THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-04008

BETWEEN

BRYAN STEPHENS

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Thursday 3 October 2019

Appearances:

Mr. Ronald Simon for the Claimant

Ms. Natoya Moore instructed by Ms. Kadine Matthew for the Defendant

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DECISION ON DEFENDANT'S APPLICATION TO STRIKE OUT

Introduction

[1] On 7 November 2017, the Claimant filed a Claim Form and Statement of Case in which he claims the following relief:

(i) Consequential loss and damages suffered by him as a result of negligence of the Defendant's servant and/or agent, the Trinidad and Tobago Defence Force, for its failure to take the decision to discharge the Claimant and to perform all procedural requirements to effect the said discharge since August 2014;

(ii) Damages and consequential loss for breach of statutory duty, namely the duty imposed on the Defendant through its servants and/or agent the Trinidad and Tobago Defence Force pursuant to Sections 23(1), 29(1), 32(1)(a) *(sic)*[1] and the Defence (rates of pay and allowances) Regulations 1989 of the Defence Act, Chapter 14:01, which breach arises out of the Defendant's servants and/or agents for its refusal to put the Claimant back to active duty/work subsequent to their failure to take the decision to discharge the Claimant and to perform all procedural requirements to effect the said discharge since August 2014;

(iii) Compensatory Damages;

(iv) Aggravated and exemplary damages for hardship, distress and embarrassment;

(v) Interest pursuant to **sections 25 and 25A of the Supreme Court of Judicature Act, Chap 4:01**;

(vi) Costs;

(vii) Such further and/or relief as the nature of the case may require.

[2] The Defendant entered an appearance on 7 December 2017. On 21 December 2017, a Notice of Consent for extension of time was filed into Court. Therein, pursuant to **Part 10.3(6) of the Civil Proceedings Rules 1998 (the "CPR")**, the Claimant agreed to extend the time for filing of the Defendant's Defence to 7 February 2018.

[1] It ought to be **Sections 23(1), 29(1) and 31(2)(a) of the Defence Act, Chapter 14:01**.

[3] However, on 7 February 2018, the Defendant filed and served its application to strike out the Claim Form and Statement of Case of the Claimant. The Defendant, on 16 March 2018, applied for an order that the Defendant's Defence be extended to a date to be decided by the Court on the hearing of the Defendant's Notice of Application filed on 7 February 2018. The Court, subsequently, granted this order on 28 March 2018.

The Defendant's Application to strike out the Claim

[4] By way of Notice of Application filed on 7 February 2018, the Defendant seeks an order that:

(i) The Claim Form and Statement of Case filed on 7 November 2017 be struck out pursuant to **Part 26.2(1)(c) of the CPR,** as the Statement of Case discloses no grounds for bringing a claim against the Defendant.

(ii) That the Claimant's Claim against the Defendant be dismissed pursuant to **Part 26.1(1)(k) of the CPR** following the Court's decision at (i) above.

(iii) The Claimant pay the Defendant's cost of this Application.

(iv) Alternatively, that an extension of time be granted to file a Defence.

[5] The grounds of the Application are as follows:

(i) The Claimant's pleaded case does not disclose a cause of action against the Defendant.

(ii) The Claimant's pleadings fail to show any alleged breach of statutory obligation, which is intended to be a ground of civil liability.

(iii) The Claimant has not pleaded that the alleged breach of duty caused any loss or damage at all or that it caused any loss or damage that falls within the ambit of protection that the statute allegedly confers.

(iv) A breach of the said sections of the Defence Act in the Claimant's pleadings does not give rise to an action in private law for breach of statutory duty.

Nature of the Claim

[6] The Claimant has been a member of the Trinidad and Tobago Defence Force (the "TTDF") since 25 March 2007 to date earning a salary of $9,799.45. According to the Claimant, sometime in 2014, whilst he was stationed at Camp Cumuto, he requested his discharge from the TTDF in contemplation of taking up a job with the Trinidad and Tobago Police Service.

[7] The Claimant averred that his Commanding Officer, Major Roachford, initially sent him on 28 days privilege leave. During this period, the Claimant was instructed by a Senior Officer (whose name he cannot recall) that the TTDF would carry out certain procedural requirements to effect the said discharge. Some of those requirements included as follows:

(i) Arrange for pre-release medical examination of the Claimant (TTR Form 109 to be completed) by 27 August 2014;

(ii) Withdraw all (the Claimant's) personal documents, including ID Card and Family Card to hand to the Adjutant for discharge action. TTR 21 to be forwarded to the S4 by 27 August 2014;

(iii) Prepare Draft Testimonial for Guidance of the Commanding Officer and submit to Adjutant by 18 August 2014;

(iv) Arrange for the Claimant to attend Commanding Officers Orders on 27 August 2014;

(v) To submit forwarding address to Bn HQ by 27 August 2014.

[8] The Claimant alleges that the TTDF has failed to carry out all the procedural pre-conditions to effect the discharge as listed above. The Claimant contacted the Adjutant, Lieutenant Carr, concerning the completion of his discharge. He was subsequently instructed that his discharge was not finalized and to proceed on 28 day's terminal leave with effect from 27 August 2014 to 23 September 2014.

[9] The Claimant alleges that the TTDF unlawfully and wrongfully stopped all salary payments and benefits to him. The Claimant further alleges that the Defendant's servant and/or agent is and has always been under a duty pursuant to **sections 23(1), 29(1), 31(2)(a) and the Defence (rates of pay and allowances) Regulations 1989 the Defence Act, Chap 14:01** to comply with the subject Act and remit all salaries and benefits to him.

[10] The Claimant contends that upon completion of his terminal leave, he telephoned Lance Corporal Seebalack who instructed him that he was discharged and to proceed to the Defence Force Headquarters to seek redress.

[11] The Claimant alleges that he is not discharged and that the TTDF has failed to put him to work and he was obliged to attend the Regimental Headquarters to seek assistance; however, he did not receive any. The Claimant was instructed by Lieutenant Carr to proceed to Defence Force Headquarters to receive his pension and gratuity. The Claimant alleges that he was threatened by Lieutenant Carr and was instructed to write a letter to the Commander of the Trinidad and Tobago Regiment seeking re-enlistment.

[12] The Claimant contends that he complied with the instructions and the Commander, who instructed him to contact Lieutenant Hacksaw, approved the letter. Lieutenant Hackshaw told the Claimant to proceed to the Regiment Headquarters El Socorro to meet with Sergeant Edwards to hand over all his kit and identification to facilitate re-enlistment. Sergeant Edwards instructed the Claimant to participate in a kit check but the Claimant left the compound.

[13] The Claimant alleges that after two years had passed, he sought legal opinion from an attorney at law and he understood that a soldier remains a member of the TTDF until his services have fully terminated. Subsequently, the Claimant dressed in his uniform, reported and performed duty at Camp Cumuto for a period of two days from 23 January 2017 to 24 January 2017.

[14] Subsequently, Captain Rodney illegally and unlawfully instructed Corporal Lee to post a photograph of the Claimant in the guardroom and throughout the TTDF that the Claimant not be allowed into any military establishment. The Claimant thus alleges that his reputation has suffered irreparable damage.

Submissions

[15] The Defendant submitted that there is no viable cause of action raised in the Claimant's Statement of Case. The Defendant relied on the authority of **Augustine Prime v The Attorney General**[2] wherein the issue to be considered was whether **Regulation 183 of the Police Service Regulations, Chapter 15:01** constituted an actionable right to challenge a failure to comply. One of the questions considered by Boodoosingh J was whether Parliament would have intended that a breach such as this would entitle a Claimant to a remedy. Boodoosingh J cited **Halsbury's Laws of England, 4th Edition Re-issue, Volume 45(2), paragraph 395** as follows:

> *"To succeed in a claim for damages for breach of statutory duty the claimant must establish:*
>
> - *A breach of statutory obligation which, on the proper construction of the statute, was intended to be a ground of civil liability to a class of persons of whom he is one;*
> - *An injury or damages of a kind against which the statute was designed to give protection; and*
> - *That the breach of statutory obligation caused, or materially contributed to, that injury or damage."*

[16] Boodoosingh J also cited **R v Deputy Governor of Parkhurst Prison ex p. Hague**[3] wherein the House of Lords held that –

[2] CV2008-02125

[3] [1992] 1 AC 48

"The question of whether an enactment conferred private law rights of action on individuals in respect of its breaches depended on the intention of the legislature, and the fact that a particular provision was intended to protect certain individuals was not of itself sufficient to confer such rights…"

[17] Boodoosingh J also cited the authority of **X (Minors) v Bedfordshire County Council**[4] where it was stated at page 365 a-b that –

"The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative decisions."

[18] Boodoosingh J concluded that the Regulation may give rise to an expectation that a retiree's benefits will be processed expeditiously but would not necessarily lead to a claim for breach of statutory duty following. However, this case is different from the case at bar as it does not involve breach of a subsidiary legislation.

[19] The Defendant, thus, submitted that **sections 23(1), 29(1) and 31(2)(a) of the Defence Act** are intended to ensure efficiency in the performance of an administrative function of the Defence Force, that is, to ensure the effective discharge of an other rank. Accordingly, the Defendant contended that this cannot lead to a claim for breach of statutory duty. The Defendant further submitted that there is nothing in the Claimant's pleadings to show any alleged breach of statutory obligation, which was intended to be a ground of civil liability.

[20] The Defendant contended that with respect to the Claimant's claim for negligence, a breach of the above-mentioned sections of the Defence Act does not give rise to an action in private law. It was further submitted that the Claimant should have utilized the route of public law to vindicate his rights as his service with his employer, the TTDF, is

[4] [1995] 3 All ER 353

underpinned by statute. The Defendant relied on the authority of **R v Lord Chancellor's Department ex parte Nangle**[5].

[21] The Defendant further asserted that the contract of military officers is made between the State and the soldier and the terms and conditions of this contract are stipulated by the Defence Act. Therefore, any such alleged breach of the terms of the contract gives rise to a public law action and not a private law action as the rights held by the employees under the contract are afforded in public law only. The Defendant further submitted that the Claimant should have applied for leave to apply for judicial review and that there is no mention that the Claimant attempted to have his grievances addressed by the Defence Council pursuant to **section 195(2) of the Defence Act**.

[22] The Defendant further contended that at common law, a member of the armed forces is precluded from bringing any action in the Courts connected to his service in the force since such service is considered voluntary and at the State's grace. The Defendant relied on the following authorities in support of its proposition: **Leaman v The King;**[6] **Aaron Samuel v The Attorney General;**[7] **Russell Joseph v Chief of Defence Staff & The Attorney General;**[8] **Dion Samuel v The Attorney General;**[9] **and Joel John v The Attorney General & Chief of Defence Staff.**[10]

[23] On the other hand, the Claimant submitted that the Defendant could not refer the Court to, nor rely upon, a single rule, direction, judgment or Act of Parliament, which provides: (1) that an aggrieved member of the TTDF be precluded from filing a common-law claim against the TTDF; or (2) that such member can only file a public law claim pursuant to the **Defence Act, Chapter 14:01** to obtain redress for a common law claim.

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[5] (1992) 1 AER 897

[6] [1920] 3 K.B. 663

[7] CV2016-00258

[8] H.C.A. 1500 of 1997

[9] CV2012-03170

[10] CV2012-03108

[24] The Claimant, however, agreed with the Defendant that the authority of **Augustine Prime (supra)** can be reconciled with the case at bar. The Claimant further submitted that he agreed with the statement made by Boodoosingh J in **Augustine Prime** at paragraph 18 where the learned Judge stated that –

> *"such an imposition will be unduly burdensome and open a flood of complaints ultimately leading to the unworkability of the Regulations. This regulation is a signal that adequate resources should be applied. It does not mean that a breach will ordinarily lead to a claim. Where the breach is particularly egregious, such as where the delay is unreasonable, it may give rise to a claim in negligence or in public law."*

[25] The Claimant thus contended that in certain similar but limited circumstances, a Claimant can file a common law claim for breach of statutory duty. In this regard, he submitted, the claim is proper before the Court and not misconceived. The Claimant further contended that this breach is particularly egregious and the delay of some 4 years in regularizing his position is totally unreasonable, thus, giving rise to a common-law claim and that the Claimant has a viable cause of action.

[26] The Claimant submitted that the authorities of **R v Lord Chancellor's Department ex parte Nangle; Leaman v The King; Aaron Samuel v The Attorney General; Russell Joseph v Chief of Defence Staff & The Attorney General; Dion Samuel v The Attorney General; and Joel John v The Attorney General & Chief of Defence Staff (all supra)** are irrelevant to these proceedings.

[27] The Claimant asserted that in **ex parte Nangle (supra)**, the judgment dealt with the issue of military officers in England being dismissed at the pleasure of the Crown, which was reviewed and has since given rise to the position where military officers in England could bring a common law claim for breach of contract. The Claimant accepted however that this situation does not operate in Trinidad and Tobago, which has retained the system that members of the TTDF do not have contracts of employment. However, the facts of the case did not involve a military officer but a civil servant appointed in the Public Trust Office.

[28] The Claimant further contended that the other authorities submitted by the Defendant relate to a breach of contract and a Claimant's contractual right to sue for wages relative to its right to property enjoyment. The Claimant reiterated that his common law actions are specifically for negligence and/or breach of statutory duty against the Defendant and not a claim for breach of its right to property enjoyment, salaries owed and/or wages pursuant to his contract of employment. It was further submitted that the Claimant is seeking special damages pursuant to pecuniary loss in a claim for negligence.

[29] The Claimant further asserted that if the Court is minded to accept that the claim for negligence and breach of statutory duty is misconceived by the Claimant and should be struck out, the Court is vested with the power to save proceedings by giving directions and converting matters. The Claimant relied on the authority of **Dion Samuel (supra) and Antonio Webster v The Attorney General**[11] and **Kelvin Parmassar v The Attorney General**[12]**.**

Law and Analysis

[30] **Part 26.2(1)(c) of the CPR** states as follows:

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

[31] According to **Zuckerman on Civil Procedure Principles of Practice Third Ed** at page 373, para 9.36:

> *"The full pre-trial and trial process is appropriate and useful for resolving serious or difficult controversies, but not where a party advances a groundless claim or defence or abuses the court process. There is no justification for investing court and litigant resources in following the pre-trial and trial*

[11] Civil Appeal No 113 of 2009

[12] Civil Appeal No 120 of 2009

process where the outcome is a foregone conclusion...In such cases the court has therefore the power to strike out the offending claim or defence and thereby avoid unnecessary expense and delay ."

[32] The **White Book on Civil Procedure 2013** considers what constitutes a Statement of Case, which discloses no reasonable grounds for bringing or defending the claim. At page 73, the authors of **The White Book** state that Statements of Case which are suitable for striking out (on the basis that they disclose no reasonable grounds for bringing or defending the claim) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides.

[33] In **Brian Ali v The Attorney General**[13], Kokaram J explained as follows:

"12. The principles in striking out a statement of case are clear. A court will only seek to strike out a claim pursuant to ***Rule 26.2(1)(c) of the CPR 1998*** *as amended on the basis that it discloses no ground for bringing the claim. The language and wording of our* ***Rule 26.2(1)*** *is very generous in that so long as the Statement of Case discloses a ground for bringing the claim, it ought not to be struck out. See* ***UTT v Ken Julien and ors CV2013-00212****.*

13. It is a draconian measure and is to be sparingly exercised always weighing in the balance the right of the Claimant to have his matter heard and the right of the Defendant not to be burdened by frivolous and unmeritorious litigation. The Court in the exercise of its discretion to strike out a claim must always ensure to give effect to the overriding objective. See: ***Real Time Systems Ltd v Renraw Investment Ltd Civ. App. 238 of 2011****.*

14. It is for the Defendant to demonstrate that there is no ground for bringing the claim. The Defendant can demonstrate for instance that the claim is vague, vexatious or ill founded. ***Porter LJ in Partco Group Limited v Wagg [2002]***

[13] CV2014-02843

EWCA Civ. 594 *surmised that appropriate cases that can be struck out for failing to disclose a reasonable ground for bringing a claim include:*

*"(a) where the statement of case raised an unwinnable case where continuing the proceedings is without any possible benefit to the Respondent and would waste resources on both sides****: Harris v Bolt Burden [2000] CPLR 9****;*

(b) Where the statement of case does not raise a valid claim or defence as a matter of law."

[34] Part of the Claimant's Claim is for breach of statutory duty on the part of the TTDF for failure to comply with **sections 23(1), 29(1) and 31(2)(a) of the Defence Act**. In order to succeed on this part of the claim, the Claimant must satisfy the Court on a balance of probabilities that a statutory duty was imposed and the above-mentioned sections conferred a right of action. Therefore, the contention arises with the consideration of whether the Claimant can rightfully bring a claim for breach of statutory duty against the Defendant.

[35] In determining such, a fundamental question to be answered is did the legislature intend to confer on the Claimant a cause of action for breach of statutory duty? The above-mentioned sections read as follows:

"23. (1) Save as herein provided, every soldier upon becoming entitled to be discharged shall be discharged with all convenient speed but until discharged shall remain subject to military law.

29. (1) Subject to this section, an other rank is entitled to claim his discharge at any time after twelve weeks and within six months from the date of his first attestation, and if he makes such a claim, he shall, on payment of one hundred dollars, be discharged with all convenient speed but until discharged shall remain subject to military law under this Act.

31.(2) Where a person has received pay as an other rank without having previously made a declaration under subsection (1), then—

(a) he shall be deemed to be an other rank until discharged;"

[36] In **R v Deputy Governor of Parkhurst Prison ex parte Hague (supra)**, Lord Jauncey at page 171H- stated that

> *"It must always be a matter for consideration whether the legislature intended that private law rights of action should be conferred upon individuals in respect of breaches of the relevant statutory provision. The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to confer private law rights of action upon them, something more is required to show that the legislature intended such conferment."*

[37] The purpose of the Defence Act is plain and straightforward. The Long Title of the Act states as follows: **An Act to provide for the defence of Trinidad and Tobago by the establishment of a Trinidad and Tobago Defence Force and to provide for matters connected therewith and incidental thereto.**

[38] Having examined the above-mentioned sections, the Court is of the view that nothing in **sections 23(1), 29(1) and 31(2)(a) of the Defence Act** would support the conclusion that it was intended to confer a right of action on an individual member of the Defence Force. The purpose of these sections is to ensure efficiency in the performance of an administrative function; that is, any matter related to the discharge of a member of the Defence Force. These sections are purely administrative. It is inconceivable that the legislature intended that private law rights of action should be conferred upon members of the Defence Force in respect of a breach of these relevant statutory provisions.

[39] I am of the view that Parliament did not intend to confer on the members of the Defence Force a cause of action sounding in damages in respect of a breach of those provisions.

[40] With respect to the Claimant's claim for negligence on the part of the TTDF in failing to take the decision to discharge the Claimant by performing all procedural requirements to effect the said discharge since August 2014, I agree with the submission of the Defendant that there is an alternative remedy available to the Claimant.

[41] Though the facts as pleaded in the Statement of Case are coherent and may be true, the Claimant has an available remedy to seek redress pursuant to **section 195 of the Defence Act**. This sections states as follows:

> *"195. (1) If an other rank thinks himself wronged in any matter by any officer other than his commanding officer or by any other rank, he may make a complaint with respect to that matter to his commanding officer.*
>
> *(2) If an other rank thinks himself wronged in any matter by his commanding officer, either by reason of redress not being given to his satisfaction on a complaint under subsection (1) or for any other reason, he may make a complaint with respect thereto to the Council.*
>
> *(3) The Council or the commanding officer shall investigate any complaint received by him under this section and shall take such steps as he may consider necessary for redressing the matters complained of.*

[42] The Claimant has not pleaded in his Statement of Case that he availed himself of this remedy before coming to this Court. Consequently, the Court is of the opinion that the Claimant should have sought redress by lodging a complaint with his Commanding Officer or with the Defence Council pursuant to **section 195 of the Defence Act**.

[43] The Claimant has submitted that the Court has the power to save the proceedings by giving directions and converting matters. However, this unworkable in this instance, as the alternative remedy available to the Claimant does not entail Court proceedings.

[44] The Defence Council is responsible under the general authority of the Minister for the command, administration and discipline of and all other matters relating to the Defence Force.[14] Accordingly, the Defence Council is the appropriate body charged with the responsibility of dealing with the type of complaint that the Claimant has.

[14] **Section 8(1) of the Defence Act, Chapter 14:01**

[45] Accordingly, the misfortune experienced by the Claimant is not a claim that ought to be entertained as a private law action since the alternative remedy of lodging a complaint with his Commanding Officer or Defence Council is available to the Claimant.

[46] In the circumstances, the Claimant's Claim and Statement of Case ought to be struck out pursuant to **Rule 26.2(1)(c) of the CPR**, as the Statement of Case does not disclose any legally recognisable claim against the Defendant.

Decision

[47] In light of the above analyses and findings, this Court orders as follows:

ORDER:

1. **The Claimant's Claim and Statement of Case be and are hereby struck out pursuant to Part 26.2(1)(c) of the CPR as the Statement of Case discloses no grounds for bringing of the Claim against the Defendant.**
2. **The Claimant shall pay to the Defendant costs of the Notice of Application to strike out filed on 7 February 2018, to be assessed in accordance with Part 67.11 of the CPR, in default of agreement.**
3. **In the event that there is no agreement on the issue of costs, then the Defendant to file and serve a Statement of Costs for assessment on or before 7 November 2019.**
4. **Thereafter, the Claimant to file and serve Objections to the items on the Statement of Costs, if necessary, on or before 28 November 2019.**
5. **Decision on quantification of costs to be given without a hearing on a date to be announced.**

Robin N Mohammed
Judge