

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2016-00258

BETWEEN

AARON SAMUEL

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Wednesday 8th November 2017

Appearances:

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

Ms. Tinuke Gibbons-Glenn and Ms. Rachel Theophilus instructed by Ms. Svetland Dass and Ms. Diane Katwaroo for the Defendant

JUDGMENT

1. This is a claim for wrongful dismissal and breach of contract of employment by the Claimant, Mr. Aaron Samuel, against the Defendant. Mr. Samuel claims that on 2nd July 2015, he was wrongfully dismissed without any charge, hearing or tribunal contrary to the Defence Act Chapter 14:01. He claims general and special damages for wrongful dismissal and gratuity.
2. Mr. Samuel was enlisted as an ordinary soldier and/or private in the Trinidad and Tobago Defence Force on 10th December 2008. He was enlisted on a contract of employment for six (6) years, also known as a term of colour service pursuant to Section 20 (2) (a) of the Defence Act. He contends that his contract was renewed at the end of this first 6 year period.
3. Upon his father's death on 5th June 2010 Mr. Samuel was granted bereavement leave for a period of ten (10) days. On the 20th October 2010, he was placed on a list of amongst twenty-

one (21) soldiers to a construction project in the Morvant Community Centre for two hundred and ten (210) days. Around November 2011, after reporting to the Company Sergeant Major (CSM) in the construction department, instructions were issued by the CSM that Mr. Samuel would be on call out duties.

4. On or about February 2012, Mr. Samuel was placed in a holding cell in the 1st Engineering Battalion Unit. He was charged for being Absent Without Leave (AWOL) for one hundred and eleven (111) days from 5th November 2011 to 22nd February 2012. He alleges that his charge was subsequently cancelled in Order Reference Serial No. 6 under the heading Pay and Allowances- Termination of Absence. His salary was withheld from March 2012 to June 2012.
5. On 1st March 2012, Mr. Samuel was taken out of the said holding cell and escorted to the Military Officer, Dr. Charles for him to be assessed if he was fit for detention. He was deemed unfit for detention and was then referred to the Army Welfare Department and Dr. Hutchinson on the same day. Dr. Hutchinson granted him fourteen (14) days sick leave away from the detention camp. On numerous occasions namely 12th July 2012, 6th July 2012 and 7th July 2015 Mr. Samuel wrote letters to Brigadier General Kenrick Maharaj for redress of grievance but his grievances were not addressed. On 22nd December 2014 he again wrote to Brigadier General Kenrick Maharaj and the Commanding Officer of the Trinidad and Tobago regiment with regards to his non-payment of salaries for 2014 and the allegations made against him by a Captain Rodney that he was a “Mad Man” but it was never acknowledged.
6. In July 2015, Mr. Samuel received lump sum payments but the monies were taken out to pay the instalments he owed to other financial institutions.
7. The Defendant denies that there was a second contract of employment nor a renewed period of engagement entered into by Mr. Samuel. The Defendant also denies that Mr. Samuel was wrongfully dismissed since he was lawfully discharged from his duties.
8. It is the Defendant’s contention that on March 2012 Mr. Samuel proceeded on an extended sick leave until June 2015. During that time, Lieutenant Colonel Weekes liaised with Dr. Hutchinson regarding Mr. Samuel’s progress. By letter dated the 16th March 2015, Dr. Hutchinson informed Dr. Charles that Mr. Samuel was willing to return to work but no date was provided.

9. The Defendant contends that Mr. Samuel's initial term of service ended on 9th December 2014 and though he remained engaged, a second term of service was not executed. On 12th June 2015 the Officer Commanding did not recommend Mr. Samuel for re-engagement. Lieutenant Colonel Weekes also reviewed the Claimant's TTR Form 54 Annual Report and Employment Sheet for the period December 2008 to April 2012 which showed that Mr. Samuel had been unavailable for proper trade assessment.
10. It is the Defendant's contention that Mr. Samuel was discharged on 2nd July 2015 with effect from 10th December 2015 and was paid all outstanding monies. The Defendant denies that Captain Rodney referred to the Claimant as a "Mad Man."
11. The following issues arise for determination:
 - (a) Whether the Claimant as a member of the armed forces has a reasonable cause of action against the Defendant for damages for breach of contract in private law.
 - (b) If so, whether the Defendant did breach the Claimant's contract of employment in wrongfully discharging the Claimant.
 - (c) Whether the Claimant is entitled to damages inclusive of aggravated and exemplary damages.

No reasonable cause of action

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

13. Of course, the State's power to dismiss such officers and soldiers are circumscribed by the Defence Act as recognised in **Russell Joseph v Chief of Defence Staff and the Attorney General** H.C.A. 1500 of 1997. It would be wrong to say that there is no contract made between the parties since clearly the terms of the engagement and terms governing the Claimant's service are outlined in the Defence Act. I considered the cases of **Thomas v The Attorney General** [1982] AC 113 and **Kevin John v Attorney General of Trinidad and Tobago** CV2011-02678 where Madame Justice Dean-Armorer held that dismissal at pleasure was inconsistent with the detailed provisions in the Defence Act. However, in matters such as these, Mr. Samuel should have utilised the route of public law to vindicate his rights as his service with his employer is underpinned by statute. See **R v Lord Chancellor's Department ex parte Nangle** [1992] I All ER 897 and **Thomas v The Attorney General** [1982] AC 113. His contract is one recognisable in public law or put another way his claims give rise to public law rights and not in private law. There is no evidence advanced in this case to demonstrate why Mr. Samuel failed to apply for leave for judicial review.
14. It would be tempting to say that because of the acute dispute of facts, the matter once commenced as an administrative law claim would be converted to a private action. However, this still does not excuse Mr. Samuel from seeking leave to apply for judicial review.

No breach of contract

15. In any event, I have analysed the evidence to determine whether there was a breach of contract. I have considered the evidence led by the Claimant by Mr. Samuel and Mr. Jason St. John. I have also considered the evidence led by the Defendant by Sergeant Roger Andrews, Captain Roxann Rodney, Lieutenant Colonel Kester Weekes and Corporal Kevoh Baptiste. Importantly, the parties submitted a joint statement of fact of the summary trial under the Defence Act.¹ The parties' submissions² and speaking notes³ were also considered.

¹ Filed on 28th April 2017.

² Defendant's submissions filed on 2nd August 2017. Claimant's submissions filed on 3rd August 2017. Claimant Submissions in reply filed on 21st August 2017.

³ Filed 27th June 2017.

No second contract of employment

16. Mr. Samuel contends and it is his case that he obtained a second contract of employment at the expiration of the first. However, in his evidence and cross examination, he can point to no such other contract of employment being executed. The evidence demonstrates that he was enlisted for a period of six (6) years from 10th December 2008 to 10th December 2014. No second term of engagement was formally executed on his behalf. Mr. Samuel's case was not advanced on the basis that there was an implied contract. There is no pleaded case of any legitimate expectation to a second period of service. Such contentions do not assist Mr. Samuel's case which was advanced on the pleadings on the plain fact of a second contract having been signed and coming into being which is palpably false on Mr. Samuel's own admission in cross examination.

No entitlement to gratuity

17. Mr. Samuel admits that he is only entitled to gratuity after ten (10) years of service. As he only served seven (7) years he was not entitled to any gratuity.

No entitlement to return of his salary deducted for AWOL

18. Mr. Samuel was AWOL for the period of 5th November 2011 to 22nd February 2012 which was a period of one hundred and eleven (111) days. He surrendered to authorities in February 2012. There is no evidence from any of the Defendant's witnesses that the charges were cancelled as alleged by Mr. Samuel. The documents on which Mr. Samuel relies as evidence of the AWOL charges do not, on their face, indicate that the charges were cancelled. What the documents do disclose, however, was that the salaries and entitlement that were forfeited were refunded to Mr. Samuel over a period of time. Captain Rodney explained in cross examination that the pay that was forfeited for the AWOL charge would have been paid back to Mr. Samuel. In Sergeant Roger Andrews' evidence in chief, he also stated that Mr. Samuel was paid all his salaries that was due and owing to him up to the time of his discharge on 10th December 2015. According to Sergeant Andrews, he was paid the sum of \$28,041.44 in August 2013 for the period of absence from 5th November 2011 to 22nd February 2012. He also received arrears of ration allowance in the sums of \$3,150.00, \$7,225.00 and \$15,260.00 in March, September and December 2013. Based on this documentation there is no further sum due to Mr. Samuel in

relation to the AWOL charge. Any discrepancy in procedure with regard to the laying of the charge is of no assistance to Mr. Samuel in his claim for damages for wrongful dismissal. He was not dismissed as a result of this AWOL incident.

Lawful termination of service

19. Mr. Samuel submitted that the Defendant failed to follow any proper procedure in dismissing him. He was discharged in 2015 and engagement in the service was not renewed. In this case an administrative decision was made to discharge Mr. Samuel as disposed by Colonel Weekes⁴. The first contract came to an end on 10th December 2014. By then, Mr. Samuel was on extended sick leave from March 2012 to June 2015 which he contended was because he suffered from Post Traumatic Depression and Stress Disorders. He also submitted that the Defendant was aware that the cause of illness was due to the murder of his father and his mother falling ill at his father's funeral.
20. However it is clear from the Defendant's evidence that in June 2015 his records were reviewed and there was no recommendation to renew his contract of engagement. Indeed in March 2015, the Defendant had no firm assurances that Mr. Samuel could return to work. I see no basis to fault the administrative decision to not renew the engagement of an officer who is unavailable for service and due to extended ill health, which is unrelated to his work environment, is incapable of resuming duties. His employment was lawfully and justifiably brought to an end.

Conclusion

21. Mr. Samuel's only entitlement is not for damages but rather for deductions made from his basic pay pursuant to Regulation 5(1) of the Defence (Pensions, Terminal and Other Grants) Regulations⁵ for pension contributions and back pay. These sums are admitted by the Defendant as being due in its written submissions. The evidence reveals that pension contributions in the sum of thirty thousand seven hundred and seventeen dollars and eighteen cents (\$30,717.18) are due and payable and should be paid to him forthwith.

⁴ Paragraph 18 of the Witness Statement of Colonel Weeks filed on 24th March 2017.

⁵ Regulation 5(1) of the Defence (Pensions, Terminal and Other Grants) Regulations provides:

5. (1) In the event of any member of the Force leaving the Force whether by reason of dismissal or otherwise, without being eligible for a pension, terminal grant or gratuity under these Regulations, he shall be entitled to the return in full of all deductions made from his basic pay under paragraph (1) of regulation 4 with interest thereon at the rate of four per centum.

22. The claims for damages for breach of contract is dismissed.
23. The Defendant will pursuant to his terms of service refund to the Claimant his pension contributions and any sum due pursuant to Regulation 5(1) of the Defence (Pensions, Terminal and Other Grants) Regulations in the sum of \$30,717.18.
24. There will be no order as to costs.

Vasheist Kokaram
Judge