

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Port of Spain

**Claim No. CV2018-03492**

**In The Matter Of The Decision Of The Chief Of Defence Staff To Discharge The Intended  
Claimants From The Appointment As Officer Cadets In Trinidad And Tobago Defence Force**

**And**

**In The Matter Of The Failure Of The Intended Respondents To Perform Functions Designated  
By Section 191 Of The Defence Act Chap. 14:01**

**And**

**In The Matter Of An Application For Redress In Accordance With Section 14 Of The  
Constitution By The Intended Claimants, Citizens Of Trinidad And Tobago Alleging That  
Certain Parts Of The Said Constitution Have Been And Will Be Contravened In Relation To  
Them By Reason Of The Action And/Or Conduct Of The State**

Between

**Reinaldo Francis Cozier**

**Aleem Brandon Khan**

**Gabriel Mc Intosh**

**Michael Esdelle**

Claimants

**And**

**The Chief of Defence Staff  
The Attorney General of Trinidad and Tobago**

Defendants

**Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell**

Delivered on: January 23, 2020

**Appearances:**

Mr. Arden Williams and Ms. Shelly-Ann Daniel, Attorneys-at-Law for the Claimants

Ms. Karlene Seenath and Ms. Amrita Ramsook, Attorneys-at-Law for the Defendants

**JUDGEMENT**

**A. Introduction**

1. The instant matter is a Judicial Review Claim filed by four former Officer Cadets of the Trinidad and Tobago Defence Force [“TTDF”] seeking declaratory reliefs and compensation. The Claim arises from the fact that in June 2018 they were all being discharged from the TTDF. This was the outcome of an incident on October 29, 2016 when, along with three other male Cadets and one female Cadet, they all engaged in activities such as drinking alcohol in an out of bounds area known as Crow’s Nest.
2. They alleged that there was procedural unfairness, breach of natural justice, breach of legitimate expectation, abuse of process and inequality of treatment contrary to **Section 4 (b) and (d) of the Constitution of Trinidad and Tobago** (“the Constitution”) in the circumstances surrounding their discharge.

**B. Factual Matrix**

3. The evidence before the Court in support of and in opposition to the Claim was based solely on Affidavit evidence as neither side cross-examined the other's witnesses. The Claimants filed the following Affidavits in support of their Claim:
  - (a) Joint Affidavit sworn September 28, 2018 and re-filed February 22, 2019;  
and
  - (b) Joint Affidavit in Reply sworn December 3, 2018 and re-filed February 22, 2019.
  
4. The Defendants filed the following Affidavits in response:
  - (a) Affidavit of Captain Nigel Parris filed November 19, 2018;
  - (b) Affidavit of Captain Michelle Moore filed November 19, 2018;
  - (c) Affidavit of Major Josette Mc Lean filed May 28, 2019;
  - (d) Affidavits of Lieutenant Colonel Peter Ganesh filed November 19, 2018 and May 28, 2019; and
  - (e) Affidavits of Major Aubyn Hinkson filed November 19, 2018 and May 28, 2019.
  
5. On a review of the Affidavit evidence, there are some aspects of the factual matrix essentially agreed by the parties. However, the parties do not agree on some aspects of the events leading to the Claimants' discharge.
  
6. It is not in dispute that the Claimants were deemed qualified and appointed to Officer Cadetship effective October 20, 2015 by the 1st Defendant Ref: NS: 44/4/20 Vol. 9 letter dated January 4, 2016.

7. On October 29, 2016, the Claimants, alongside four other Officer Cadets, collectively engaged in conduct to the prejudice of good order and military discipline contrary to the Defence Act at Tetron Barracks. That conduct of this nature which was engaged in by the Claimants is admitted at page 9, Paragraph f.ii. of the Fixed Date Claim. The four Claimants and the other Officer Cadet involved were collectively subject to four different charges under the Defence Act.
8. They were in training to be commissioned as Officers. Documents on file indicate that they had all been successful in training and had been recommended for appointment as Second Lieutenants.
9. On or around February 23, 2017, an investigation was launched, and the conduct of the group of Cadets involved in the October incident was called into question. The Claimants, who were part of this group, were interviewed and asked to submit reports. The interviews were conducted by Major Damian Phillips, Chief Instructor of the Officers' and Warrant Officers' Training Division and later by Lieutenant Colonel Peter Ganesh, Commanding Officer.
10. At the time of these investigations, the Claimants were informed, that an allegation of sexual assault was made by the sole female Officer Cadet who had been implicated with them in the October incident.
11. The Claimants claim they were directed to disclose no information to anyone regarding this allegation of sexual assault as this was an internal affair. Specifically, they say they were advised by Major Phillips that the part about sex should be left out of their reports as the events of October 29, 2016 was a minor matter and would end with minor or no punishment. The Claimants claim that Captain Michelle Moore and Major Julia Charles Joseph advised them not to obtain any legal representation. Captain Michelle Moore denies ever having interviewed or spoken to the Claimants about anything other than welfare services.

12. Eventually on March 16, 2017, the Claimants were charged with offences under the Defence Act Chap 14:01, namely disobeying commands prohibiting entry to an out of bounds area, disobedience to Standing Orders by consuming alcohol and by fraternizing with a female Officer Cadet and colluding to conceal the events that occurred on the night of October 29, 2016.

13. The Claimants each were summarily charged as follows:

- i. DISOBEYING A LAWFUL COMMAND CONTRARY TO SECTION 44 (1) OF THE DEFENCE ACT CHAPTER 14:01 OF THE LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO, in that he, at Tetron Barracks on Saturday October 29, 2016, disobeyed an order to not enter an 'out bounds' area at the Crow's Nest Jetty that was given by Major D Phillips, Chief Instructor of the Officers' and Warrant Officers' Training Division;
- ii. DISOBEDIENCE TO STANDING ORDERS CONTRARY TO SECTION 46 (1) OF THE DEFENCE ACT CHAPTER 14:01 OF THE LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO, in that he, at Tetron Barracks on Saturday October 29, 2016 contravened the Standing Orders of the Trinidad and Tobago Regiment Basic Officer Training Course Paragraph 40 by consuming alcohol in a location other than the Officers Mess, an order known to him or one which he might reasonably be expected to know;
- iii. CONDUCT TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE CONTRARY TO SECTION 77 OF THE DEFENCE ACT CHAPTER 14:01 OF THE LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO, in that he, at Tetron Barracks on Sunday October 30, 2016 colluded with other Officer Cadets of the Trinidad and Tobago Regiment Basic Officer Training Course 1601 to conceal the facts about the events that occurred on the night of Saturday October 29, 2016;
- iv. DISOBEDIENCE TO STANDING ORDERS CONTRARY TO SECTION 46 (1) OF THE DEFENCE ACT CHAPTER 14:01 OF THE LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO in that he at Tetron Barracks on Saturday 29, October 2016 contravened

the Standing Orders of the Trinidad and Tobago Regiment Basic Officers' Training Course, Paragraph 35, by fraternizing with 13125 Officer Cadet Janine Drakes (Female), an Order known to him or one which he might reasonably be expected to know.

14. The Claimants all entered guilty pleas to these offences. They were convicted after a military tribunal hearing in which Major Aubyn Hinkson, Chief Instructor [CI] and Officer Commanding of the Army Learning Centre presided. The sanction imposed was that they were admonished.
15. The Claimants say that based on the prior advice received from the above-mentioned officers, they had no legal representation prior to being convicted for the Defence Act offences. Major Hinkson admits that he indicated to the Claimants that as it was a summary trial, the Claimants were not entitled to representation by an Attorney at law. However, he states that they were free to consult an Attorney on any issue of law relating to the charges made against them.
16. There is however, a note by Lieutenant Colonel Ganesh dated the same March 16, 2017 day of the summary trial in the Commanding Officer's book that states that the Claimants were advised to begin the process of seeking legal counsel so that they would be able to mount a sound legal defence should matters related to the conduct they were involved in proceed to the criminal court.
17. Shortly after the Defence Force charges were dealt with, the Claimants were in fact charged by the Trinidad and Tobago Police Service with sexual offences against the female Cadet. The criminal charge in the civil jurisdiction (non-military jurisdiction) laid against the Claimants after they were convicted by the military tribunal for Defence Act offences is still pending.

18. On or about the 3<sup>rd</sup> week of March, 2017, the Claimants claim they were informed by Major Aubyn Hinkson, in his capacity as the new Chief Instructor [“CI”] at the Army Learning Centre, that, they would be discharged on the basis of the Chief of Defence Staff’s “Zero-Tolerance Policy” in relation to members of the TTDF charged with criminal offences. This is denied by Major Hinkson in his own affidavit, where he avers that the Claimants were administratively separated from the Defence Force due to undisciplined behaviour. A report by Major Hinkson dated 17 March, 2017 recommended to Lt. Col. Ganesh that the Claimants be discharged.
19. On 20 March, 2017, the Claimants were advised by Lieutenant Colonel Ganesh that his decision as Commanding Officer was to recommend to the Commission that the Claimants be discharged from the Regiment. Thereafter, on 4 May, 2017, the Claimants were informed that they had been recommended for discharge but that no final decision had yet been received from headquarters. Both of these indications are written in the Commanding Officer’s book by Lieutenant Colonel Ganesh.
20. On June 29, 2018, the Claimants were informed of their discharge effective June 29, 2018. The reason for discharge cited on Ref: TTR 41/8 was “*failing to qualify for selection as an Officer Cadet*”. It is this discharge decision that the Claimants challenge by way of these Judicial Review proceedings. The Claimants contend and seek declarations that *inter alia*;
- (a) The decision against the Claimants amounted to inequality of treatment from a public authority in exercise of its functions in breach of Section 4 (b) and (d) of the Constitution.
  - (b) The Claimants’ Constitutional Rights under the Constitution at Section 5(2)(f) and (i) to be presumed innocent until proven guilty, Section 4(b) and 5(2)(e) to protection of the law and a fair hearing have been breached by the alleged application of the zero-tolerance policy in deciding on their discharge.

- (c) No adequate reasons were given for the decision because the Defendants' written reference to "failing to qualify" for selection was irrational since the Claimant's had already been selected as Cadets.
- (d) The Claimants were not given an opportunity to be heard before the discharge decision was taken.
- (e) The rules of natural justice were not duly applied in deciding on the discharge.
- (f) The discharge was ultra vires the provisions of the Defence Act.
- (g) The Claimants relied to their detriment on assurances given to them prior to the military tribunal hearing that legal representation was not required to assist them.

**C. Issues**

21. Neither the Claimants nor the Defendants have clearly identified issues in their written submissions filed pursuant to the Court's directions. However, having reviewed the Fixed Date Claim with the evidence in support and against, it has been determined that there are certain key issues that underlie the relief claimed by the Claimant and the defences raised by the Defendants. These issues relevant to the determination of the Claim are summarised in the following questions:

- (a) Did the Claimants suffer breaches of natural justice due to absence of any opportunity to be heard or make representations on their own behalf in respect of the decision to discharge following the decision to admonish? In particular, were the Claimants denied an opportunity to be given timely information as to the reason for discharge and then to receive legal advice to defend against the stated reason namely, that they failed to qualify as Officer Cadets before being discharged?;
- (b) Was the discharge decision made after the conviction for Defence Force charges based on the alleged zero-tolerance policy being applied to the pending civilian charges or was there sufficient basis for their discharge for Defence Act offences by virtue of the Standing Orders without consideration



of the civilian charges for sexual assault which arose from the same incident?  
And if a zero tolerance policy was applied, did this amount to a breach of the constitutional presumption of innocence?;

- (c) Were the Claimants treated less favourably than others similarly circumstanced?;
- (d) Did the decision to discharge the Claimants, after the conduct in the October 2016 incident was adjudicated upon and admonitions given to them, amount to an abuse of process?;
- (e) Is there sufficient evidence that the Claimants relied on the assurances and orders of the Commanding Officer of the Support and Service Battalion, the Officer Commanding the Army Learning Centre Major Aubyn Hinkson, the Chief Instructor Major Damian Phillips, the G1 Legal, Major Julia Charles-Joseph, a Staff Officer, to their detriment when they advised against obtaining legal representation for the trial of the Defence Act offences due to the sensitive nature of the matter and were ordered not to disclose anything to anyone, and as such the Claimants were unable to defend against the discharge decision that came afterwards?;
- (f) Were the Claimants unfairly treated when the Defendants decided on their discharge which in effect amounted to a further sanction although they had received prior punishment of admonition for the same conduct?;
- (g) Were the Claimants deprived of the opportunity to challenge the discharge decision made by the Defendants?

22. The Claimants also raised a sub-issue as to whether the procedure followed in the summary trial was unfair. The subject matter of this claim is, however, neither that proceeding nor the conviction/admonition decision was its outcome. The subject matter of the Claim is the discharge decision that followed based on a recommendation arising from the Trial. The fairness of the Summary Trial will however be looked at in this Judgement as a component of factors, along with mitigation, proportionality and other

matters that the Claimants could have raised had they been afforded natural justice before the discharge decision was made.

23. The Defendants, in closing submissions, raised a preliminary issue in relation to whether the Claimants sufficiently pleaded their case by outlining the reliefs being claimed. Other points submitted on by the Defendants as to availability of an alternate remedy, were over-ruled at the initial stage of this matter when the Claimant's application for leave to file the Claim was granted.

#### **D. Law and Analysis**

##### *Preliminary Objection:*

24. Counsel for the Defendants raised a preliminary objection in closing submissions that the Claimants failed to properly outline the relief being claimed and against which of the Defendants it was being sought. They, therefore, submit that the Claimants are not entitled to relief for any aspect of the Claim argued for in their written submissions.

25. The Claimants submit in reply that pages 11-16 of their Claim filed on February 22, 2019, with pellucid clarity, itemized each and every one of the reliefs sought. Further, they highlight that all of the reliefs sought at this stage were also outlined in the original Application for leave, which was granted.

26. Indeed, although not drafted in the traditional way, the Claimants' Fixed Date Claim outlines at pages 11 to 16 numerous declarations sought, including an order quashing the decision to discharge the Claimants and order that they be reinstated. There are also claims for monetary compensation with interest and damages. The Defendants, from the initial stage of the matter, knew what case they had to answer, and the Court was at all material times aware of what the Claimants complained of and what they were seeking. This point raised by the Defendants is therefore without merit.

The Legislative and Regulatory Framework:

27. The relevant provisions of the Defence Act, Chap. 14:01 cited by the parties are set out below:

*“2. In this Act—*

*“appropriate superior authority” has the meaning assigned to it by section 86(1) and section 90(2);*

*“commanding officer” has the meaning assigned to it by section 90(1);*

*“service law” includes this Act, the Army Act 1955 of the United Kingdom, the Air Force Act 1955 of the United Kingdom and the Naval Discipline Act 1957 of the United Kingdom;*

*46. (1) Any person subject to military law who contravenes any provision of orders to which this section applies, being a provision known to him, or which he might reasonably be expected to know, is, on conviction by Court-martial, liable to imprisonment for two years or less punishment.*

*(2) This section applies to Standing Orders or other routine orders of a continuing nature made for any formation or unit or body of troops, or for any command or other area, garrison or place, or for any ship, train or aircraft.*

*77. Any person subject to military law who is found guilty of any conduct or neglect to the prejudice of good order and military discipline is liable, on conviction by Court-martial, to imprisonment for two years or less punishment.*

*85. Before an allegation against a person subject to military law (herein referred to as “the accused”) that he has committed an offence against this Part is further proceeded with, the allegations shall be reported, in the form of a charge, to the*

*accused's commanding officer and the commanding officer shall investigate the charge in the prescribed manner.*

*86. (1) After investigation, a charge against an officer below the rank of lieutenant-colonel or against a warrant officer or corresponding rank may, if an authority has power under this Part to deal with it summarily, be so dealt with by that authority (herein referred to as "the appropriate superior authority").*

*90. (1) In this Act, the expression "commanding officer", in relation to a person charged with an offence, means the officer for the time being commanding the unit to which the person belongs or is attached.*

*(2) The reference back of a charge under subsection (1) is without prejudice to the preferring of another charge where the higher authority has so directed or the commanding officer thinks fit.*

*(2) Subject to this section, the following persons may be an appropriate superior authority in relation to a person charged with an offence:*

*(a) the Chief of Defence Staff;*

*(b) any other officer or panel of officers appointed for the purpose by the President under subsection (3).*

*(4) Rules of Procedure may confer on officers, or any class of officers, who are authorised by such Rules to exercise the functions of commanding officer, power to delegate those functions, in such cases and to such extent as may be specified in such Rules, to officers of a class so specified.*

*91. (1) Rules of Procedure may specify the charges which may not be dealt with summarily –*

*(a) by a commanding officer;*

*(b) by an appropriate superior authority; and*

*(c) by a commanding officer or an appropriate superior authority except with the permission of an officer authorised to convene a Court-martial for the trial of the accused.*

*139. (1) Subject to this section, the Minister may make Rules (herein referred to as Rules of Procedure) with respect to the investigation and trial of, and awarding of, punishment for offences cognisable by Court-martial, commanding officers and appropriate superior authorities and with respect to the confirmation and revision of findings and sentences of Courts-martial.*

*(8) Until such time as Rules of Procedure are made under this section, the matters with respect to which such Rules may be made shall be governed, with such modifications as shall be necessary for the purpose, by the Rules of Procedure made under sections 103, 104 and 105 of the Army Act 1955 of the United Kingdom.*

28. The relevant provisions of the **Trinidad and Tobago Regiment Basic Officers' Training Course Student Standing Orders** are outlined below:

*"22. Although all courses are primarily educational in nature, designed to permit students to develop their abilities, it is possible for students to fail to meet the absolute performance criterion and thus fail the course. Two pre-conditions, honesty and conduct are pass/fail criterion. Unacceptable conduct or lack of honesty while on the course will result in course failure. The principal reason for failure to meet the minimum assessment standards are:*

- a. Unmilitary-like (or "un-officer like") behaviour;*
  - b. Lack of motivation; or*
- Lack of ability.*

*23. Unmilitary-like Behaviour. Any student whose conduct while attending the ALC involves unmilitary-like behaviour, such as plagiarism, excessive use of alcohol, etc will be recommended by the CI of the relevant Training Division to the CI ALC for immediate failure and RTU (Return to Unit). DS will report students affected to the CI.*

*26. Students are required to maintain the highest levels of discipline in accordance with the Standing Orders.*

*27. Students will be RTU on a recommendation from OG Trg Coy for any matter that results in disciplinary action being taken against them. Any student found guilty of collusion/cheating during exams, plagiarism, theft, insubordination, fraternization (students and students or students and staff or students and non-staff members i.e. Defence Force personnel) or any act of indiscipline will be immediately RTU or discharged.*

*35. Fraternization between Course Participants is STRICTLY PROHIBITED. Any Course members or other Military Personnel will be RTU's or discharged in the case of Local Students.*

*40. Consumption and use of alcohol and cigarettes and illegal drugs are restricted. Students are forbidden from consuming alcohol during class hours and such use will be restricted to the Officers' Mess.*

*79. The provisions in the following sections apply to Basic Recruit Training Programmes conducted by the ALC on behalf of the Trinidad and Tobago Regiment (Army) or any other external organisation that has requested such training to be run on its behalf. The final authority for all matters pertaining to Basic Recruit Training is the Commanding Officer of the Trinidad and Tobago Regiment (Army). The Commandant of the ALC acts on his behalf and therefore has authority to enact policy and decisions that affect the conduct and execution of training."*

29. Additional relevant provisions are found in the **Trinidad and Tobago Regiment Army Learning Centre (ALC) Student Standing Orders:**

*“4. Personnel attached or posted to the Army Learning Centre are under the command of the Chief Instructor for the purpose of Administration and Discipline. All other administrative responsibilities and disciplinary procedures remain with the individual’s parent unit.*

*87. Absolutely no cell phone or sim cards are allowed during recruit training. Knives, weapons of any type, non-prescription medication, pornographic material, computers or similar electronic devices are considered contraband. If at any point recruits are discovered with these items, the items will be confiscated and returned to the recruit’s next of kin.*

*98. Any recruit who causes or colludes with anyone to harm himself or others... will be charged with an offence against these Orders and the Defence Act and will be liable, upon being found guilty, to withdrawal from training.”*

30. The provisions of the **UK Army Act 1955** cited by the Claimant are set out below:

*“82. (3) Regulations under this section may confer on officers, or any class of officers, who by or under the regulations are authorised to exercise the functions of commanding officer power to delegate those functions, in such cases and to such extent as may be specified in the regulations, to officers of a class so specified.”*

### Natural Justice/Procedural Fairness

31. By virtue of Section 5 (3) of the Judicial Review Act, Chap 7:08 the Court may, on an application for Judicial Review, grant relief upon any number of the listed grounds. These include breach by the decision maker of the principles of natural justice and the unreasonable exercise by the decision maker of a discretion. These two grounds have been taken into account in the review of the decision made to discharge the Claimants. In so doing, it is recognised that under Paragraph 24 of the Student Standing Orders there is authority for a recommendation to be made where any cadet is found to have

committed certain breaches of the Student Orders. There is no indication of specifically who such recommendation should be made to, however, Paragraph 79 indicates the chain of command as being the Commandant of the Army Learning Centre who then reports to the Commanding Officer of the Regiment.

32. There is no provision that the decision makers having received such a recommendation are permitted to merely rubber stamp it and implement the discharge. However, there is no evidence in the instant case as to the process and factors that guided the Defendants in exercising their discretion whether or not to discharge the Claimants. There is evidence of the prior summary trial process and the convictions considered before the discharge recommendation was made but no evidence as to how that recommendation was considered before deciding to discharge the four Claimants. Moreover there is no evidence that the Claimants' representations as to relevant factors, such as mitigation, were taken into account.
33. The Claimants claim they were neither afforded sufficient notice of the charges in relation to their discharge, nor given an opportunity to be heard with legal representation. Further, they say they that, prior to the discharge decision, they were not afforded notice of issues to be addressed as to their "qualifying" for a Cadetship.
34. The Claimants submit that no adequate reasons were given for the decision because the Defendants written reference to "failing to qualify" for selection as Officer Cadets was irrational since the Claimants had already been selected as Cadets. In my view, this may have simply been an error in phrasing as it is clear that what was intended was discharge based on failing to qualify for **continued** Cadet training towards being appointed as Second Lieutenants (Paragraph 9 of Joint Affidavit in Reply filed by Claimants on Dec 3, 2018) based on not meeting the standards of conduct set in the Standing Orders. However, the irrational reason is an issue that could have been clarified through an opportunity given to the Claimants to make representations before the discharge decision.



35. On behalf of the Defendants, Lt Col. Peter Ganesh states in his affidavit that the Claimants were advised by him to seek external legal advice if they so desired and Major Jozette McLean also avers that the Claimants were advised that they could submit requests for information through their lawyers or on their own behalf. The Claimants point out that Lt. Col. Peter Ganesh in his Affidavit does not state when he advised the Claimants to seek legal advice. Additionally, this suggested recourse to legal advice was not in relation to an opportunity to be heard prior to the discharge decision. The advice of Lt Col Ganesh was given in relation to the pending civilian charges for sexual assault. The advice of Major Jozette Maclean was given in June after the Claimants had already been discharged.
36. As it relates to the Summary Trial that preceded the discharge decision, Major Aubyn Hinkson's evidence is that the Claimants were given notice of the trial, copies of the charge reports had been read out and explained to them and they had the opportunity to present their defence and to call witnesses. He further indicated that as it was a summary trial, the Claimants were not entitled to representation by an Attorney at law but were free to consult an Attorney on any issue of law relating to the charges made against them.
37. The Defendants highlight in submissions that the Claimants could have elected to be tried by Court-martial. This would have entitled them to have legal representation at trial but none of them made that election.
38. In **Chief Immigration Officer of British Virgin Islands v Burnett (1995) 50 WIR 153 (BVI)** the right to be heard was examined:

*“According to the audi alteram partem rule, where any authority (person or body of persons) intends to exercise a constitutional, statutory or prerogative power and thereby to make or take a judicial, quasi-judicial or administrative decision or action which will adversely affect the status, rights, interests or legitimate expectations of any other person (the complainant), the authority is under a common-law duty (and may also be under a constitutional or statutory duty) to*

*observe certain formalities and the complainant has a correlative common-law right (and may also have a correlative constitutional or statutory right) to the observance of those formalities before such a decision or action is made or taken. Those formalities may include **notice to the complainant of the specific allegations made against him** and a **fair and reasonable opportunity for the complainant to answer or rebut those allegations** and to make representations in regard to the intended decision or action.”*

39. It is unequivocal that the Claimants indeed wrote and signed statements admitting to the events that forms the basis for their summary trial and admonition. However, this does not mean that consideration ought not to have been given by the decision maker who subsequently decided on their discharge as to whether the Claimants should be afforded an opportunity to make representations as to whether they had qualified to be Cadets before a decision was made to discharge them on that basis.

40. In the decision of **Rees v Crane (1994) 43 WIR 444** the decision-makers in question did not notify the applicant that the question of removing him was being considered, nor did they give him any notice of the complaints made against him, nor did they give him any chance to reply to them. The House of Lords analysed the principles of natural justice in determining whether the applicant indeed had a right to these procedural stages.

41. The House of Lords considered the case of **Furnell v Whangarei High Schools Board [1973] AC 660**:

*'It has often been pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules: see the speeches in Wiseman v Borneman [1971] AC 297. Natural justice is but fairness writ large and juridically. It has been described as “fair play in action”.*

42. The House of Lords also considered several factors including the seriousness of the charge and the penalty involved in determining whether there was in fact fairness in the process. In the present case, charges laid against the Claimants have been admitted to in their reports on the incident. A disciplinary decision was taken to find them guilty and admonish them. That decision is not questioned in the instant proceedings.
43. However, the administrative decision made subsequent to the Claimants' Trial to discharge them as Officer Cadets is a grave one that impacts the Claimants' livelihood and reputation. It is that second decision made by the Defendants that is challenged. Fairness required that some representation by the Claimants should have been considered before such a decision was made.
44. There is merit to the submission by Counsel for the Claimants that they were entitled to adequate notice of their recommendation for discharge. They also ought to have been given information on the basis for discharge, specifically as it relates to their alleged failure to qualify for Cadetship. This fair procedure was required so as to allow for the Claimants to make the representations which they could have made if the decision maker regarding the discharge had given them an opportunity to be heard.
45. These possible representations would include mitigating factors pertaining separately to each cadet, if applicable.

*Zero-Tolerance or Not?*

46. There was a submission by the Claimants that their discharge was effected on the basis of a "Zero Tolerance Policy". However, there is no documentary evidence of this as pointed out by the Defendants. The Discharge documents make no mention of such a policy and the Defendants, through their witnesses Lieutenant Colonel Peter Ganesh and Major Hinkson, have been adamant that this policy was not applied.

47. Major Hinkson states at Para. 11 of his affidavit that the Claimants were “administratively separated from the Force due to their indiscipline behaviour” which “created serious doubts about their leadership, decision-making and moral judgment”. He states that the former Zero Tolerance Discharge Policy was not applicable as “that Policy previously applied to service personnel who were charged before the criminal courts for serious criminal offences listed in the said Policy and not service personnel who were the subject of an internal disciplinary Summary trial process”, and further, that in any event, it was previously deemed unconstitutional by the High Court in **Wilt Vincent v Attorney General CV2016-00691**. Lt. Col. Ganesh echoes this averment at Para. 10 of his affidavit.

48. The Defendants’ response to this is that the decision to discharge was an administrative one and not part of a disciplinary proceeding. The Defendants submit that the Claimants were dismissed in accordance with the Trinidad and Tobago Regiment Basic Officers’ Training Course Student Standing Orders (“Student Standing Orders”).

49. Paragraphs 22, 23, 26, 27, 35 & 40 of the Student Standing Orders cited above, reflect that even if there had been no element at all of sexual assault charges pending, the unmilitary-like conduct admitted to by the Claimants, though seemingly minor from the civilian perspective, could have been sufficient basis for discharge. It is clear that the discharge of the Claimants had nothing to do with the fact that they are all on pending criminal charges for rape arising from the same incident that caused them to face military charges of misconduct (i.e. unmilitary-like behaviour, fraternising and alcohol consumption in restricted areas). The discharge was not based on a zero-tolerance policy as alleged by the Claimants. Thus this alleged unconstitutional aspect of the discharge decision has not been proven.

### Unequal treatment

50. Counsel for the Claimants submitted that the Claimants were treated less favourably than others similarly circumstanced. He contends that the Defendants, in particular the 2<sup>nd</sup>

Defendant and its Permanent Secretary, Ministry of National Security, cannot objectively justify the reason for the decision and the difference in treatment. The Claimants submit that the Decision effectively treats the Claimants differently from persons similarly circumstanced to them who had not been discharged. Instead, some had been demoted or lost seniority and for others their promotional prospects were affected. According to the Claimants all such persons had been reprimanded and/or admonished following certain conduct but did not thereafter suffer the severe outcome of discharge.

51. Further, the Claimants highlight that at Paragraph 13 of the Joint Affidavit in Reply, they noted that no charges were proffered against the female Officer Cadet. They cite this as wholly unfair as she was, at all material times, part of the joint enterprise namely the misconduct at the October incident, for which the Claimants had been penalised and were similarly circumstanced. However, it is important to take into account that pending determination of her criminal allegations against the Claimants that Officer cannot per se be seen as similarly circumstanced.

52. At Paragraph 23 of the Joint Affidavit in Reply, the Claimants provide additional instances where other students were in violation of the Student Standing Orders and were not discharged. However, these allegations were in relation to two students charged with a different type of misconduct (holding of cell phones). There is provision in the Standing Orders at Paragraph 87 for this type of prohibited item to be confiscated. This misconduct does not attract the same sanctions as the charges the Claimants faced. Moreover, the example cited is insufficient to show a pattern of different treatment in the face of clear guidelines set out in the Student Standing Orders and certainly does not meet the criteria for establishing discriminatory treatment.

### Abuse of process

53. The Claimants claim that the conduct of the Defendants in pursuing the Claimants' discharge in the light of their earlier conviction/admonition is an abuse of process. It is

submitted that the Claimants' discharge was a collateral attack on the earlier decision of guilty and admonished; and thus, the discharge decision should not stand. Furthermore, the Claimants contend that the element of abuse is such that it ought to attract an award of aggravated and exemplary damages.

54. The Claimants further submit that the issues treated with as the basis for discharge were identical to those in the summary proceedings for Defence Act offences in relation to which the Claimants were admonished. Accordingly, the Claimants argue that the recommendation for discharge and the discharge itself ought to have been barred by virtue of res judicata and issue estoppel.

55. The Claimants submit that the present situation satisfies the requirements outlined in **Henderson v Henderson (1843) 3 Hare 100, 67 ER 313**:

- a. That the same question has been decided and was fundamental as opposed to collateral or incidental to the decision;
- b. That the decision in the first proceeding said to create the estoppel was final; and
- c. That the parties to the first proceeding or their privies are the same persons as the parties or their privies to the subsequent proceeding.

56. The Claimants rely on the authority of **Bradford and Bingley Building Society v Seddon [1999] 1 WLR 1582 at 1491** wherein Auld LJ stated as follows:

*“Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or the issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. **It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue.**”*

57. These authorities cited by the Claimants appear to be wholly irrelevant since they relate to estoppel in civil proceedings. The Claimants were subjected firstly to disciplinary proceedings ending with an administrative finding of guilt and punishment of admonition determined by Hinkson, the Chief Instructor. Then as a completely separate matter, they were subject to another administrative decision that addressed their employment status i.e. their discharge based on the recommendation of the Chief Instructor. Neither of these was a civil court proceeding.

58. Even so, on the facts of this case, it does not appear that there was any retrial of the Claimants. Having been found guilty of the offences, based on reports made by themselves, the Defendants made the decision to discharge the Claimants. A guilty finding on the offences admittedly carried out by the Claimants may have satisfied the Defendants that there was unmilitary-like behaviour as contemplated by the Student Standing Orders. There was no further finding of the guilt or innocence of the Claimants, only further repercussions in a separate administration decision to discharge them due to their having been convicted for the Defence Force charges.

#### Legitimate expectation

59. The Claimants claim that the Defendants breached established practice and procedure by admonishing them for the disciplinary offences and then later on discharging them. They submit that the decision to discharge was unreasonable and/or irrational and contrary to natural justice as the Claimants' award of admonition was properly and/or lawfully considered. The Claimants contend that in making the discharge decision, the Defendants failed to consider properly or at all the Trinidad and Tobago Defence Act, the finding of guilty and the prior admonition decision. The Claimants contend that they could neither have legitimately, reasonably or foreseeably expected an admonition to be a precursor to subsequent decision of discharge nor were they so pre-advised.

60. The Claimants claim that they placed reliance on certain assurances received from the Defendants' agent, Captain Nigel Parris, regarding their future at the TTF, i.e. that there was nothing to worry about and an indication that they would not be discharged. Captain Nigel Parris denies stating no when asked by the Claimants whether they would be discharged. The Claimants' evidence is unsupported by any document as the alleged indication was made orally.
61. In **R (on the application of Al Sweady) v Secretary of State [2009] EWHC 2387**, it was acknowledged by Scott Baker LJ that where there are factual disputes in judicial review decisions, the Court is ordinarily obliged to resolve them in favour of the defendants. Therefore, where there are hard-edged questions of fact, cross-examination will be allowed.
62. In the present case, the Claimants made no application to cross-examine any of the Defendants' witnesses. Therefore, the denial by Captain Parris, without more, must be accepted as truth. It cannot be considered proof of a promise that could have given rise to a legitimate expectation on the part of the Claimants that they would not be discharged.
63. The Claimants also claim that there exists a long-standing practice that Cadets who are summarily charged and admonished are not further and doubly punished by being discharged supplemental to their sentence of admonition. Additionally, as a matter of practice such Cadets are not discharged for failing to qualify as Cadets, having been qualified and appointed a year prior, without justification.
64. The Claimants have, however, failed to provide either evidence of such established practices or proof of such a policy.



Was the Summary Trial that premised the discharge decision Ultra Vires the legislative framework?

65. The Claimants also submit that the incorrect procedure was followed when Major Hinkson made the decision to charge, summarily try and convict the Claimants as this decision is to be made by the Commanding Officer (Lieutenant Colonel Peter Ganesh) or a person to whom authority is specifically delegated.
66. The Claimants cite **Section 82(3) of the UK Army Act 1955** in their submission that the Commanding Officer must specifically delegate the authority to investigate and make charges. They submit that this Act, referred to in the interpretation section of the Defence Act, Chap. 14:01, is applicable where the Defence Act is silent. In the interpretation section, however, the Act is very specific as to where the external legislation applies i.e. where references to “service law” are made. This, in the Defence Act applies mainly to the Court-martial procedure.
67. Further, S.139 (8) of the Defence Act states that where Rules of Procedure have not yet been made by the Minister, *“the matters with respect to which such Rules may be made shall be governed, with such modifications as shall be necessary for the purpose, by the Rules of Procedure made under sections 103, 104 and 105 of the Army Act 1955 of the United Kingdom.”* There is, therefore, specific applicability of these Rules in the present situation as local Rules have not yet been made.
68. The Claimants submit that only the Commanding Officer or a person to whom he specifically delegated authority could have investigated and dealt summarily with the Claimants’ actions. This submission is based on Section 85 of the Defence Act. The Claimants submit, therefore, that there is no evidence submitted to the Court on Major Hinkson’s delegated authority. Further, as Hinkson was the Chief Instructor [CI] and Officer Commanding of the Army Learning Centre and not the Commanding Officer, a

position held by Lt. Col Ganesh, he had no authority to conduct the investigations that he did.

69. The Commanding Officer, Col Lt Ganesh, made the decision to recommend to the Commanding Officer, Trinidad and Tobago Regiment, that the Claimants' Commission be rescinded. This followed upon Major Hinkson's recommendation to him after the summary trial (See Paragraph 5 of the Affidavit of Lt. Col. Peter Ganesh). Major Hinkson's power to recommend discharge as Chief Instructor is provided for in the ALC Student Standing Orders at Paragraphs 4 and 23. The Claimants have not established therefore that there was irregularity in the involvement of Major Hinkson in the decision to discharge.

70. Finally, the Claimants belatedly submit in Reply submissions that there was no jurisdiction to conduct a summary trial or award a finding of guilt on the Claimants as they were not "Officers" – as contemplated under the Defence Act. The Claimants suggest that they are solely governed by the Disciplinary Policy outlined in the Student Standing Orders.

71. The Claimants submit that they should not have been subject to summary trial as they were at all material times students in training to be appointed a Commission by Her Excellency, the President of the Republic of Trinidad and Tobago. This class of persons, they submit, is governed only by the Student Standing Orders which state that they are to be returned to unit ["RTU"] or recommended for discharge when found guilty of indiscipline. This, they submit, also affects their rights to redress as Sections 194 & 195 of the Defence Act, which deals with avenues for redress, are inapplicable to the Claimants.

72. The Student Standing Orders do, however, appear to contemplate some form of trial/investigation as there is to be a finding of guilt prior to the making of RTU or discharge recommendations. For example, Paragraph 98 of the Student Standing Orders provides that a recruit who causes or colludes with anyone to harm himself or others will

be charged with an offence against these Orders and the Defence Act and will be liable, upon being found guilty, to withdrawal from training. This underscores the intention that the recruits are to be governed by the trial procedures outlined in the Defence Act.

This aspect of the Claimants' submissions cannot succeed. The Claimants, in their initial submission, put forward no challenge to the jurisdiction of the Defendants to have held a summary trial, but rather challenged aspects of the procedure followed. Even further, this submission appears to contradict the Claimants' own previous submissions which relied on several provisions of the Act governing the procedure for the summary trial (Sections 85, 86, 90).

#### **E. Conclusion**

73. In conclusion, the Claimants have succeeded in one aspect of their claim i.e. that they ought to have been given notice of the reasons for the intention to discharge and an opportunity to make representations on same. Furthermore, there is no evidence of how the discretion of the Defendants as to the discharge decision was exercised, save that principles of natural justice were not applied.

74. However, in substance the Summary Trial provided grounds, based on the Claimants' admissions, for their conviction for unmilitary-like behaviour in accordance with the Student Standing Orders. There was, based on the provisions of the Standing Orders, authority for a recommendation to be made thereafter by the CI that a decision be taken to discharge the Claimants. It is only in relation to factors regarding the appropriateness, proportionality and mitigating circumstances of the subsequent discharge decision that the Claimants were not heard as part of the decision making process.

75. The discharge decision will be quashed due to this procedural irregularity, but remitted to the Defendants to apply natural justice in determining whether the Claimants are to be discharged. It is only if this is done that the Defendants can be considered to have reasonably exercised the discretion whether to discharge the Claimants.

76. No compensation or reinstatement will be awarded in the interim. However, these matters are to be considered by the Defendants in the event that after following the proper process the discharge of any or all of the Claimants is found not to be merited. The Claimants sought twenty-five items of relief by this Claim. Only two will be awarded. Accordingly, the Defendant has partially succeeded in defending the Claim and will not be required to pay full costs to the Claimants.

77. It is hereby ordered:

- i. A declaration that the failure of the Defendants to allow for the Claimants to make representations regarding the recommendation for their discharge prior to the June 29, 2018 finalisation of the decision amounted to a breach of the principles of natural justice.
- ii. An Order of Certiorari is granted quashing the discharge decision and the matter is remitted to the Defendants to consider the representations of the Claimants regarding their recommended discharge.
- iii. The claims for reinstatement and damages are dismissed, however, these matters must be considered by the Defendants if deemed appropriate after complying with the above Order of Certiorari.
- iv. The Claimants, having succeeded in only one aspect of the relief claimed, will be awarded one fifth of the costs of this Claim to be paid by the Defendants in an amount to be assessed by the Registrar, if not agreed.
- v. Liberty to apply.

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by Christie Borely JRC1