

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2013/0357

**IN THE MATTER of the decision to withhold the salary and allowances of Captain George
Wehner, an officer of the Antigua and Barbuda Defence Force**

IN THE MATTER of sections 10(1) and 164(1) (a) of the Defence Act 2006

INTHE MATTER of an application for an Administrative Order

BETWEEN:

CAPTAIN GEORGE WEHNER

Claimant

AND

**(1)THE ANTIGUA AND BARBUDA DEFENCE BOARD
(2) CHIEF OF DEFENCE
(3) MAJOR RANDOLPH BEST**

Defendants

Appearances:

Dr. David Dorsett of Watt, Dorsett & Company for the Claimant

Ms. Bridget Nelson of the Attorney General's Chambers for the Defendants

2016: May 12

JUDGEMENT

- [1] **HENRY,J.:** The claimant (Captain Wehner) was, on the 15th July 1998, appointed by the Governor-General as a Second Lieutenant in the Defence Force. Subsequently, with effect from 1st January 1997, he was appointed a Captain. In the latter half of 2009, the third defendant (Major Best), indicated to Captain Wehner that he was recommending his retirement from the Defence Force. Captain Wehner thereafter indicated to his superiors that he would not resist the recommendation. However, according to Captain Wehner, the process seemed to come to a standstill. By letter

dated the 19th June 2013 addressed to the Secretary of the Defence Board, the Chief of Defence authorized the stoppage of Captain Wehner's pay pursuant to section 164 (1)(a) of the Defence Act, 2006. The claimant now seeks the following relief:

- (1) A declaration that the applicant is and remains a member and officer of the Antigua and Barbuda Defence Force at the rank of Captain.
- (2) A declaration that matters relating to the payment or non-payment of salaries, allowance and other pecuniary benefits to members and officers of the Antigua and Barbuda Defence force is an administrative matter for which the 1st Respondent shall have responsibility pursuant to section 10 (1) of the Defence Act 2006
- (3) A declaration that the decision on the 2nd respondent to authorise the stoppage or forfeiture of the applicant's salary, allowances and other pecuniary benefits from March 2010, and the said decision having not been communicated to the applicant, is a decision that does not have the character of a determination with legal effect and is accordingly a nullity.
- (4) A declaration that the applicant is entitled to the payment of his full salary, allowances and other pecuniary benefits accruing to him from the cessation of the payment of the same since March 2010.
- (5) An order that the respondents do pay, or do all things to ensure the payment, of the applicant's full salary, allowances and other pecuniary benefits due to him from March 2010.
- (6) Damages.
- (7) Interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act the cause of action arising on the 1st March 2010.
- (8) Cost pursuant to CPR 2000 r.56.13(5).
- (9) Interest pursuant to section 7 of the judgements act.
- (10) Any other relief that the court deems fit pursuant to section 20 of the Eastern Caribbean Supreme Court Act.

At the close of the trial items 1 and 2 were withdrawn.

Background

- [2] Major Best is the Commanding Officer of the Service and Support Battalion (SSB). Effective 1st January 2008 Capt. Wehner was transferred to the SSB under Major Best's command. By the 9th June 2009, Major Best had written to the Chief of Defence recommending Capt. Wehner's retirement from the Defence Force due to allegations of insubordination and disregard for authority. According to Major Best, Capt. Wehner's conduct as an officer was "far from exemplary". Soon thereafter Major Best had cause to reprimand Capt Wehner by letter dated 22nd June 2009.
- [3] On 8th July 2009, the Chief of Defence held his annual interview with Captain Wehner and informed him that he would be recommending to the Defence Board that he be retired from the Force.

The Chief of Defence by letter dated November 24, 2009 did write to the Defence Board recommending Capt. Wehner's retirement. However, according to the Chief of Defence no action was taken by the Defence Board up to the date of his affidavit in August 2013.

- [4] On 1st March 2010, Major Best again had occasion to write to Captain Wehner in respect of his reporting duties and allegations of poor job performance.
- [5] By letter dated 12th March 2010, Major Best was informed by the Finance Officer, that Captain Wehner had refused to sign the pay sheet for the week ending 12 March 2010 to allow for the timely submission of the imprest for payment of salaries. The letter further stated that Captain Wehner had been absent from work "for quite a while". Major Best, by letter dated 17th March 2010, advised the Chief of Defence of the repeated failure of Captain Wehner to report for duty and appended to the letter a log of his absences from the base during the period January 4, 2010 to March 2, 2010. The letter ended with a request that Captain Wehner's services be terminated in the interest of the force in accordance with S 9020 (a) of the Queens Regulations.
- [6] On Major Best's instructions, Captain Graham by letter dated 22nd March 2010, requested a stoppage of Captain's Wehner's pay. The Chief of Defence Staff admits receipt of the correspondence from Capt. Graham. The Chief of Defence states that he subsequently authorised the stoppage, given Capt. Wehner's continued absence without leave. Captain Wehner's last pay was for the period 7th to 10th March 2010.
- [7] On 20th May 2010, four (4) charges were served on Captain Wehner under cover letter signed by Major Best. The four charges are as follows:
 - (1) Disobedience to particular orders contrary to section 48(1) of the Defence Act. The particulars state that Camp Blizzard on 1 March 2010 you received in writing a letter instructing you to report daily to the Commanding Officer of Service and Support Battalion or the second in Command between the hours of 0800 – 0900 hrs on the operation of the Construction Electrical and Mechanical Engineer Department and also to make yourself available for consultation through the day when required in which you failed to do from 1 March 2010 to 11 May 2010.
 - (2) Failure to perform military duties contrary to section 54 of the Act. The particulars state "for that you at Camp Blizzard over the period of 1 March to 11 May 2010 without reasonable excuse failed to perform duties as the Officer in Charge of the Construction Electrical and Mechanical Engineer Department (CEME).
 - (3) Absence without leave contrary to section 52(1) (a). The particulars state that "you at Camp Blizzard over the period 1 March – 11 May 2010 did absent yourself without leave without obtaining permission to do so from the Commanding Officer of the Service and Support Battalion.

(4) Conduct to prejudice of military discipline contrary to section 80 of the Act. The Particulars read "that you at Camp Blizzard over the period 1 March – 11 May 2010, the conduct you displayed by absenting yourself without leave and failing to perform military duties as the Officer in Charge of the Construction Electrical and Maintenance Engineer is unbecoming of an Officer and more so as a member of the Antigua and Barbuda Defence Force."

[8] Also enclosed in the correspondence were (1) a movement log for the period 2 March – 14 May 2010 and (2) a copy of the 1 March 2010 letter.

[9] According to the defendants, hearing of the charges did not take place until July 2013 because Captain Wehner refused to attend the hearing. Captain Wehner asserts that he was never given a hearing date in respect of the above charges and that in any event new charges were served on him in July 2013. The record indicates that on 24th July 2013, Captain Wehner pleaded guilty to five charges and was sentenced accordingly.

1. Disobedience to Standing Orders contrary to section 48 (1) of the Defence Act
2. Disobedience to Standing Orders contrary to section 50 of the Act
3. Failure to perform Military duties contrary to section 54 of the Act
4. Absence without leave contrary to section 53 (1) (a)
5. Conduct to the Prejudice of Military Discipline contrary to section 80

[10] On charge 1 he was fined equivalent to 40 days' pay; on charge 2 he was reprimanded; on charge 3 he was severely reprimanded; on charge 4, a fine equivalent to 45 days' pay and on charge 5 he was reprimanded.

[11] According to Major Best, Captain Wehner did not report for duty for the period March 2010 to 17th July 2013 and was recorded as absent without leave for that period. The defendant's position is that the Chief of Defence authorised the stoppage of Captain Wehner's pay pursuant to section 164 (1) (a) of the Act for his refusal to perform or neglect of duties assigned and frequent and continuing absences from camp without permission.

Issue

[12] (1). Whether the principles of natural justice and due process require that an officer receive notice before his pay is forfeited pursuant to section 164 (1) of the Act; and if so

(2). Whether adequate notice was given to the Officer Wehner that his pay was being forfeited pursuant of section 164(1).

[13] For the purposes of this decision the court is not concerned with whether Captain Wehner in fact

neglected his duties and was frequently absent from camp without permission. The court is concerned with the procedure and process employed by the defendants in implementing section 164 (1).

[14] The case put forward by Captain Wehner is based on lack of due process and violation of the rules of natural justice. His position is that until and unless the Chief of Defence's decision has been communicated to Captain Wehner, it is of no legal effect.

[15] Counsel for the defendants admit that there is normally a requirement of due process, but submits that in this case it was the claimant who chose to withdraw his services. He was absent without leave therefore his pay was liable to be forfeited. There was no need for additional measures to be taken because he was notified by letter dated 1st March 2010 and was required to report for duty. He did not. He was perfectly aware of why he was not being paid. Further, having pleaded guilty to being absent without leave for March 2010, he could not say that he is entitled to be paid. If one is absent without leave, then it is a natural consequence that one does not get paid.

Discussion

[16] I start with the general premise set out in section 163 of the Act which states that the pay of an officer or soldier shall not be forfeited unless authorised by this Act or some other enactment, and no deduction from his pay shall be made unless it is so authorised.

[17] The side note to section 164 is captioned "Forfeiture of pay". That section provides:

"164 (1) The pay of an officer or soldier is liable to be forfeited

(a) For any day of his absence in circumstances constituting an offence under section 51 or 52, or, if the Chief of Defence Staff so directs, of other absence without leave;

[18] In **Ridge v Baldwin**¹ Lord Reid examined the cases to which the rules of natural justice apply. They include cases which deal with the decisions by Ministers, Officials and bodies of various kinds which adversely affect property rights or privileges of persons who had no opportunity to be heard. Lord Reid cited with approval the decision of Byles J in *Cooper v Wadsworth Board of Works* (1863) 14 C.B.N.S. 180 where it was stated "that although there are no positive words in a statute requiring that the party shall be heard, yet the justice of common law will supply the omission of the legislature.

[19] More recently, in **R (Anufrijeva) v Secretary of State for the Home Department**² Lord Bingham confirmed that constitutional principles required an administrative decision which was adverse to an individual to be communicated to him before it could have the character of a determination with legal effect, thereby enabling him to challenge it in the courts if he so wished.

¹ [1963] 2 All ER 66, [1964] AC 40

² [2003] UKHL 36

- [20] It is therefore accepted that in exercising any administrative function, there is a duty to perform it fairly and honestly and that the court ought to intervene in order to enforce appropriate requirements of natural justice and fairness³. Forfeiture cases especially, in which a decision takes away some existing right have long been accepted as among the cases where the requirements of natural justice apply. In such cases, at least the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges are considered requirements⁴.

The letter of 1st March 2010

- [21] The letter reads:

"Captain George Wehner

1. I have observed that since our last conversation with reference to your job performance, you have paid little or no attention to the department for which you have been given the responsibility of supervising. In fact, your behaviour and performance would indicate that you have become a 'ghost worker' drawing a salary that you do not earn.
2. I gave you the task to work along with the Volunteer Baptist Group, while they were here during the period of 15 – 29 January 2010 in the renovations undertaken by them at Camp Blizard and you were also given a task in preparing the 'soak way' at Crabs Training Area (CTA), both tasks you have failed to do or report on. Be therefore advised that you will be charged under S48 of the Defence Act 2006.
3. Further to this be advised that you are required to report daily to me at the Battalion second in command in my absence between the hours of 0800 – 0900 on the operation of the Construction Electrical and Mechanical Engineer Department (CEME), and you are to be available for consultation throughout the day when required. Any movement off the Base is also to be communicated to this Headquarters.
4. For your immediate attention and action."

- [22] The letter is signed by Major Randolph Best.

- [23] The letter specifically mentions two tasks assigned to Captain Wehner which it is alleged that he failed to do. The letter advised him that as a result, he would be charged under section 48 of the Act. It further required Captain Wehner to report to the writer or his second in command at a certain time on the operation of CEME and be available for consultation during the day. He was also to communicate any movement off base. There is no mention in the letter of forfeiture of pay pursuant to section 164 (1). Section 48 is not one of the sections mentioned in section 164 (1) for which an officer's pay is "liable to be forfeited", so that it could be said that he had notice that it was likely that his pay would be forfeited in these circumstances. Further, Section 48 creates an offence for disobedience to particular orders not an offence for being absent without leave. In short there is nothing in the letter which notified Captain Wehner that Major Best was seeking

³ Bushell v Secretary of State for the Environment [1981] AC 75

⁴ Bushell, supra citing Ridge v Baldwin [1964] AC 40

authorization or that the Chief of Defence Staff had issued authorization for his pay to be forfeited as a result of his alleged absence without leave.

- [24] The court can only conclude that the letter was not intended to nor did it give Captain Wehner notice in connection of the intended forfeiture of his pay under section 164 (1).

The Charges

- [25] Counsel for the defendants makes reference to certain charges that were served on Captain Wehner. Captain Wehner accepts that he was served with the 4 charges on 20th May 2010, but states that he was not given notice of the hearing date with respect to the charges. The court notes that no documentary evidence of notification to Captain Wehner of a hearing date has been submitted. In any event, Captain Wehner states that new charges were served on him in July 2013 to which he pleaded guilty on 23rd July 2013.

- [26] Even if the court considers the first set of charges served on 20th May 2010, clearly they too cannot be considered proper notice in regard to the earlier forfeiture of his pay. By the time he was served with the charges, the authorization by the Chief of Defence Staff to forfeit his pay had already been in effect for almost two months and have continued in effect since about the end of March 2010.

- [27] Interestingly, at the hearing of the charges on 23 July 2013, having pleaded guilty to the charge of absent without leave pursuant to section 52 (1)(a), he was sentenced to a fine equivalent of 45 days pay. At that time his pay had already been forfeited since March of 2010.

- [28] The court is of the view that while section 164 (1) gives the Chief of Defence Staff the authority to direct that an officer's pay be forfeited, the decision to direct forfeiture must be undertaken in accordance with the rules of natural justice and the requirements of due process. At a minimum, it requires that before forfeiture, the officer in question be notified and given an opportunity to challenge the decision, if he so desires.

- [29] Neither the letter of 1st March 2010 nor the service of the four charges on 20th May 2010 constituted proper notice to Captain Wehner that his pay was liable to be forfeited pursuant to section 164 (1). It means that Captain Wehner was deprived of the opportunity, if he so desired, to challenge same. While the defendants paint a picture of Captain Wehner's conduct during the relevant period that does not evoke sympathy, the court must state that the requirements of due process are not only applicable to persons with exemplary records. In fact, it is in respect of those persons with the unsympathetic records, that the relevant authority ought to be diligent to observe the requirements of due process and/or natural Justice

The retirement issue

- [30] One further matter bears comment. By letter dated June 9, 2009 Major best wrote to the Chief of Defence Staff recommending that Captain Wehner be retired from the Force. Up to the date of his affidavit on 27th August 2013, no action was taken by the Defence Board. The Chief points out that the Defence Board is the only authority under the Act to make and effect that decision.

- [31] There is evidence that after the meeting with the Chief Defence Staff, Captain Wehner was under the mistaken impression that his retirement would be effective at the end of his vacation in December 2009. Reference is made to a letter from Captain Wehner's former Counsel in which he refers to Captain Wehner as "Retired Captain George Wehner." The letter is dated July 12, 2010. In the letter it is alleged that it was Major Best who had informed Captain Wehner that he, Major Best, did not expect to see him on the compound after his vacation. The defendants point out that no protest was made in that letter of Captain Wehner's lack of pay. Instead the complaint was made in regard to his retirement benefits not being forthcoming.
- [32] Even if Captain Wehner held such a mistaken belief, the defendants actually did not. They were aware that there had been no decision by the Defence Board in regard to the recommendation for Captain Wehner's retirement. It was therefore incumbent upon for the defendants, to set the record straight. At the hearing of the matter, a letter dated 30th June 2014 and issued by the Chief of Defence Staff was given to Captain Wehner's Counsel. It stated: "At a meeting of the Defence Board held on the 27th June, 2014 a decision was made to accept the recommendations that you be retired in accordance with your mandatory retirement age which occurred on 15 June 2014." When the request was made for the stoppage of his pay there was no doubt on the defendants' part that he was still an officer of the Defence Force. Captain Wehner's misunderstanding could not justify the failure of the defendant to afford him the requirement of due process.
- [33] In all the circumstances the court finds that the requirements of due process were not afforded to Captain Wehner in that before his pay was stopped pursuant to section 164 (1) he was not informed of the decision and given an opportunity, if he so desired, to challenge same. The order of the Chief of Defence is therefore without legal effect.

Relief

- [34] There is evidence before the court that during the period that Captain Wehner was absent from the base, he was engaged in other employment. There is evidence that he incorporated a security company and that he was engaged in the business of this company during the relevant period. The Act is clear that an officer's pay shall not be forfeited except in accordance with the Act or some other enactment. The court has found that although the Chief of Defence had the authority to order the forfeiture, the order had no legal effect because of the lack of due process. There was no subsequent direction for forfeiture pursuant to section 164 (1) after Captain Wehner pleaded guilty to being absent without leave in July 2013. He was fined for the offence under section 53 (1) (a) and this has not been challenged. Therefore Captain Wehner is entitled to his salary and allowances. However, the circumstances do not call for the award of any further damages.
- [35] Accordingly, the court makes the following declaration and order
- (1) A declaration that the decision of the Chief of Defence Staff to authorise the stoppage or forfeiture of Captain Wehner's pay from March 2010, without prior notice to Captain Wehner is without legal effect and therefore a nullity.

- (2) A declaration that the Claimant is entitled to the payment of his full salary, allowances and other pecuniary benefits accruing to him from the date of cessation of the payment of same in March 2010 to the date of his retirement in June 2014.
- (3) An order that the Defendants do ensure the payment of the Claimants full salary, allowances and other pecuniary benefits due to him in accordance with paragraph 2 above.
- (4) Costs to the Claimant to be assessed, if not agreed.



CLARE HENRY
High Court Judge
Antigua & Barbuda