TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. 2011/02678

BETWEEN

KEVIN JOHN CLAIMANT

AND

THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE DEAN-ARMORER

APPEARANCES
Mr. Ronald Simon for the Claimant.
Ms. Giselle Jackman and Ms. Kamala Mohammed Carter for the Defendant.

RULING

1. By notice of application filed herein on 19th August, 2011, the defendant[1] sought orders that the instant claim be struck out pursuant to ***Part 26.2(1)(b)*** and ***26.2(1)(c)*** of the ***Civil Proceedings Rules 1998***[2] ("the CPR").

2. On 22nd March, 2011, I dismissed the defendant's application to strike and extended time for the filing of a defence. The defendant filed a procedural

[1] Defendant/Attorney-General.
[2] Civil Proceedings Rules 1998

appeal. This was however discontinued by notice filed on the 24th of April 2012. The reasons for my decision are nonetheless set out below.

Procedural History

3. On 15th July, 2011, the claimant instituted the instant proceedings, seeking the following orders:

   1. *Arrears of salary and benefits for breach of contract of employment and wrongful dismissal.*
   2. *Interest …*
   3. *Damages for breach of contract.*

4. By his statement of claim the claimant alleged that he had been enlisted as a Private in the Trinidad and Tobago Defence Force on an initial contract for a period of six years. At length, the claimant alleged that he was discharged on the 1st of March, 2011 without "any discussion, enquiry, hearing or tribunal[3]". It is in respect of this dismissal that the claimant seeks relief.

5. The defendant did not file a defence, but by notice of application on 19th August, 2011 learned attorneys-at-law for the defendant applied to have the claim struck on the following grounds:

[3] See the Statement of Case filed 15th July,2011 paragraph 13.

i. *The terms of engagement of members of the armed forces do not constitute a contract of service … and courts will … not entertain an action for wrongful dismissal …*

ii. *One can only complain of a lack of an opportunity to be heard in the context of judicial review proceedings ".*

6. The defendant's application was listed for hearing on 3rd November, 2011. I gave directions for the filing of written submissions on behalf of both parties. Further submissions in reply were filed on behalf of the Attorney General. It was on the basis of written submissions that I gave an oral decision.

Law and Submissions

7. Submissions for both parties were in writing. The defendant argued that the terms of engagement of members of the armed forces, do not constitute a contract of service. Learned attorneys-at-law for the defendant argued further that the claim ought to have been brought by way of judicial review.

8. The ***Defence Force Act*** Ch. 14:01 provides:

"20 (1) The term for which, a person enlisting in the Force may be enlisted is the term beginning with the date of his attestation mentioned in this section.

(2) Where the person enlisting has attained the age of 18 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 … .

23 (1) … every soldier upon becoming entitled to be discharged shall be discharged with all convenient speed … .

(2) Except in pursuance of the sentence of a court martial under service law an other rank shall not be discharged unless his discharge has been authorized by order of the competent military authority.

(3) Every other rank shall be given on his discharge a certificate containing such particulars as may be prescribed."[4]

Part V of the ***Defence Force Act***[5] provides for discipline and trial and punishment of members of the defence force.

9. Section 79[6] provides for punishments as follows:

[4] Defence Force Act Ch. 14:01.
[5] Ibid.
[6] Ibid.

"(1) The punishments which may be imposed on an officer by sentence of a Court-martial are:

(d) dismissal from the State …"

10. Section 92[7] provides for Court-Martial and related general provisions. At section 2[8] of ***the Act***, the term *"service law"* is defined to include *"this Act; the Army Act 1955 of the United Kingdom, the Air Force Act 1955 of the United Kingdom."*

11. Learned attorney for the defendant relied on the following extract from ***Halsbury's Laws of England***[9] (4th ed. Reissue).

"The terms of engagement of members of the armed forces do not constitute a contract of service."

This learning is supported by ***In Re Tufnell*** [10] and ***Quinn v Ministry of Defence*** [11] in which the plaintiff served as an enlisted member of the Royal Navy. It was there held *inter alia* that no contract of employment existed between the plaintiff and the defendants as there was no intention to create legal relations between a member of the armed forces and the Crown.

[7] Defence Force Act Ch. 14:01.
[8] Ibid.
[9] 2 (2), Halsbury's Laws of England (4th ed. Reissue).
[10] In Re Tufnell [1876] 3 Ch. 164.
[11] Quinn v Ministry of Defence [11][1998] P.I.Q.R. 387.

12. Attorneys-at-law for the defendant relied on a judgment of the Court of Appeal in Northern Ireland that is to say ***In the Matter of an Application by BW for Judicial Review***[12]**.**

In that case the learned judge at first instance had dismissed an application by the appellant who had challenged the legality of his discharge from the army by the General Officer commanding in Northern Ireland and the Ministry of Defence.

The appellant had not been informed of his discharge on security grounds. The Court of Appeal considered the governing legislation including the Army Act of 1955, the Queens Regulations and the European Convention on Human Rights.

The Court of Appeal upheld the decision at first instance that the appellant's discharge did not offend the 1955 Act or the Queen's Regulations at paragraph [47].

13. In ***R v Lord Chancellor's Department, ex parte Nangle***[13] the applicant had been dismissed from his clerical position in the civil service. He appealed the decision to the permanent secretary however the appeal was dismissed.

[12] In the Matter of an Application by BW for Judicial Review [2007] NICA 44.

[13] R v Lord Chancellor's Department ex parte Nangle [1992] 1 All ER 897.

The applicant thus sought judicial review of the decision to uphold the charges and dismiss the appeal. The department applied to dismiss the application on the ground that the conduct of disciplinary procedures in relation to Crown servants was not a matter of public law which was susceptible to judicial review since the applicant was employed by the Crown under a contract of employment and the appropriate remedy was an action for breach of contract. In addition, even if the applicant was not employed under a contract of employment there was an insufficient public law element in the dispute to justify judicial review.

The court held that all the incidents of a contract of employment were present in the applicant's relationship with the Crown including offer, acceptance, consideration as well as an intention to create legal relations. Furthermore, despite the statement in para 14 of the Civil Service Pay and Conditions of Service Code that the relationship between civil servants and the Crown was regulated by the prerogative and that civil servants could be dismissed at pleasure, it could not have been intended that the conditions relating to civil servants' appointments were to be merely voluntary.

In any event, even if there was no legally enforceable contract of employment between the applicant and the Crown the mere fact that the applicant had no private law remedy did not mean that he had a public law

remedy. The internal disciplinary procedures of the applicant's department arose out of his appointment and were consensual, domestic and informal, unlike an appeal to an independent body set up under the prerogative. As such, judicial review would not be an appropriate remedy since there was an alternative and more effective remedy available from an industrial tribunal.

14. In ***Russell Joseph v Chief of Defence Staff, The Attorney General of Trinidad and Tobago***[14], the applicant, a Corporal in the Trinidad and Tobago Regiment brought a constitutional motion contending that his discharge from the Defence Force constituted a deprivation of his right to enjoyment of property under s.4[a] of the ***Constitution***[15] and/or that it was contrary to his right to equality before the law and protection of the law under s.4[b].

The respondents argued that the applicant did not hold a contract of service with the Defence force and therefore, could not bring an action in the courts connected to his service within the Defence force. His position was voluntary and that by virtue of s 28 of the ***Defence Act***[16] his service could be

[14]Russell Joseph v Chief of Defence Staff*, The Attorney General of Trinidad and Tobago* HC 1500/1997

[15] Constitution of Trinidad and Tobago Ch 1:01
[16] Defence Force Act Ch. 14:01.

determined at any time by the Chief of Defence Staff. Furthermore, it was submitted that the ***Defence Act***[17], was an existing law and thus remained valid in spite of ss.4 and 5 of the Constitution. The applicant submitted that the Chief Defence Staff could not determine his service before a court martial had been determined, by virtue of s 28 of the ***Act***[18]. The respondent submitted that s.25 [1] did not restrict the power of the Chief of Defence Staff to discharge another rank under s.28 of the ***Act***[19].

It was held, by the Honourable Justice Smith as he then was, that the applicant's right to the protection of the law as guaranteed by the ***Constitution***[20] was breached and a declaration to that effect was granted. The applicant was not dismissible at the pleasure of the State. In addition, the court agreed that a member of the armed forces does not hold a contract of service and therefore cannot sue for his pay. The statute had not altered the common law position therefore; the applicant had no property right which was infringed by his wrongful discharge.

15. ***Part 26.2*** of the ***Civil Proceedings Rules***[21]reads *inter alia*:

[17] Defence Force Act Ch. 14:01.
[18] ibid
[19] ibid
[20] Constitution of Trinidad and Tobago Ch 1:01
[21] Civil Proceedings Rules 1998

26.2 (1) The court may strike out a statement of case or part of a statement of case if it appears to the court –

(b) that the statement of case or the part to be struck out is an abuse of process of the court.

(c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim.

Reasoning and Decision

1. It was my view that as a matter of principle the Court ought not to strike out proceedings at its inception except in the clearest of cases. This principle had obtained under the old rules[22] and in my view it still obtains since it is founded on the fundamental right to be heard.
2. I therefore considered whether, having regard to the submission of the defendant it was clear that these proceedings failed to disclose a reasonable cause of action and/or constituted an abuse of process.
3. In respect of her contention that the proceedings failed to disclose a reasonable cause of action learned attorney-at-law cited a number of authorities which are referred to above. In my view it was doubtful whether these cases were applicable to our jurisdiction.

[22] Supreme Court Practice Rules 1991, para 18/19/3

In my view the case of ***Re Tufnell***[23] was of dubious relevance because of its antiquity.

The remaining authorities applied statutes which were not relevant to this jurisdiction. Learned attorney-at-law for the defendant attempted to integrate the ***U.K. Army Act of 1955***[24] into her argument by referring the definition of *"service law"* at section 2[25]. In my view, her attempt was unsuccessful.

4. Moreover, my perusal of the ***Defence Force Act***[26] suggested that procedures were set out for discipline and dismissal. In my view the concept of dismissability at pleasure was inconsistent with the detailed provisions which were to be found in the ***Defence Force Act***.[27]

5. The Court's doubts as to the merits of the defendant's application were intensified when I considered the claimant's submissions.

The claimant referred to the watershed decision of the Privy Council in ***Thomas v A.G.***[28] where Lord Diplock ruled that the concept of dismissability at pleasure was no longer applicable under Westminster constitutions.

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[23] Re Tufnell [1876]3 Ch.164.
[24] United Kingdom Army Act of 1955
[25] Defence Force Act Ch. 14:01.
[26] ibid
[27] ibid
[28] [1982] AC 113

6. Learned attorney-at-law, Mr. Simon relied as well on ***exp. Nangle***[29] which suggested that all the elements of a contract of employment were present in a public servant's relationship with the Crown.

7. It was my view therefore that it was far from clear that the claimant had failed to disclose a reasonable cause of action. It was also my view that the defendant's submission in support of their application to strike served to raise more questions than to provide answers.

8. I then considered the defendant's application to strike out the claim on the ground that the action constituted an abuse of process. As a matter of principle, the court will find the presence of an abuse of process where the claimant complains of a public authority's infringement of public law rights by way of ordinary action.[30]

9. The claimant in these proceedings did not seek orders which are required to be sought by way of judicial review. Although there had been an allegation of a breach of natural justice, the items of relief sought in these proceedings were those traditionally sought by way of writ. Had the claimant sought an order of certiorari for example, the defendant would have been correct in contending that there had been an abuse of the cause of action and the relief sought, the claim was properly instituted by way of a claim filed under Part

[29] R v Lord Chancellor's Department ex parte Nangle [1992] 1 All ER 897
[30] O'Reily v Mackman [1983] 2 A.C. 237

8.1 of the ***Civil Proceedings Rules.***[31] It was my view that the mere allegation of a breach of natural justice is not adequate to inject a public law element into the cause of action or to require the claimant to proceed by way of judicial review.

10. Accordingly, it was my view that learned attorney-at-law for the defendant had not substantiated her application to strike. I dismissed the application and gave the defendant permission to file a defence.

Dated the 1st day of May, 2012

M. Dean Armorer

Judge[32]

[31] Civil Proceedings Rules 1998

[32] J.R.A. Kendy Jean
Judicial Secretary Irma Rampersad