

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2016-02012

BETWEEN

KEVIN JOHN

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances

1. Mr. R. Simon for the Claimant
2. Ms. K. Redhead and Mr. A. Lamont for the Defendant

Date of Delivery: 13th June, 2017

Oral Judgment reduced into writing

REASONS

Overview

1. By Fixed Date Claim Form dated June 7, 2016 the Claimant brought a constitutional motion against the Defendant and sought the following reliefs:
 - a) A declaration that his discharge on 2nd March 2011 from the Trinidad and Tobago Defence Force pursuant to a unilateral, unknown and inflexible policy on the grounds that his services were no longer required, is unfair, unreasonable, ultra vires the Defence Act, Chap 14:01 and amounts to an infringement of the Claimant's constitutional rights under section 4(b) of the Constitution of Trinidad and Tobago;
 - b) A declaration that the enforcement and application by the Trinidad and Tobago Defence Force of a unilateral, unknown and inflexible policy against the Claimant prior to his discharge on the 2nd March, 2011 is an abuse of power and authority, a failure to consider relevant considerations, the fettering of discretion, a breach of the Claimant's rights of natural justice and amounts to an infringement of the Claimant's constitutional right not to be deprived of his rights except by due process of law under section 4(b) of the Constitution;
 - c) A declaration that the enforcement and application by the Trinidad and Tobago Defence Force of a unilateral, unknown and inflexible policy against the Claimant prior to his discharge on the 2nd March, 2011, amounts to an infringement of the Claimant's constitutional right to equality before the law and the protection of the law under section 4(b) of the Constitution;
 - d) A declaration that the enforcement and application by the Trinidad and Tobago Defence Force of a unilateral, unknown and inflexible policy against the Claimant prior to his discharge on the 2nd March, 2011 was in breach of the principles of natural justice since at no time prior to the decision was the Claimant given an opportunity to be heard and amounts to an infringement on the Claimant's constitutional right to a fair trial under section 5(2)(e) of the Constitution;

- e) A declaration that the enforcement and application by the Trinidad and Tobago Defence Force of a unilateral, unknown and inflexible policy against the Claimant prior to his discharge on the 2nd March, 2011, amounts to an infringement on the Claimant's constitutional right to procedural provisions as are necessary for the purpose of giving effect and protection to the rights and freedoms under section 5(2)(h) of the Constitution;
 - f) An order that monetary compensation, including aggravated and or exemplary damages for distress, inconvenience and loss suffered by the Claimant as a result of the contravention and breach of his fundamental rights under the Constitution be assessed and paid to the Claimant;
 - g) An order that monetary compensation and loss of salary, emoluments and benefits suffered by the Claimant as a result of the contravention and breach of his fundamental rights under the Constitution be assessed and paid to the Claimant;
 - h) All such orders, writs and directions as the Court may consider appropriate for the purpose of enforcing, or securing the enforcement of and/or redressing the contravention of the human rights and fundamental freedoms to which the Claimant is entitled under the Constitution.
 - i) Such further and/or other reliefs as the nature of the case may require; and
 - j) Costs.
2. The Claimant was a soldier in the Trinidad and Tobago Defence Force having enlisted on September 29, 2003. On December 18, 2010 while in the company of his girlfriend at her home in Cascade, officers of the Trinidad and Tobago Police Service entered the property for the purpose of executing a search warrant in relation to his girlfriend.
 3. Having conducted the search, the police officers allegedly found a quantity of marijuana in one of the bedrooms and proceeded to arrest and jointly charge the Claimant and his girlfriend for the possession of marijuana. The Claimant was able to secure bail and was released into the custody of Warrant Officer John of the Trinidad and Tobago Defence Force, who then escorted him to the Cumuto Barracks.

4. Thereafter the Claimant was instructed by the officer to undergo urine testing for marijuana and cocaine and he complied. That test was negative. Soon after, he was instructed to take another test which was also found to be negative. On a third occasion, on December 20, 2010, the Claimant was instructed to take another urine test for cocaine and marijuana. This test came up positive for marijuana. Processes were then engaged to discharge the Claimant pending an official confirmation from the Forensic Sciences Complex that his urine tested positive for marijuana and the subsequent testing in fact confirmed same. The Claimant was eventually discharged from the Trinidad and Tobago Defence Force under the rubric “service no longer required” pursuant to a ‘no tolerance’ policy for drug use with respect to its members.
5. The Claimant denied the outcome of the positive test and pointed to the fact that the two prior test were negative. The aforementioned sequence of events and the processes employed by his superiors in discharging him gave rise to this constitutional motion.

Assessment of the Evidence

6. In this matter the unusual course was taken to allow for cross examination as the court felt that it was important to test the sequence of events relative to the production of the Claimant’s urine samples which formed the basis the Trinidad and Tobago Defence Force (“TTDF”) assessment as to whether or not there was a presence of any narcotics in the claimant’s urine.
7. The Claimant was charged by the police for the possession of marijuana on the 19th December, 2010 and the charge is still pending. In a democratic society and having regard to the important function and role that the TTDF plays, such a circumstance cannot be ignored. The Court is of the view that it was entirely within the remit of the TTDF, to satisfy themselves as to whether or not this officer had, or was using illicit substances. It is clear that there was some process and procedure already in existence to make that determination, as there was an examination room and reactive test strips were available for the purpose of forming a preliminary view as to whether or not a narcotic such as cocaine or marijuana was present in a urine sample. Consequently, it cannot be said on a balance of probabilities that an unusual or unheralded course of events was initiated relative to the Claimant vis-à-vis the request for him to produce urine samples.

8. It is an undisputed fact that three urine samples were taken. The position advanced by the Defendant was that the first two samples were not obtained in a controlled environment nor under observation. Warrant Officer Stevenson John testified that on the first occasion he did not search the Claimant before he went into the toilet and that the Claimant's back was turned to him and though the door was open, he said that he could not see the Claimant while he was producing the sample. He said, however, that he heard a snapping noise that caused him some concern. In relation to the second sample, the Claimant was again not searched but Warrant Officer John said that he did not hear the snapping sound although others said that they heard such a sound.
9. This led to the third sample. The sequence of events with respect to the third sample were that the Claimant was searched by Warrant Officer John and Officer John said categorically that he searched for any device or vessel that may have stored urine. Having conducted the search, he was satisfied that the Claimant had nothing on his person. This evidence was corroborated by the evidence of Corporal Mohammed who said he was present when the search was done. Corporal Mohammed's evidence was that he produced and handed over to the Claimant a "clean sample vessel". The Claimant having been searched by Officer John then headed to the toilet area. Corporal Mohammed said that he was not there to observe the actual event when the sample was produced but Officer John said that he had sight of the Claimant when the sample was produced. More specifically, he said that he saw the Claimant's penis as the urine sample was produced. On a balance of probabilities, the Court had no reason to disbelieve the evidence of Officer John or Corporal Mohammed relative to the circumstances that prevailed in relation to the third sample.
10. The Court formed the view that it was entirely within the remit of the TTDF to ensure that the Claimant was drug free, having regard to the important public function they perform and the absolute need for the members of the public and for the hierarchy of the TTDF to have confidence in the ability of all of the officers to properly and soberly discharge the functions that their office impose upon them.
11. Ultimately the Court was satisfied on a balance of probabilities that there was no unusual circumstance with respect to the production of the third sample which produced a positive reactive test result. The said sample was subsequently analysed at the Forensic Sciences

Centre by Scientific Officer Michelle Nasseir who concluded that the person from whom the sample was retrieved had used marijuana prior to the sample being produced.

12. The Court next considered the issue as to the procedure that was adopted relative to the ultimate discharge of the Claimant on or about March, 2011. In that regard, Lieutenant Colonel Kester Weekes testified as to the chain of command and the procedure that is adopted. His evidence was that immediately after there is a positive confirmation of a test, administrative processes could be engaged provided that there is actual scientific confirmation of drug use, for a decision as to whether the officer's service should be terminated.
13. It appears that there is nothing unusual, suspicious or unconventional in such an approach and prior to any such administrative process being engaged there was a preliminary confirmation by way of the reactive test which was done on the 20th December and proved positive. The Court was not inclined to disregard the evidence of Captain Roxanne Rodney and noted that there was a factual dispute as to the processes adopted by her relative to the continuation of the administrative processes which were engaged. It is an undisputed fact that prior to the decision to terminate the Claimant's active duty (and he accepted that he was in fact paid up until June, 2011 and therefore remained a soldier until then), the Forensics Centre certificate of analysis report was obtained and this report was secured prior to the meeting that the Claimant had with Lieutenant Colonel Weekes. The Court felt some degree of disquiet in relation to the circumstances attendant to the Claimant's detention after he was released into the TTDF custody. However, that was not an issue to which the Court had to address its mind having regard to the nature of the action given that the Court's jurisdiction was expressly invoked to consider whether there were breaches of the fundamental rights as alleged by the Claimant. Consequently, the issue as to the nature of his confinement after he was taken to the TTDF base having been released from police custody was not left for the Court's determination. The TTDF however must always exercise caution and ensure that they treat the members of the service justly and with procedural fairness.
14. The Court addressed its mind to the following issues:
 - a) Whether there was a breach of section 5(2)(e) or 5(2)(b) of the Constitution.

- b) Whether there were circumstances in this case that could lead the Court to conclude that the Claimant was deprived of his right to a fair trial?; or
 - c) Whether there were breaches of a procedural nature that rendered the decision making process nugatory because it infringed or impacted upon the established law as it relates to procedural fairness and natural justice.
15. In its determination of the aforesaid issues, the Court considered whether there was a determination by the scientist at the Forensic Sciences Centre that the Claimant's urine sample did produce a positive result for marijuana and whether the course adopted by the Chief of Defence Staff was fair, reasonable and proportionate and/or whether it was in accordance with the rules and regulations contained under the Defence Act.
16. It cannot be disputed that the Chief of Defence Staff could terminate the service of a member of the force under the umbrella "service no longer required". Nor can it be disputed that there exists no definition in the Act or any regulations which positively identify the offences or circumstances which qualify or entitle the Chief of Defence Staff to discharge a member of the TTDF on the ground of "service no longer required". The Claimant produced a memorandum issued by the Permanent Secretary to the Ministry of National Security on or about September, 2009 where a certain administrative process was outlined in relation to circumstances involving the use of illicit substances. The Court had no information regarding the named officer on the face of that letter or the nature of the substance that he was alleged to have used.
17. Having reviewed the evidence, the Court found no basis to conclude on a balance of probabilities that the Claimant was treated unfairly or that the administrative decisions which were made did not accord with the principles of natural justice. The Claimant himself produced a report in which he said that he was instructed to produce a urine sample and in the said report joined no issue with the fact that on 20th December he produced a sample which produced a positive result.
18. When the Court considered the case law as to the relevant considerations to which it must address its mind when determining whether or not there is a breach of either section 4 or section 5 of the Constitution, the Court found that there was no circumstance in this case

which could lead it to conclude that the Claimant was deprived of a fair hearing which did not accord with the principles of natural justice. The Court was cognisant that the Defence Act provides for a process for an officer to go to the Defence Council if he has an issue with the process that had been adopted and there was no evidence that such a process was engaged save for the Claimant's assertion that he made an oral request through Captain Rodney. In a civilised and democratic society, the Court is entitled to expect that there is regularity in the way administrative action is undertaken by functionaries of the State. There was no evidence to discredit Captain Rodney or the Lieutenant Colonel so as to lead the Court to find that the process and procedure engaged was flawed.

19. The Court also noted that it was conceded by Mr. Simon on behalf of the Claimant that there was no evidence to establish that someone similarly circumstanced to the Claimant by way of a comparator was treated in a manner that was inconsistent with the manner in which this Claimant was treated. In the absence of such evidence as it relates to similar circumstanced persons, the Court could not find that there was any unequal treatment or inequality in relation to the Claimant.
20. It was open to TTDF pursuant to section 52 of the Defence Act to court martial the Claimant and for him to be charged with an offence. The facts in this case are that no such action was taken. The Lieutenant Colonel indicated that being aware that he was before the "civil" courts facing criminal charges for marijuana, no decision was taken to invoke the court martial processes but instead they sought to have him discharged not dishonourably or under an anomaly, but under the rubric "service no longer required".
21. While there exists no clear definition in the Defence Act as to what ought to constitute an offence under "service no longer required", and given that there are no express regulations, the Court is of the view that the TTDF should address its mind to the production of a list so as to provide for the benefit of all officers, an outline which should include interalia the nature of offences where a no tolerance approach will be adopted. Such a list would assist members of the service as well as the commanding ranks and enable them to operate in an environment that is not masked with the cloak of uncertainty.
22. The use of narcotics should always be viewed by the TTDF as a circumstance where a no tolerance approach should be adopted. Public confidence in the ability of the TTDF to

discharge their constitutional mandate must be of utmost importance and so long as the use of marijuana remains a criminal offence in this jurisdiction, the public is entitled to expect that officers within the TTDF operate with strict compliance of the law. During cross examination the Claimant admitted that his duties sometimes involved the use of high powered guns and that he would have to drive in certain circumstances. Consequently any impairment of judgment and/or ability, cannot be countenanced. The use of marijuana is not a circumstance which should lead to a flexible or tolerant approach by the TTDF and, it was entirely within the remit of the Chief of Defence Staff to ultimately find and to hold that the Claimant's use of marijuana which was established by the Forensic Sciences Centre certificate was a circumstance which justified the decision that his service was no longer required. The Claimant was indeed fortunate that he was not discharged in circumstances which amounted to as a dishonourable discharge.

23. The Claimant has no proprietary right to be a member of the TTDF and his employ with the TTDF was at the State's grace. The process which was engaged in relation to the Claimant was regular and when the Forensic Sciences Centre confirmed the presence of marijuana in his urine sample, it was well within the remit of Chief of Defence Staff to adopt a zero tolerance approach.

24. The Claimant said under cross examination that he understood that there was an unspoken policy; that there was no room for drug use as a member of the TTDF and that there was a no tolerance for the use of any illicit narcotic including marijuana.

25. In the circumstances, there was no evidence before this Court upon which the court could find that the Claimant was treated unfairly and he has not established that his rights or freedoms as guaranteed by the Constitution were violated or infringed. Accordingly, the Claimant's case must be and is hereby dismissed and there shall be no order as to costs.

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FRANK SEEPERSAD

JUDGE