the Type Training, the company may in its discretion determine either further training and a check or terminate your employment forthwith without notice or any payment in lieu of notice.

3.4: At any time during your probationary period, your employment may be terminated by the Company in its sole discretion, with two (2) weeks notice in writing, or payment in lieu of notice.

187. Q.7 of the Pilot Training Manual states:

A pilot on probation will be confirmed in his position on passing his Check 'A' and Check 'B' with a grade of GOOD, provided no adverse reports concerning his employment generally, have been received by the Chief Pilot. A pilot about whom adverse reports have been received, will have his probation extended for a period of three (3) to six (6) months and will only be confirmed, if there are no reasonable doubts about his suitability for employment.

A pilot on probation, who receives a grade lower than GOOD in his first Check 'A' or Check 'B' will remain on probation until such time as he passes his second Check 'A' or Check 'B' with a grade of GOOD. Should his second Check 'A' or Check 'B' result in a grade lower than GOOD he will have his employment terminated.

188. The claimant pointed out that the defendant breached its own policy if the claimant was terminated during the probationary period. Further the termination letter refers to a debriefing session on July 5, 2012. If there was a progress check on June 28, 2012, then that is considered the first check and the claimant ought to have remained on probation until he passed his second check. Thereafter, if he failed the second check, then his employment could have been terminated.

189. In response, the defendant relied on **Joel Browne v The Vehicle Management Corporation of Trinidad and Tobago, CV2015-04037**, a case determined by this court, where it was held at paragraph 14 that in relation to termination, the terms specifically provided for by the contract could not be superseded or overwritten by the terms of the defendant's internal policy.

Analysis and Findings

190. The court finds that the pilot training manual was in fact incorporated as the procedure to be followed under the contract of employment and must be read with the contract. There is no evidence that the claimant was given a second progress check. This specific requirement is fundamental but the relevant provisions of the manual as is obvious, conflicts with the relevant provisions of the contract.

191. The issue therefore arises as to which provision is to prevail. In that regard, it is clear that as a matter of law the specific provisions of the contract would prevail in so far as they specifically derogate from the process set out in the manual, the intention being to specifically exclude the application of the relevant provisions on the incorporated manual.

192. Under clause 3.2 of the contract, the defendant retained the sole discretion in relation to whether a second check was to be done. That clause therefore takes precedence over the collateral provision set out in the manual.

193. It follows, therefore, that the claimant was not terminated in breach of the provisions of the contract and his training was conducted in accordance with the defendant's Regulations. It appears from the whole of the evidence that the defendant entertained a reasonable basis for finding that the claimant lacked the basic skills of airmanship, speed control and landing and that it operated well within the terms of its contract in training the claimant and in coming to that conclusion. It was not lost on the court that at least part of that training was conducted at the cost of some Thirty Five Thousand Euro €35,000.00. There would also

have been other costs. These are costs that the defendant would not have likely thrown away except for very good reasons.

BREACH OF NOTICE OF TERMINATION CLAUSE

194. The claimant sought damages, special damages of \$11,443.00 representing salary in lieu of notice and repayment of expenses incurred during employment and exemplary damages, attributable to his wrongful dismissal. The court having determined that the claimant was terminated within the probation period Clause 3.4 of the contract of employment, set out above and which refers specifically to termination during the period of probation applies.

195. It follows equally that contrary to the submission of the claimant, clause 18.2 (*The Company may terminate your employment at any time by giving you one (1) month's notice in writing or by paying you one (1) month's salary in lieu of notice*) cannot apply that clause in any event treating with termination otherwise than while on probation.

196. It follows that the defendant breached clause 3.4 by not giving either two weeks notice or two weeks salary in lieu thereof. The claimant is herefore entitled to damages in the sum of the equivalent of two weeks salary with interest from the date of the breach namely the 5th July 2012. His monthly salary was at the time the sum of Eight Thousand, Four Hundred and Forty Three dollars.

DISPOSITION

197. The order of the court is therefore as follows:

1. The defendant shall pay to the claimant damages for breach of clause 3.4 of the contract, (namely for failure to give two weeks notice of termination or pay half salary in lieu thereof) in the sum \$4,221.50 together with interest thereon at the rate of 3.5% per annum from the 5th July 2012 to the date of judgment.
2. In all other respects the claim is dismissed.
3. Each party to bear its own costs.

Ricky Rahim

Judge