THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2012-03170

BETWEEN

DION SAMUEL

Claimant

AND

THE ATTORNEY GENERAL OF TRININDAD AND TOBAGO

Defendant

Before the Honorable Mr. Justice V. Kokaram

Date of Delivery: 12th June 2013

Appearances:

Mr. Ronald Simon for the Claimant

Ms. Giselle Jackman-Lumy for the Defendant

JUDGMENT- SUMMARY

1. Mr. Dion Samuel, the Claimant, was discharged as a cook from the Coast Guard and Defence Force of Trinidad and Tobago on 20th December 2011. He was found guilty of conduct to the prejudice of good order and military discipline contrary to section 77 of the Defence Force Act by his Commanding Officer Kent Moore. The hearing was conducted summarily by Kent Moore and not by way of a court martial which the Claimant contends was specifically requested. His complaint in these constitutional law proceedings is essentially that the said failure to convene a court martial was a violation of his constitutional rights to a fair trial, protection of the law, the right to the enjoyment of property and equality before the law.

2. He complains that the hallmarks of a fair hearing which included receiving prior notification of charges, being given information about the charge and being given an opportunity to answer the charges were absent from the disciplinary proceedings, known in the Defence Force as "Fox Trot", conducted on 27th April 2010 and which led to his discharge. He complains that he was not provided with any documentation in relation to the charge. He was unable to fully advise his representative at the hearing. He was not afforded a hearing by court martial although he requested same. In these circumstances the proceedings were unfair. The Defendant however contends that the basic requirements of a fair hearing was afforded to him, where he was informed of the charge, given an opportunity to plead and to call witnesses in his defence. He failed to call any witness and he was found guilty of the charge. The Defendant's evidence however hinged largely on the skeletal elements of a fair hearing without giving particulars of the events which actually transpired at the hearing.

3. The Claimant further contended that he was discriminated against in that another Officer in the service, Officer Jankie, also tested positive for drug use but she was not discharged from the service. The Defendant produced evidence to demonstrate however that Officer Jankie was not similarly circumstanced to the Claimant. She had pleaded guilty to the charge and sought to mitigate her punishment by reference to extenuating circumstances which were accepted by the Commanding Officer. She was however punished but received a lesser penalty of 28 days detention to barracks which the Defendant contends is consistent with its zero tolerance policy of the Defence Force.

4. The main issues that arose for determination on these proceedings were as follows:
    - Should the motion be dismissed as an abuse of the process as there is a parallel remedy namely judicial review proceedings and secondly there are sharp disputes of fact unsuitable for consideration in these proceedings.
    - Right to property: Is the loss of the Claimant's job a breach of the constitutional right to property?
    - Right to equality before the law: Is there a sufficient comparator to determine a breach of this constitutional right?

- Right to a fair hearing: was the Claimant afforded a fair hearing? Did the Defendant comport with the basic requirements of natural justice and fair play in action?
- Protection of the law: whether the fact that the Claimant can approach the Court is a sufficient remedy to preserve the Claimant's constitutional right to the protection of the law.

5. Upon an assessment of the facts I have found that there is no breach of the Claimant's constitutional right to property. No arguments were made on this issue. In any event the Claimant submitted to this Court the authority of **Russell Joseph v Chief of Defence Staff and AG** HCA No. 1500 of 1997 in which Justice Smith as he then was held that there can be no property right of a member of the Defence force that can be infringed. The member has no contractual right to sue for wages, as his employment is at the State's grace.

6. I have also found that there is no breach of the Claimant's constitutional right to equality before the law as there are no satisfactory comparators to make such a complaint. See **Graham v. Police Service Commission and the AG of Trinidad and Tobago**, Civil Appeal No. 143 of 2006 and **Bhagwandeen v. The AG** [2004] UKPC 21. Further the bare fact that Officer Jankie was the subject of disciplinary proceedings as a result of which she received a different penalty as that received from the Claimant does not amount to an act of discrimination.

7. However, I have found that the hallmarks of a fair trial were absent from these disciplinary proceedings and that the discharge was a breach of the Claimant's constitutional right to a fair hearing and to the protection of the law. The Defendant simply cannot conduct trials by ambush as I have found that it did in this case and it must exercise its power of discharge fairly. There is no exact definition of fairness as the demands of fairness is contextual and varies with the circumstances and nature of the hearing. The common denominator of what fairness demands is determined on a case by case basis along broadly intuitive lines of responsible action that serves the ends of justice and fair play. There are minimum requirements which include having notice of charges and being placed in a position where one can defend oneself. In other words, at the very least, it cannot be a hearing by ambush. A complaint which was made by Justice Crane in **Rees v Crane** [1994] 1 All ER 833 and as

recently by the head of the Police Service Commission in **Nizam Mohammed v AG** CV 2011-04918. I endorse the observation of Justice Jones in **Nizam Mohammed** which captured the essence of the procedural demands for fair play in action:

"I agree with Lord Mustill when he says that a determination of what is fair is essentially an intuitive judgement. A court is required to look objectively at all the circumstances and answer the question has the Claimant been fairly treated. At the end of the day is this an example of fair play in action? The fact that it may very well be that the same decision would have been arrived at even if the Claimant had been given a fair opportunity to answer the case made out against him is in my opinion irrelevant. The fact is that a decision arrived at without compliance with the rules of natural justice or procedural fairness is no decision at all and must be declared as such by the court."

8. I have found that there was a breach of the constitutional rights guaranteed under section 4(b) and 5(2) (e) of the Constitution for the following main reasons, which I have expanded in my written judgment:

   (a) In this case the Claimant was first confronted with the charge on 21st April 2010. This was when his urine test was conducted in September the previous year and the report is dated November 2009. The charge was read out to the Claimant however he was not given a copy of the charges nor was he given nor shown a copy of the certificate of analysis. Whereas the Claimant was ambivalent and contradictory in his cross examination, he remained firm and unshaken in the main aspects of his claim. This, coupled with the absence of an answer on affidavit by the Defendant to some of his evidence and the lack of knowledge of the Defendant's witness of what transpired at the hearing suggest to me that I cannot reject the Claimant's evidence. He was subjected to a random drug test which returned positive. He was first told this by Petty Officer Hosten after which he was immediately arrested and imprisoned. Upon his release, he discovered that his matter was forwarded to an officer, with whom he had a meeting and throughout the course of which he protested his innocence. He was never given a formal notice of the charges. He was never provided with a copy of the certificate of analysis. If he was, it would have revealed the words "preliminary report". That in itself raises a question as to its meaning. He was never given a copy of the zero tolerance policy which his seniors referred to, nor was it explained to him

as to what it means. There were no witnesses who attended to lead evidence particularly, in relation to the certificate of analysis and the results of the drug test. No evidence was led as to the zero tolerance policy. He was asked to plead and he pleaded 'not guilty' on all occasions and maintained his innocence. He was told he can lead evidence but at that stage it would have been a sham hearing if he had not been provided with information prior to the hearing to properly defend himself or advise his representative. At the hearing before Kent Moore, which was the substantial hearing which led to the recommendation for his dismissal, Mr. Moore confirmed that no prior notification of the charges was sent to the Claimant. He cannot remember who if any of the prosecution witnesses gave evidence and no one from the Forensic Science Centre attended to explain the findings in the report. His notes were mere notations on a small note pad which he destroyed sometime later when he knew that the charges could have been the subject of a Court Martial.

9. I also find as a fact that the Claimant did request a Court Martial. I say so for the following reasons. First the Claimant makes that clear statement in his affidavit and the Defendants' in their response do not deny that he ever made that statement. Second the Defendant did not cross examine the Claimant on this issue at all. Third from the cross examination of the Defendant's witnesses, it inspired no confidence in me that they could accurately tell this Court what took place at those hearings. Indeed their affidavits reflect their knowledge which is they simply cannot recall anything. On a balance of probabilities, it is more likely that he did make such a request and it was ignored in the same way he made a request for the zero tolerance policy and it was ignored. Finally knowing that with these charges the Claimant can elect to have it heard by Court Martial and in fact the legislation provides for an election by Court Martial to be put to the accused, it should have been clearly recorded that the Claimant does not elect to have the matter tried by Court Martial. Indeed Kent Moore does not ask the Claimant whether he would elect to have the matter heard by Court Martial when Moore admitted that the charges "quite possibly" can be heard by Court Martial. In any event section 70 of the Defence Act is clear that it was a matter to be heard by Court Martial and the Claimant would have been ordinarily entitled to it. There ought therefore to have been some clear record of his election for the summary process. As to the Defendant's logic if it was not there, then it did not happen, there is no evidence before me as to the practice

applicable to the notations on the charge book and it is only too convenient for the Defendant to pick and choose implications from the absences of notations when there is no regulation or standard procedure governing these notations before the court.

10. The following deficiencies were therefore evident:

    a. The Claimant was unarmed with the specifics and particulars of the charge to properly prepare for the hearing.

    b. The Claimant did not have a copy of the report to obtain advice.

    c. The Claimant was unable to properly brief his legal representative as he was unsure of the nature of the charges and the evidence against him.

    d. Mr. Moore acknowledging that it was possible that the matter could have been dealt with at court martial and failed to take any evidence down in writing.

    e. No witness attended to tender into evidence the Certificate of Analysis nor to explain its findings.

    f. Mr. Moore failed to put to the Claimant an election after being found guilty of the charge.

    g. Mr. Moore failed to convene a court martial after the Claimant requested that the proceedings be deal with at court martial.

    h. Mr. Moore failed to take into account the Claimant's record or to invite representations on the nature of the punishment that should be imposed in this case.

11. The hearing did not bear the hallmarks of any proper hearing. From my assessment it appeared, rushed, pre meditated and a sham.

Protection of the law

12. I hold that there was a breach of the constitutional right to the protection of the law. Quite apart from the failure to observe the principles of natural justice which were examined above, the Defendant quite simply adopted the wrong procedure in discharging the Claimant. The

summary procedure was wholly inapplicable as the Claimant had made a request for the proceedings to be referred to a court martial. The statutory provisions which deal with court martials deal extensively with the accused rights in those proceedings and set out the nature of his protection during the conduct of those proceedings including his ability to challenge those proceedings. In **Antonio Webster v AG** CA Civ113 of 2009 Justice of Appeal Nolan Bereaux explained the wide import of the term "protection of the law" which would take it out of what was once interpreted to be confined to simply being able to obtain a remedy before the Courts in **Mc Leod v AG** 1984 1WLR 522. Bereaux JA made reference to **AG v Oswald Alleyne** Ca 52 of 203 which had approved of the dictum of de la Bastide P and Saunders in **AG of Barbados and others v Joseph and Boyce** [2006] CCJ1 (AJ) that "the term protection of the law was so broad and pervasive as to be almost impossible to encapsulate in a section of the constitution all the ways in which it may be invoked."

Abuse of process

13. I do not view these proceedings as an abuse of process. In determining whether a constitutional motion amounts to an abuse of process there are two competing principles. First that the Constitution provides in clear terms of the person right to apply to the High Court is without prejudice to any other action with respect to the same matter that is lawfully available. Where there is a breach of the fundamental law the citizen must have recourse to the court. The second competing principle is that at the same time however the court's process is not to be abused by frivolous claims that are not made bona fide or genuinely in pursuit of a vindication of constitutional rights, or where resort is being had to circumvent restrictions of time in disposing of cases in ordinary private action or leave requirement in judicial review. I hasten to add that in cases where there clearly is a remedy in common law and in a private action such as the case of **Jaroo v AG** (2002) UKPC 5 and **Ramanoop v AG** (2005) UKPC 15 the inference of abuse is more patent. However in balancing the competing interests the court also has an overriding duty to deal with a case justly, it can be creative. This is what was in effect fashioned the procedural devices in **Ramanoop** and in **Damian Belfonte** CA Civ 84/2004. Rather than for instance shut a litigant out proceedings can be converted, directions can be given, the Court has been invested with power to save proceedings.

14. Where the alternative remedy is also an administrative claim seeking relief under the Judicial Review Act the enquiry becomes focused on the special features of the case which will permit the constitutional court from hearing the claim rather than dismiss it knowing that the time bar has already elapsed and in effect the Claimant will be without relief. Resort to Constitutional remedies rather than resort to judicial review is not unexceptional and can be permitted. In **Jaroo** it was expressed as permitted in exceptional circumstances. In **Ramanoop** there must be some feature to make it appropriate to take such a course. Such as the inadequacy of the parallel remedy, the arbitrary use of state power.

15. However there are substantial reasons why a constitutional remedy is permissible in this case. They are as follows:

    a. There was a clear breach of the Claimant's fundamental right to due process and protection of the law.

    b. The breaches were virtually admitted by the Defendant's failure to properly place before this Court evidence to demonstrate that the hallmarks of a proper hearing was present in relation the Claimant.

    c. The Claimant has repeatedly called for a court martial and for a review of his case, both of his claims were unanswered and left unheeded.

    d. He was the victim of strong handed conduct where he was immediately arrested, then he was subjected to a sham hearing and his discharge was effected more than a year later. The actions smack of arbitrariness.

    e. A trial is fundamental and the procedures are all laid out in the standing orders. I find it incredible that no written notes were made of the proceedings and the laissez faire attitude adopted to making a record of what transpired demonstrated no real attempt to justify the final decision or to provide a transparent and open process of disciplining. If there is such a practice it must stop. It leaves the Defendant exposed to frivolous claims likewise it exposes the accused to accusations and allegations which cannot be supported by any contemporaneous record.

16. The Defendant also argued that where there is a dispute of fact the constitutional remedy is inappropriate. There is no doubt that save in simplest cases the summary procedure is ill suited to decide substantial factual disputes and that satisfactory resolution of factual disputes usually requires pleadings discovery oral evidence. That being said however disputes of fact in constitutional proceedings does not of its own amount to an abuse. However in this case the dispute of fact does not make it an abuse and indeed there was no necessity to convert the proceedings to an ordinary claim to resolve them. Firstly both parties succinctly identified the narrow dispute in their submissions and both agreed to the cross examination of the witness on those issues. Secondly the cross examination did not materially affect the Claimant's main complaint of lack of adequate notice of the charge and many aspects of his evidence were not dealt with. Thirdly the cross examination indeed merely confirmed the Defendant's lack of knowledge as to what transpired.

Declaration and Damages

17. I would make a monetary award in addition to declaratory relief. It is important in my view to go beyond a simple declaration having regard to the arbitrariness of the conduct of the Defendant and to ensure it is not repeated. As a purely compensatory element there is a paucity of evidence as to the Claimant's actual terms and conditions and no justification to say that based on those terms he would have continued beyond the initial 6 years of his service in the force.

18. I would make the following orders:

    (a) That the Claimant's discharge on 19th December 2011 from the Trinidad and Tobago Defence Force on the grounds that his services were no longer required has contravened: (a) the Claimant's right to the protection of the law as guaranteed under section 4(b) of the Constitution and (b) the Claimant right to a fair hearing guaranteed under section 5(2) (e) of the Constitution and is therefore illegal null and void and of no effect.

    (b) That the Defendant do pay to the Claimant damages in the sum of $18,000.00.

    (c) That the Defendant do pay to the Claimant 50% of his costs which are assessed in the sum of $45,000.00.

Vasheist Kokaram

Judge