[2022] JMSC Civ 229

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2018 HCV 04356

BETWEEN	**GARY LLOYD**	**CLAIMANT**
AND	**RICHARD DACOSTA**	**1ST DEFENDANT**
AND	**JAMAICA DEFENCE FORCE**	**2ND DEFENDANT**

IN OPEN COURT

Mr Gary Lloyd in person

Ms. Faith Hall instructed by the Director of State Proceedings for the Defendants

Heard: October 20, 2022 and December 20, 2022

Judicial review – Military law – Jurisdiction of court – Discharge from military – Whether claim justiciable – Breach of natural justice – Defence Act - The Defence (Regular Force Enlistment and Service) Regulations, 1962 – Force Standing Orders

WINT-BLAIR, J

[1] Mr Lloyd who was self- represented throughout these proceedings was granted leave to apply for judicial review by the learned judge, Thompson-James, J on December 3, 2020 in the following terms:

> *"Leave to apply for Judicial Review for an Order of Certiorari quashing the oral communication given to the Applicant by the first Respondent on the*

19th of October 2018 in which the first Respondent informed the Applicant that his application for redress was denied and that the Applicant was no longer engaged to the JDF is granted.

A stay of the decision by the first Respondent as contained in the oral communication dated 19th October 2018 to have the Applicant removed from the JDF and that he be reinstated pending the determination of the matter is refused."

[2] Mr Lloyd by way of an Amended Fixed Date Claim Form[1], now seeks the following relief:-

1. *An Order for Judicial Review pursuant to Part 56 of the Civil Procedure Rules (CPR) 56.2(1) and 26).*

2. *An Order of Certiorari quashing the decision to discharge the claimant from the JDF which was communicated orally to him by the 1st Respondent on the 19th of October 2018, in which the 1st Respondent informed the claimant that his application for redress was denied and that the claimant was no longer engaged to the JDF.*

3. *An Order of Mandamus that the 1st and 2nd Defendants, comply with the Force Service Orders, the Defence Act and the Defence (Regular Force Enlistment and Service) Regulation regarding the claimant's purported discharge.*

4. *An Order that the claimant be retroactively paid all his salary, pension benefits and other benefits from the 19 of October 2018, when it was purported that he was discharged from the JDF to present.*

5. *A declaration that the procedures as documented in the amended version of Force Service Orders and the original version of Force Service Orders were breached regarding the claimant's purported termination and discharge from the JDF which forthwith constitute breaches of the*

[1] Filed on April 30, 2021

Defence Act, the Defence (Regular Force Enlistment and Service) Regulation and the Jamaica Constitution making the purported decision to discharge the claimant ultra vires and of no effect.

6. *A declaration that the Part 2 Orders dated the 23rd of July 2018, did not say that the claimant was discharged but that his discharge is pending confirmation and the only document to confirm the claimant's discharge is the AF B130 which is illegal, null and void.*

7. *A declaration that the Defendants exceeded or acted outside of the confines of the Force's jurisdiction when they fail[sic] comply with the Force Service Orders, the Defence Act and Defence (Regular Force Enlistment and Service) Regulation.*

8. *A declaration that there is no basis in service law to discharge a soldier for a performance appraisal that does not exist.*

9. *A declaration that the claimant's performance appraisal for the period 2016 to 2017 is incomplete making it illegal, null and void and of no effect.*

10. *A declaration that the prescribed ground (Termination of Engagement) that the claimant is purported to have been discharged on is illegal and has violated both versions of the Force Service Orders and the Defence Act*

11. *A declaration[sic] the Defendants fail[sic] to act within the confines of the administrative rules and regulations which govern the Force making the, claimant's discharge illegal, null and void.*

12. *A declaration that the decision to discharge the claimant was made in breach of the principles of natural justice and the rule of law.*

13. *A declaration that the claimant must be first seen on a formal interview and the grounds and reasons explained to him before a decision is made*

to discharge the claimant pursuant to the[sic] both versions of the Force Service Orders.

14. *A declaration that before the claimant attends the Medical Centre to have his final medical done, the date and time must be communicated to him as there is no provision in the Force Service Orders or service law that declares that a soldier must arbitrarily attend the Medical Centre to get his final medical done.*

15. *A declaration the 2nd Defendant breached its service liability policy when it failed to grant the claimant an additional service period of two years pursuant to the original version of the Force Service Orders or one-year extension pursuant to the amended version of the Force Service Orders for attending the Basic Operational Intelligence course.*

16. *A declaration that the claimant was deprived of the opportunity to challenge the 2015 to 2016 performance appraisal that the 1st Defendant asserted he used to give the claimant a one-year extension.*

17. *A declaration that the claimant was deprived again of the opportunity to challenge the performance appraisal for the period January 2018 to June 2018, which was given as a directive to determine whether the claimant's service with the JDF would continue or come to an end.*

18. *A declaration that the claimant was deprived of his military right[sic] serve to the prescribe[sic] age limit of 56 years.*

19. *A declaration that there is[sic] clear procedural improprieties and procedural unfairness regarding the claimant's purported discharge.*

20. *General Damages.*

21. *Cost of the Claim to the claimant.*

22. *Such further and other relief as the court deems just.*

Background

[3] Mr Lloyd was at all material times, a soldier in the Jamaica Defence Force ("JDF") he had attained the rank of Sergeant. In January 2018, Mr Lloyd applied to be re-engaged for a period of two years. He was instead re-engaged for a period of 6 months. In April 2018, he again applied to be re-engaged for a period of two years. In June 2018, Mr Lloyd met with his then Acting Commanding Officer, Major Phillip Stewart and was informed that his application for re-engagement would not be granted.

[4] In response, Mr Lloyd submitted a redress of complaint against the decision of his Acting Commanding Officer to deny his application for re-engagement. It was forwarded to the Headquarters of the JDF to be considered by the Chief of Defence Staff ("CDS"). The CDS affirmed the decision.

[5] On October 19, 2018, Mr Lloyd met with Lt. Colonel Dacosta ("Mr. Dacosta"), who was then his Commanding Officer. Mr. Lloyd was verbally informed by Mr. Dacosta that his redress of complaint was not approved and that he would be terminated.

The Issues

[6] The following issues arise for the court's determination:

1. Whether the claim concerns military or civil law;

2. Whether the decision to deny Mr Lloyd's application for re-engagement is ultra vires;

3. Whether Mr Lloyd was properly discharged in accordance with the Defence Act, the Defence (Regular Force Enlistment and Service) Regulations and the Jamaica Defence Force Standing Orders.

The Evidence

[7] Mr Lloyd filed an affidavit[2] which stated that he was a soldier in the JDF with the rank of Sergeant. He served in the Jamaica Defence Force Intelligence Unit for over sixteen years. On or about January 2018 he applied to renew his engagement with the JDF for a period of two years and approval was given for six months. In or about April 2018, he reapplied to renew his engagement with the JDF for a period of two years.

[8] He said that to be re-engaged in the military a soldier must be eligible pursuant to chapter 15, part 5, 15.116 of the amended Force Standing Orders ("FSO".) He maintains that at the time of his application, he was eligible to be re-engaged with a rating of "Exemplary" which is the highest military conduct that any soldier can attain according to chapter 15, part 4, section 2, 15.079 of the amended FSO.

[9] Mr Lloyd said that in or about June 2018, he was seen in an interview by Major Phillip Stewart (Acting Commanding Officer) of the Intelligence Unit about his application to re-engage. Major Stewart rejected his application and terminated his engagement with the JDF in breach of Chapter 15, part 4 section 1, 15.066 of the amended FSO and section 46 of the Defence Act ("the Act".)

[10] Mr Lloyd said that on or about August 2018, he submitted a redress of complaint to the CDS from Major Stewart's decision to terminate his engagement. On October 19, 2018, he was seen in an interview by his then Commanding Officer Lt. Col. Richard Dacosta regarding his redress of complaint and was told that the CDS did not find favour with it. Mr Lloyd said that he requested of Mr Dacosta that his redress of complaint be forwarded to the Defence Board according to the provisions of the amended FSO. His request was refused. This refusal to forward his redress of complaint to the Defence Board denied him the right to a fair hearing and expressly offended chapter 5 part 6, 5.210 of the amended FSO.

[11] During the interview on October 19, 2018, Mr Dacosta informed him that his army career had come to an end. In the interview, Mr Dacosta verbally

[2] Filed on December 11, 2020

communicated to him that he was discharged. Mr Lloyd told Mr Dacosta that many egregious errors had been made. Mr Dacosta disregarded what he had to say and proceeded to discharge him, causing significant emotional, financial and psychological distress. He asserted that Mr Dacosta also wrote a letter to the National Housing Trust stating that Mr Lloyd had terminated his service which was untrue. That letter has been exhibited before the court.

[12] Mr Lloyd said that he was deprived of another hearing with Mr Dacosta and the CDS in contravention of chapter 15 part 4, section 2, 15.072 of the amended FSO, Premature Certificate Option. He was also refused his final medical even though he had an ongoing medical condition which breaches chapter 15, part 4 sections 2, 15.073 and 15.076 of the amended FSO.

[13] Mr Lloyd stated that he later came into possession of the Instrument of Authority ("the AF B130"), to discharge him from the JDF, which had the following violations:

a. Mr Dacosta did not sign or authorize that document in breach of chapter 15, section 4, 15.102 of the amended FSO and sections 22 and 46 of the Act and of the Regulations;

b. The date of his discharge was not recorded, in breach of the Regulations;

c. The medical officer did not sign that document in breach of chapter 15, section 4, 15.102 of the amended FSO and section 46 of the Act and the Regulations.

[14] He claimed that according to the Part 2 Orders published on July 23, 2018, as a result of the faulty AF B 130 form, his discharge is still pending confirmation. The AF B130 form is the document that confirms his discharge therefore he is still subject to military law.

[15] Mr Lloyd's evidence is that that Mr Dacosta's actions were deliberate, irresponsible, malicious and meant to cause extreme deleterious effects on his civil life.

[16] Mr Lloyd stated that even though he had committed no offences, broken no rules, laws or regulations to be worthy of a discharge, it has had a negative effect on his ability to obtain gainful employment as potential employers are concerned about offences he could have committed which led to his discharge from the JDF. Therefore, his discharge can be equated to ignominy.

[17] On April 30, 2021, Mr Lloyd filed an affidavit in response to the affidavits of Mr Richard Dacosta and Mr Jermaine Johnson in support of his amended fixed date claim form.

[18] Mr Lloyd maintains that the JDF has two versions of the FSO. The original version and the amended version. He said that while working with the JDF he was presented with the amended version of the FSO as a legally binding and updated document. The amended FSO contained amendments dating back as far as 2007 regarding the appointment of the Chief of Staff being changed to Chief of Defence Staff inter alia. Both versions were exhibited for the court. The original version was marked GL1 and the amended version was marked GL2. Mr Lloyd said that it is false for the witnesses from the JDF to tell the court that the amended FSO is not in use.

[19] An example of this falsehood is that the performance appraisal report which Mr Dacosta exhibited to his affidavit was generated from the amended version of the FSO and not from the original. This is demonstrated by the original FSO at Chapter 3, instruction 'C' paragraphs 7a to 7d and the amended FSO at chapter 5 part 12, 5.502 page 5 - 93.

[20] Mr Lloyd gave evidence that he served in the JDF for over eighteen years and had never received a performance appraisal where his overall rating was below the accepted standard as itemized in the FSO. The sole exception is the performance appraisal report generated for the period October 2016 to September 2017 (which has an overall rating of 28 out of 60). He argued that this performance appraisal is clearly incomplete, illegal, flawed, unenforceable and in breach of both versions of the FSO and the Act. He said that in the military, a performance appraisal is not an apparatus used independently to determine whether a soldier re-engages, or is discharged; neither is it an instrument used to

determine how many years a soldier is granted by the competent military authority. The sole criteria or qualification to re-engage a soldier is 'Eligibility' which he had attained prior to his purported discharge.

[21] Pursuant to section 20 of the Defence Act, his conduct or his overall character assessment is rated as 'Exemplary' which is above the character assessment of 'Good' mentioned in the Act. Therefore, Mr Lloyd argues that there is absolutely no basis administratively or in service law, not to approve his application to re-engage or to unlawfully discharge him from the JDF.

[22] He referred to paragraph 5 of Mr Dacosta's affidavit which said that he made an application in 2016 to be re-engaged for a period of two years. Mr Dacosta stated that he granted approval for a one-year extension on the basis of the performance appraisal for the year 2016. The performance appraisal indicates that Mr Lloyd's general work attitude needed improvement but that he was not interested in developing his skill set. Mr Lloyd contended that he was not provided with a performance appraisal report for the period October 2015 to September 2016. Mr Lloyd asserted a right to acknowledge the contents of the performance appraisal report, saying that he should be shown this and that by affixing his signature would confirm sight of it. He was deprived of the right to appeal the performance appraisal report by way of redress of complaint before the decision was made to grant him the one-year extension.

[23] Mr Lloyd referred to paragraph 6 of Mr Dacosta's affidavit which said that on November 1, 2017, he again applied to be re-engaged for a further period of two years. Mr Dacosta said that his then Commanding Officer met with him on January 9, 2018 and approved six months, for his performance to be assessed, in order to determine whether he would be granted a further extension. Mr Lloyd averred that this was clearly in violation of the FSO. This is because prior to the six-month extension for him to be assessed, he had no performance issue neither had there been any negative performance appraisal report on his military record since he enlisted in January of 2000.

[24] Mr Lloyd asserted that the performance appraisal which was submitted in Mr Dacosta's affidavit was generated on the 15th January 2018, after the six-month

extension had been granted on January 9, 2018. Therefore, the then Commanding Officer who granted the six months' extension was also in error as he had no basis to grant his application for re-engagement for those six months.

[25] Mr Lloyd went on to state that in paragraph 7 of Mr Dacosta's affidavit, Mr Dacosta declared that in keeping with the directive of the then Acting Commanding Officer, his performance was to be assessed by Captain Nashon Smith (Officer Commanding) in April 2018. A performance appraisal report was to be generated by Captain Smith for the period January 9, 2018 to April 2018 (which is just over three months, and constituted the period that he served under Captain Smith.) Captain Smith later went on a course overseas in April 2018, during the same period Mr Lloyd was enrolled in a basic operational intelligence course. Major Derrick Brown later took over as the Supervising Officer which meant that he (Major Brown) would have had to complete the remaining period of assessment based on the directive given by the then Capt. Smith. However, Major Brown did not generate an appraisal report. Instead, he gave Mr Lloyd a positive written recommendation in June 2018. Mr Lloyd had served under Major Brown for over sixteen years meanwhile he had served under Captain Smith for just over three months which meant that Major Brown would have been in a better position to assess his performance.

[26] At paragraph 8 of Mr Dacosta's affidavit it was deposed that Mr Lloyd met with the then Acting Commanding Officer Major Phillip Stewart for the application for a further extension but his application was not approved due to his failure to improve his performance, whereas:

a) No appraisal report was generated after the six-month period of assessment as directed by the then Acting Commanding Officer. This was to determine whether a further extension would have been granted. This failure breaches section 44 of the Act.

b) He was deprived of the contents of the performance appraisal report which Mr Dacosta stated was done by Captain Smith. There is no signature on that report from Mr Lloyd as he never received it.

c) He was deprived of his right of appeal against the performance appraisal report before the decision not to approve his application was made by Major Phillip Stewart.

d) He commenced a Basic Operational Intelligence Course in April 2018 and was later removed from the course which violates the JDF's Service Liability Policy.

[27] At paragraph 10 of Mr Dacosta's affidavit, he stated that the ground on which Mr Lloyd was discharged was termination of engagement. Mr Lloyd asserted that this ground breaches both versions of the FSO.

[28] At paragraph 12 of Mr Dacosta's affidavit he advanced that he authorized Mr Lloyd's discharge by reason of termination of engagement by way of an Application for the Discharge of a Soldier (AF B130). Mr Lloyd's purported discharge to date has not been authorized by Mr Dacosta nor by the Medical Officer which breaches the FSO. Additionally, Mr Dacosta's failure to authorize the AF B130 constitutes breaches of sections 22 and 46 of the Act and the Regulations. Mr Lloyd argued that the AF B130 is the instrument of authority and the administrative apparatus used to carry out or effect his discharge not Mr Dacosta's verbal indication that he was discharged.

[29] Further that Captain Gayle who is stated as the officer recommending discharge on the AF B 130 was not authorized to apply for Mr Lloyd's discharge because he had not served under him.

[30] At paragraph 13 of Mr Dacosta's affidavit he deposed that once a member of the JDF is informed that he is being discharged pursuant to the Act, the practice is for that member to immediately attend the JDF's Medical Centre to be examined. Mr Lloyd contended that this is not stated in the FSO, the Act or any regulation. The medical is an administrative order which has to be communicated to the Medical Centre by way of the AF B130. The proper correspondence is communicated to Mr Lloyd's unit after which he is informed that a date is set for his medical to be done. Mr Lloyd submits and the court notes that the section of original version of the FSO which speaks to the medical examination has been partially erased.

[31] At paragraph 16 of Mr Dacosta's affidavit he noted that Mr Lloyd failed to attend the Medical Centre and having been a member of the JDF for over eighteen years Mr Lloyd ought to have known he had to do so. Mr Lloyd responded saying that attending the Medical Centre is a command, and not arbitrarily done. He stated that he was never informed at any time that he was to attend the Medical Centre until December 2018, long after his purported discharge and long after the matter was brought to the Supreme Court. This was communicated via Telephone Messenger by Desk Sergeant Major W02 Dacres who was in charge of administration in the department that he worked. If the medical or any other administrative action is not carried out by the relevant personnel involved in his discharge it forthwith constitutes a breach of section 46 of the Act which is punishable with imprisonment.

[32] Mr Lloyd said he was not formally informed at any time that he would have been discharged. Any purported discharge was verbal. He advanced that his discharge was premature and that once a soldier is being discharged prematurely he or she must be seen formally in an interview and should be informed of the decision.

[33] In paragraph 14 of Mr Dacosta's affidavit he deposed that the completion of the AF B130 or the Instrument of Authority is not mandated by the Act. Mr Lloyd's evidence is that this is not so, as both versions of the FSO, section 22 of the Act and the Regulations speak to the contrary. Where there are flaws and errors with the AF B130 form it constitutes a breach of the FSO and the Act. In the present case, section 22 says that a soldier shall not be discharged unless the said discharge has been authorized by the competent military authority. Both versions of the FSO state that a discharge is to be authorized on the AF B130 as the instrument of authority. Therefore, as Mr Dacosta failed to ensure its completion, Mr Lloyd argued that he is therefore still subject to military law.

[34] Mr Lloyd submitted that after the submission of the redress of complaint, he could not have gone to the Medical Centre. The submission of the redress of complaint to the CDS has an effect equivalent to that of a temporary injunction, if the CDS had favourably ruled that there were irregularities with his pending discharge, the entire process would have been reversed.

[35] Mr Dacosta at paragraph 16 said that the separation process was initiated by the publication of the Unit's Part 2 Orders. Mr Lloyd responded saying that this evidence shows clearly that the discharge process was incomplete, hence the declaration in the Part 2 Orders that Mr Lloyd's discharge was pending confirmation by the OIC Records.

[36] Mr Lloyd advanced that if the Part 2 Orders initiated the separation process then the administrative document which completes the process is the completed AF B130 which is sent to the OIC Records for confirmation. Mr Dacosta failed to use the AF B 130 as the instrument of authority to carry out Mr Lloyd's discharge, failed to complete the Instrument of Authority in compliance with the FSO, the Act and the Regulations and failed to disseminate it to the OIC Records in the same way that his re-engagement certificate was completed and sent to OIC Records.

[37] Mr Dacosta also testified that over the years it has been his observation that service members fail to attend the Medical Centre to do their medical and this is a practice use to frustrate the process of being discharged by causing the soldier's AF B130 to be incomplete. However, Mr Lloyd asserted that if that is the present case, he ought to have been charged and prosecuted for failure to comply with a military order, under the provisions of the FSO and the Act.

[38] At paragraph 17 of Mr Dacosta's affidavit, he said that the application for discharge of soldier does not provide the legal authority to discharge a soldier. Mr Lloyd responded that this was a contradiction of both versions of the FSO, the Act and the Regulations making his discharge illegal, null and void.

[39] At paragraph 18 of Mr Dacosta's affidavit, he asserted that the part 2 Orders communicated the decision of the Commanding Officer and by extension the Headquarters of the JDF. Mr Lloyd responded saying that the Part 2 Orders clearly state that his discharge is pending confirmation by OIC Records. The application for the discharge of a soldier or AF B130 must be approved or authorized first in order for the soldier to be discharged. Without the AF B 130 being signed it is not authorized by the competent military authority, therefore, he remains subject to military law pursuant to section 22 of the Act. The OIC

Records cannot confirm his discharge without the completion of the AF B 130. If he is discharged in this manner, then his discharge is ultra vires.

The Defendant's case

Affidavit of Richard Dacosta

[40] Mr Dacosta's stated that he was[3] currently the Staff Officer in charge of Intelligence and Operations of the JDF. Previous to this current appointment, he was the Acting Commanding Officer of the Intelligence Unit during the period June 2016 to July 2017. He was subsequently appointed as the Commanding Officer of the Intelligence Unit on 11 August 2018 and relinquished that post on 31 December 2020.

[41] The JDF is established by statute, and is guided by the Act and Regulations in so far as it relates to the engagement and termination of its members. The JDF is also guided by the FSO which governs its daily administration. For the purposes of approving the re-engagement of a member, the responsible person is that member's Commanding Officer.

[42] A member who wishes to be re-engaged usually has to indicate within six months before completing his service period ("run out date") his intention to be considered for re-engagement, having proven that he is medically fit to be so considered. The member must meet the standard of discipline and assessed efficiency by the officer commanding the sub-unit. The Commanding Officer is empowered to vary the requested period of re-engagement and to decline to re-engage a soldier if he has not satisfactorily met the criteria in accordance with section 20 of the Act.

[43] On September 16, 2016, Mr Dacosta stated that Mr Lloyd made an application to be re-engaged in the JDF for a period of two years effective April 20, 2017. At the material time, Mr Dacosta as the commanding officer of the Intelligence Unit was vested with the authority to approve or refuse the application. Having reviewed the application for re-engagement for a period of two years, he

[3] At the time of writing

approved an extension of only one (1) year. This was done on the basis of Mr Lloyd's performance appraisal for the year 2016 to 2017 which indicated that his general work attitude needed improvement.[4] The appraisal showed that Mr Lloyd was not interested in developing his skill sets. A one-year extension was granted, so that Mr Lloyd could improve on the areas highlighted in the performance appraisal. Mr Lloyd did not challenge that decision and therefore the extension expired on April 20, 2018.

[44] He goes on to say that on November 1, 2017, Mr Lloyd again requested a two-year extension which would have taken effect from April 20, 2018 to April 20, 2020. The then acting commanding officer met with Mr Lloyd on January 9, 2018 and approved a six-month extension for Mr Lloyd's performance to be assessed with a view to determining whether a further extension would be granted based on any improvement in performance. Mr Lloyd did not challenge that decision. Mr Lloyd was aware from as early as January 9 2018 that his tenure with the JDF may not go beyond October 20, 2018 if his performance did not improve. In keeping with the directive of the then acting commanding officer, Mr Lloyd's performance was assessed by his commanding officer in April 2018 and he was informed that an extension would not be recommended based on the lack of improvement in his performance. Notwithstanding being informed of this recommendation, on January 26, 2018, Mr Lloyd applied to be re-engaged for a period of two years, to end on October 20, 2020.

[45] Mr Dacosta stated that on June 15, 2018, Mr Lloyd met with his then acting commanding officer, Major Phillip Stewart and was informed that his application dated January 26, 2018 would not be granted, due to his failure to improve his performance and that his tenure with the JDF would therefore not go beyond October 20, 2018. In response, Mr Lloyd submitted a redress of complaint as provided for by section 174 of the Act, against the decision of the acting commanding officer to remove him from a course of instruction as well as the decision not to approve his re-engagement.

[4] "RD2"

[46] Mr Dacosta deposed that upon his resumption of command of the Intelligence Unit in August 2018, Mr Lloyd's redress of complaint was brought to his attention. In keeping with section 174 of the Act, it was duly forwarded to the JDF Headquarters to be considered by an officer above the rank of Colonel. It was the CDS as the officer under whose command he served who had the authority to address the redress of complaint. There is no further appeal from a decision of the CDS. Mr Lloyd's redress of complaint was denied.

[47] As a consequence of the denial of Mr Lloyd's redress of complaint, Mr Dacosta saw Mr Lloyd in an interview on October 19, 2018 and informed him that the redress of complaint had not been approved and therefore his tenure with the JDF would come to an end on October 20, 2018 on the ground of termination of engagement. The application for re-engagement having not been approved by Mr Dacosta in his capacity as the competent military authority prescribed by the Act and the Regulations.

[48] During the interview, Mr Lloyd requested that his redress of complaint be forwarded to the Defence Board, Mr Dacosta said he informed Mr Lloyd that based on his understanding of section 174 of the Act this was not an option for an enlisted soldier who was to be dealt with by the officer in command of the officer against whom the complaint is directed and is above the rank of Colonel. The redress of complaint was dealt with by the officer under whose command Mr Dacosta served, that is the CDS. This is compared to section 173 which specifically states that for officers, their redress of complaints can be sent to the Defence Board. Mr Lloyd's application for re-engagement not having been approved, Mr Dacosta stated that he authorised the discharge by reason of termination of engagement by way of an Application for Discharge of a Soldier (the AF B130) marked as RD5.

[49] It is Mr Dacosta's evidence that once a member is informed that he is being discharged pursuant to the Act, the practice is for that member to immediately attend the JDF's Medical Centre to be examined. A copy of the Application for Discharge of a Soldier is then sent to the Medical Centre to await the arrival of the soldier so that the medical examination can be performed. The reason for this is that in the event the member soldier is found to be suffering from any

ailment, referrals for outpatient treatment can be provided. The member's medical state is then recorded on the Application for Discharge of Soldier. The attendance at the Medical Centre is done at the initiative of the member. Therefore, if the member does not attend to have the examination done, then the Application for the Discharge of the Soldier cannot be completed.

[50] The Application for Discharge of Soldier is an administrative form used by the JDF to document the particulars of the discharge of a soldier. Its completion is not mandated by the Act or the Regulations which constitute the legal authority for the discharge of a soldier.

[51] Mr Dacosta said that in the case of Mr Lloyd even though he had not signed the Application for Discharge of Soldier, it was he who verbally advised Mr Lloyd on October 19, 2018 that his application for re-engagement had not been approved. Further, it was he who informed Mr Lloyd that his redress of complaint was not approved by the CDS, the response to Mr Lloyd's redress of complaint is marked RD4.

[52] Mr Dacosta stated that in addition to completing the medical examination, a member being discharged is also required to hand over all military items of Kit (uniforms and other property) belonging to the JDF. The handing over of the Kit is not prescribed by law, but it is a practice of the JDF given the need to account for military property so that it is not used in an unauthorised manner.

[53] In keeping with that practice, Mr Lloyd duly turned in his items of Kit; however, he failed to attend the Medical Centre to have his final medical examination performed. Mr Dacosta asserted that Mr Lloyd having been a member of the JDF for eighteen years, was aware that he ought to have attended the Medical Centre to have the final medical completed. However, there is no record that he attended the Medical Centre or communicated with the Medical Centre to express any challenge that he may have been experiencing at the time which would have affected him doing the medical examination.

[54] Mr Dacosta noted that over the years, it has been his observation that it is a practice often employed by members to frustrate the process of being discharged by causing the Application for Discharge of a Soldier to be incomplete. However,

the discharge process can be continued once the commanding officer provides the necessary instructions for the separation process to begin and this is initiated by the publication of the Unit's Part 2 Orders. This publication is notice to the entire JDF that the member will be separated from the JDF and forms the basis of removing the member from the monthly payroll and notifying the relevant Units of the service member's separation from the JDF. Mr Lloyd's discharge was published in the Unit Part 2 Orders dated July 23, 2018 to take effect October 20, 2018.

[55] Mr Dacosta contended that the Application for the Discharge of a Soldier cannot provide the legal authority to discharge the soldier, discontinue the soldier's emoluments or to remove him from the record of serving members of the JDF. Hence the unsigned Application for the Discharge of a Soldier is not detrimental to the discharge process. The Regulations indicate that it is the decision of the commanding officer that forms the legal basis for the termination of the re-engagement of a member and subsequently triggers the process for the discharge of that soldier.

[56] He further contended that the publication of the Part 2 Orders communicates the decision of the commanding officer and by extension the Headquarters of the JDF, not to re-engage the individual. Once published, the Part 2 Orders are used as the authority to commence the process of discharge. Subsequently, the member is sent on what is referred to as terminal leave on the date indicated in the Part 2 Orders. During this period which lasts twenty-eight days, the soldier will continue to be paid whilst the process of reconciling his leave records, checks to ascertain if all items of Kit are accounted for, auditing of any funds owed to the JDF by the member as well as other administrative processes involved in a separation from the JDF are done. Mr Dacosta said that he was advised that the Certificate of Discharge and emoluments due to Mr Lloyd on separation have been ready since 2018 and are awaiting his collection.

[57] He stated that at the end of the terminal leave and upon completion of the administrative processes for discharge, the member is deemed to be discharged. It is the evidence of Mr Dacosta that Mr Lloyd's actions demonstrate that he accepted that he was terminated because having proceeded on his terminal

leave upon its expiry, he did not report to work. He has been advised that Mr Lloyd's pension payments were approved by the Ministry of Finance and Planning on October 25, 2018 and that he has been in receipt of his monthly pension since then.

[58] Finally, Mr Dacosta said that Mr Lloyd's assertion that his actions were deliberate, irresponsible, malicious and meant to cause extreme deleterious effects on Mr Lloyd's civil life is untrue as his decision and actions were in accordance with the Act, the Regulations and the FSO.

Affidavit of Devon Williams

[59] Mr Williams stated that he has been a serving member of the JDF for the past twenty-eight years. He is currently acting as the Force Chief Clerk of the JDF's Headquarters. However, his substantive post is that of Assistant Force Chief Clerk and he has been appointed in this capacity since January 2020.

[60] He said that in his capacity as the Assistant Force Chief Clerk, his duties include providing assistance to the Force Chief Clerk and the staff officers of the JDF Headquarters by:

a. Ensuring that documents are handled as per the JDF's instructions and Regulations;

b. Ensuring the timely and accurately publication of Force Orders, as well as publications related to Courts Martial, Boards of Survey, Audit Boards, Continuance Boards, Authorized Drivers, Diary of Events, Medals of Honour, Appointments and Relinquishment of Officers and any other matter which is required to be published; and

c. Maintaining current and amended copies of Force Standing Orders, Force Policies Agreements, Memoranda of Understanding, Trade Test Regulations, Pay and Allowance Regulations, Basic Fitness Standard Test Manual, Queen Regulations, Defence Act and Manual of Military Law and Joint Services Publication 101 as well as securing copies of Gazettes relating to the JDF.

[61] The affiant stated that Mr Lloyd has purported to exhibit a document, Exhibit "GL2" that he alleges is a legally binding updated version of the JDF's FSO. Mr Williams further stated that having reviewed this document in its entirety, he can attest to the fact that this document is neither authorized nor promulgated for use in the JDF.

[62] Mr Williams asserted that the approved and authorized FSO which is in force and widely known by members of the JDF is a document which was originally produced by way of a typewriter. Save and except for a few recent pages which were generated by way of a computer, all the remaining pages of the FSO are typewritten. Given the fact that the document is archaic both in terms of appearance and content, some time ago, directives were given for the FSO to be updated. He stated that a draft was prepared and he recognized this draft to be the document that was exhibited by Mr Lloyd. He said that this draft was never circulated amongst members of the JDF and as such it ought not to have been in Mr Lloyd's possession.

[63] He noted that after a careful examination of Exhibit "GL2" at page xii, the words "Chapter 16 - Ceremonial (still being reviewed)" appears. Similarly, at page xiv, the words "Chapter 21 - Arrest, Charge and Trial (still being reviewed), on page xv "Chapter 22 - General Legal Matters (still being reviewed)" also appears in the document. He argued that the document exhibited as "GL2" is a draft and is a work in progress. He further argued that a document which purports to give rights, obligations and benefits to members of the JDF and which they ought to be able to rely on in a court of law, cannot contain sections which are still under review. Therefore, Mr Lloyd's view that Exhibit "GL2" is the binding FSO is erroneous.

[64] Moreover, Mr Williams advanced that in recognition of the fact that a draft of the updated FSO was already in existence, the JDF through the office of the Colonel Adjutant Quartermaster, issued a communication to all Units of the JDF directing that the FSO are to be reviewed throughout the period May 16, 2021 to July 31, 2021. Consequent on the review of the FSO conducted by representatives of the various units of the JDF, the document exhibited at "GL2" was updated in keeping with the current disposition of the JDF. The most recent draft of Chapter

1 of the updated FSO as at March 2022 (Exhibit "DW2") indicates that the command of the JDF is vested in the CDS and introduces the General Staff Board at paragraph 1.006. The comparison of paragraphs 1.006 in Exhibit "DW2" and Exhibit "GL2" clearly shows differences between both documents.

[65] He asserted that on further review of Chapter 1 of Exhibit "GL2", he noticed at paragraph 1.005 that the document states that "The Jamaica Defence Force consists of a regular force and a reserve force to be known as the Jamaica National Reserve..." It should be noted that by way of an amendment to the Act in 2017, a third force, the Jamaica National Service Corps was added to the JDF.

[66] Finally, Mr Williams maintains that the aforementioned amendments illustrate that the document exhibited by Mr Lloyd is a work in progress and is just one of several iterations or drafts that are in existence. Consequently, it is his assertion that it is not authorized for use by any member of the JDF nor does it devolve any legal rights on any of its members.

Affidavit of Jermaine Johnson

[67] Mr Johnson stated that he has been a serving member of the JDF for the past twenty-five years. He is the Force Chief Clerk of the JDF's Headquarters and has been employed in this capacity since November 18, 2019. His duties include but are not limited to having responsibility for:

a. Ensuring that documents are handled as per the instructions and Regulations of the JDF;

b. Ensuring the timely and accurate publication of Force Orders, as well as publications related to Courts Martial, Boards of Survey, Audit Boards, Continuance Boards, Authorized Drivers, Dairy of Events, Medals of Honour, Appointments and Relinquishment of Officers and any other matter which is required to be published; and

c. Maintaining current and amended copies of Force Standing Orders, Force Policies Agreements, Memoranda of Understanding, Trade Test Regulations, Pay and Allowance Regulations, Basic Fitness Standard

Test Manual, Queen Regulations, Defence Act and Manual of Military Law and Joint Services Publication 101 as well as securing copies of Gazettes relating to the JDF.

[68] The JDF was established and is maintained, by section 4 of the Act. While the legislation addressed matters such as enlistment, discharge, discipline, Court Martial and other similar matters, there was nothing to address the day-to-day operations of the JDF. As such, in 1962, the JDF drafted Administrative Standing Orders which essentially governed the administration of the JDF as it emanated from the British military system.

[69] The standing orders comprise a collation of documents which address matters relating to the operation of the JDF. Over time, these documents were amended, new documents added, and some were repealed. The Administrative Standing Orders were re-named the Force Standing Orders on 1 February 1968. The FSO is a guide for how matters related to the JDF, its assets and members should be governed and treated with on a daily basis.

[70] Mr Johnson goes on to state that he has observed that throughout Mr Lloyd's affidavit he makes mention of the FSO with several sections attached as exhibits. He has perused those exhibits and compared them against the FSO authorized for use by the JDF and can confirm that they do not represent extracts from the FSO being used by the JDF.

[71] He noted that chapter 15 of the FSO addresses "Neglect, Misuse and Damage Reports, Disciplinary Reports and Death Benefits" whereas chapter 3 addresses matters relating to discipline/discharge of members, which Mr Lloyd is seeking to invoke in this claim. With respect to chapter 3, the relevant provisions are contained in instruction B of chapter 3 which addresses re-engagement, and Instruction E, which addresses Termination.

[72] Mr Johnson concluded by asserting that the document as exhibited by Mr Lloyd is not authorized for use by the JDF and a member cannot rely on its contents as being representative of the contents of the FSO.

Mr Lloyd's Submissions

Breaches of the Force Standing Orders, Defence Act and the Defence (Regular Force Enlistment and Service) Regulations

[73] Mr Lloyd submits that there are two versions of the Force Standing Orders ("FSO") in use by the JDF, there is the original version and there is the amended version. He argues that as both are in use, the procedure to discharge him from the JDF breached both FSO's, the Defence Act ("the Act"), the Defence (Regular Force Enlistment and Service) Regulations, 1962 ("the Regulations.")

[74] Mr Lloyd argues that termination and discharge are not the same. The procedure for discharge begins with termination as set out in both versions of the FSO. Discharge is commenced by way of the Application for the Discharge of a Soldier form ("AF B130"), which forms the nucleus of the decision-making process. The AF B130 is to be authorized by the medical officer and the competent military authority pursuant to the FSO, the Act and the Regulations. The AF B130 form has to correctly state the grounds for and the effective date of discharge. This has not been done, which means that his discharge is in breach of this established legal procedure and is ultra vires.

[75] In addition, Mr Lloyd said that in April 2018, prior to his purported discharge, he was enrolled in a basic operational intelligence course which would have allowed him to serve for an additional period of one or two years in accordance with the JDF's service liability policy for attending courses as laid down in both versions of the FSO.

[76] It is Mr Lloyd's position that the Part 2 Orders dated July 23, 2018 make it pellucid that his discharge was "*pending confirmation by OIC Records wef*[5] *20 October 2018*". He states that the only instrument that can confirm his discharge is the AF B130 form duly authorized by the competent military authority in order

[5] With effect

to effect his discharge from the JDF and for confirmation to be made by the OIC[6] Records.

[77] When a soldier applies to be re-engaged, in order for his re-engagement to be confirmed, his re-engagement certificate must be approved or authorized by the competent military authority. Similarly, for his discharge from the JDF to be confirmed, the AF B130 must be authorized by the competent military authority in accordance with the FSO, the Act and the Regulations.

[78] Mr Lloyd maintains that as a result of breaches in the completion of the AF B130 his purported discharge is ultra vires, illegal, null, void and of no effect.

[79] Mr Lloyd complains that Mr Dacosta failed to forward the redress of complaint against the decision to terminate his engagement to the Defence Board pursuant to the amended FSO.

[80] He states that he was further deprived of a hearing with Mr Dacosta as he was not seen in an interview and informed of the grounds on which he was being discharged or given the Certificate of Option to indicate whether he wished to see the CDS in a separate interview. Further, that he was denied a hearing when he was deprived of the opportunity to appeal the 2016 and 2018 performance appraisal reports which Mr Dacosta claims are the reasons for Mr Lloyd's purported discharge. Mr Lloyd argues that these are breaches of the principles of natural justice.

Jurisdiction

[81] Mr Lloyd submits that both his military status and civil status were affected by the purported discharge as the principles of natural justice were breached. He argues that there is overwhelming evidence that his purported discharge was done at pleasure without any justifiable basis. He asserts that the defendants have clearly exceeded or acted outside of the confines of the JDF's jurisdiction. This is therefore a breach of his civil rights.

Cases

[6] Officer in Charge

[82] Mr Lloyd relied on the case of **Marvin Alexis v The Chief of Defence Staff (Republic of Trinidad and Tobago)**, a decision of Madame Justice Joan Charles of the High Court of Justice of Trinidad and Tobago.[7] In this case, Marvin Alexis was discharged from duty in the Trinidad and Tobago Defence Force ("TTDF") on the grounds of 'service no longer required' with effect from December 13, 2016 under section 28 of the Defence Act and Regulation 5 of the Defence (Enlistment and Service) Regulation Cap 14:01. His discharge was based on a failed random drug test conducted on March 11, 2016. He sought judicial review of the decision of the Chief of Defence Staff to discharge him.

[83] The court considered two questions, the first was whether Mr. Alexis was discharged in breach of the principles of natural justice and the second was what were the appropriate remedies to which he was entitled.

[84] On the first question, the court found that a failed drug test did not amount to an offence against service law under section 52 of the Defence Act, which deals with drunkenness by way of drugs or alcohol. The learned judge found that there was no evidence that Mr. Alexis, at the time of his positive drug test, was in breach of the provision. Further, that despite the zero tolerance drug policy in the TTDF, the punishment was imprisonment for less than two years, therefore, Mr. Alexis would not have foreseen that a failed drug test could result in his discharge, particularly in circumstances where the Defence Act did not prescribe such severe punishment. This means he was never made aware of the penalty which was imposed upon him; and thereby deprived of the opportunity to make representations on his own behalf before the decision to discharge him was taken; he was not fully informed of the case which he had to answer as all he knew was that he had failed the drug test, but was unaware of the factors which weighed against his interests and so could not make worthwhile representations even if given the opportunity.

[85] In the circumstances, Mr. Alexis was discharged in breach of the rules of natural justice. In answer to the second question, the court made an order of certiorari, and declared that the Chief of Defence Staff was not empowered to discharge

[7] H.C.557/2017. CV.2017-00557; (2018.05.22.)

Mr. Alexis under the Defence Act and Regulations for a failed drug test. The court also declared that the decision was made in breach of the rules of natural justice, based on an irrelevant consideration and ordered reinstatement retroactive to December 2016 for the remainder of his second contract.

[86] This case of Mr Alexis is different from the case of Mr Lloyd. Mr Lloyd's period of engagement was coming to an end and he had to apply to re-engage. There was no offence used as a basis for discharge. The application for re-engagement in the JDF is at the discretion of the Commanding Officer. There is no statutory provision for a hearing at the application stage.

[87] Mr Lloyd cited the case of **R v the Commissioner of Police ex parte Courtney Ellis**,[8] a decision of Sinclair-Haynes, J (as she then was) in which Courtney Ellis filed an application for judicial review against the decision of the Commissioner of Police to refuse his application to re-enlist on the grounds of no confidence. Mr. Ellis sought an order of certiorari to quash the decision and an order of mandamus to compel his reinstatement to active duty in the Jamaica Constabulary Force with salary and allowances paid retroactively.

[88] The application was based on breaches of natural justice and the right to a fair hearing as provided for in the Constitution, in that, the decision was unlawful and in breach of the Constabulary Force Act and the Police Regulations. Mr Ellis argued that he had not been given notice of the charges or accusations made against him which had deprived him of the right to make representations. He argued also that he had not been given any of the evidence in the Commissioner's possession, nor the opportunity to test any of that evidence in light of the allegations against him. Mr. Ellis argued further that he was denied his legitimate expectation of having the allegations fairly considered by the Commissioner based on his knowledge of the general practice. And lastly, that the decision made against him was unreasonable.

[89] The Commissioner of Police argued first, that the court was being asked to make orders as an academic exercise as Mr Ellis had appealed the decision by

[8] Delivered December 17, 2011 (unrep.)

meeting with the Commissioner.[9] Second, Mr Ellis did not place a decision before the court for review. In addition, the Commissioner argued that the Administrative court exists to decide cases which raise a challenge to individual decisions. It does not exist to monitor and regulate the performance of public authorities.[10] The focus of the judicial review hearing should be on actions having substantive legal consequences, not preparatory steps.[11] Mr. Ellis was discharged, not dismissed. A dismissal engages section 3(2)(a) of the Jamaica Constabulary Force Act and the rules 1.1, 1.9 and 3.1 of the Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force. The law is as set out in the cases of **Kenyouth Handel Smith v The Police Services Commission et al[12]** and **Nyoka Segree v Police Services Commission.**[13] A decision not to grant re-enlistment is not covered by the Constabulary Force Act or the Police Service Regulations. Therefore, it was incorrect for Mr Ellis to argue that the decision to refuse to re-enlist him was in breach of the law.

[90] Further, the court should interpret section 5 of the Constabulary Force Act and the Regulations to mean that the Commissioner has the sole operational command and superintendence of the Force. Re-enlistment is within his discretion and not that of the Police Services Commission. The function of the Commissioner is administrative. There is no obligation on the Commissioner to grant an application to re-enlist. The discretion of the Commissioner is set out in the case of **Corporal Glenroy Clarke v Commissioner of Police and the Attorney General of Jamaica.**[14]

[91] The Commissioner submitted that Mr Ellis received a fair hearing as he was heard by the Commissioner who met with him in the presence of another officer. Mr Ellis had said that he would attend the meeting with his attorney, however the

[9] Tindall v Wright Times LR, May 5, 1922 and Ainsbury v Millingen [1987] W.L.R. 379

[10] R (P) v Essex County Council [2004] EWHC 2027 (Admin) at [33]

[11] R v Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government [2008] 3 All ER 548 at [32] – [36].

[12] SCCA 60/2005; delivered November 10, 2006

[13] SCCA 142/2002; delivered March 11, 2005

[14] (1966) 33 JLR 50

attorney did not attend. He did not ask for the meeting to be postponed for his attorney to attend. He was given the various notices which recommended that he not be re-enlisted. He failed to show cause why the discretion of Commissioner should be exercised in his favour, this was not a failure of the Commissioner to properly exercise that discretion. The exercise of his discretion was reasonable and rational in the factual circumstances and no irrelevant matters were considered. (see **Associated Provincial Picture Houses v Wednesbury Corporation.)**[15]

[92] The Commissioner may take confidential reports into account, there was no obligation to disclose these reports to Mr Ellis. Also, it was not the remit of the court to assess the information presented to the Commissioner. The court is to decide whether the Commissioner exercised his discretion fairly.

[93] The learned trial judge decided that the decision maker was the Commissioner of Police and that the right to appeal was not academic, but that it was the right of Mr Ellis under the law to judicial review of the decision. The decision was communicated to Mr Ellis in a letter. He did not seek to have the letter or the Force Orders communicating the decision quashed, but the decision which was communicated to him in the letter. The court held that the letter contained the decision not to re-enlist Mr Ellis and that was the means by which he was officially notified of his discharge. That Mr. Ellis had a legitimate expectation that he would have been re-enlisted was affirmed. He was given an opportunity to be heard. The Commissioner was exercising an administrative function and therefore must act fairly. The learned judge found that the Commissioner did not provide a fair hearing to Mr Ellis and granted the order for certiorari but not the order of mandamus for want of jurisdiction.

[94] This case assists Mr Lloyd in that there is an expectation that the decision maker will act fairly in the performance of his administrative function. Similarly, confidential reports are submitted in the JDF but they are not shared with the soldier. Like the Jamaica Constabulary Force, there is no automatic right to re-

[15] [1948] K.B. 223

enlist in the Jamaica Defence Force. There was also no notice of discharge given to Mr Lloyd in the case at bar.

[95] Mr Lloyd cited the case of **Elroy Awardo, Damian Amaya v The Security Services Commission and the Attorney General,**[16] a decision of Sonya Young, J of the Supreme Court of Belize. In this case forty-two weapons had been stolen from the Belize Defence Force 's ("BDF") Armoury. Investigations commenced and a reward was offered, the weapons were never recovered. On October 13, 2011, Mr Awardo wrote and submitted a report to the Commandant on the changing of the Force Field Officer. On November 17, 2011, he received a force routine order of even date on the BDF's letterhead placing him on administrative leave until further notice. One Captain Amaya received a similar memorandum of even date. Both men received discharge letters on the BDF letterhead effective December 23, 2011. The men stated that they were never informed of the reasons for their discharge and they were never charged for any wrong doing. This, they argued, was in direct contravention to the Regulations which outline the procedure for removal. Each complained of the denial of the right to a fair hearing.

[96] Mr Awardo through his attorney requested disclosure, he was advised that the matter had been forwarded to the Solicitor General and heard nothing further. Correspondence from the attorney went unanswered. There reason for discharge was never communicated to the men who commenced an action for judicial review.

[97] The BDF resisted the action, arguing that the men were properly discharged on national security grounds in accordance with the Act, and that details surrounding the discharge ought not to be disclosed. Natural justice is exempt in national security matters and that the court ought not to interfere in matters of military law.

[98] The learned trial judge identified the issues as whether the claimants were subject to military law and whether the internal workings of the BDF was non-justiciable. On the first issue, she found that military law is all the body of law

[16] Claim No. 601 of 2012

and procedures concerned with the maintenance of order and discipline in the armed forces. The claimants were held to be subject to military law. The court held that the discharge of an officer of the BDF fell within the scope of public law and was justiciable.

[99] On the second issue, whether the decision of the 1st Defendant to terminate the Claimants from the Belize Defence Force without first affording them a hearing was ultra vires the regulations; the court found that they were owed an opportunity to be heard and to make representations. Furthermore, those representations should have been taken into consideration by the SSC before a final decision was made. Once that decision was made the claimants should have been notified of the type of discharge, the particular section of the Act under which it was effected, their right of appeal to the Belize Advisory Council and any time limit placed thereon. But by giving a gist of the allegations against them, the Claimants would have at least been allowed the opportunity to comment - make observations or submissions on the matters.

[100] This case in instructive on the modern approach to service law, while, the facts are dissimilar, the complaint regarding procedural breaches is similar.

[101] In the case of **Re: Ian Hugh Clarke**,[17] the Full Court refused an order for certiorari to quash the order of discharge made by the Chief of Staff of the JDF. Mr Clarke was a private soldier at the relevant time. On July 17, 1992 he claims to have accidentally discharged a round from his rifle into the roof of Lathbury Barracks, Up Park Camp. He was charged with the offence of negligent discharge and taken before his Commanding Officer, Lieutenant Colonel Graham who conducted a hearing in respect of the charge. Mr. Clarke pleaded guilty to the charge and was sentenced to serve forty-two days at the Red Fence Detention Centre without pay. After serving his sentence, he read of his discharge from the JDF in the JDF Part 1 Orders Serial 185. He applied to the Supreme Court for an order of certiorari to quash his order of discharge and on February 16, 1993, the Full Court issued the order as he had not been afforded a hearing in relation to the decision.

[17] M91 of 1993; delivered on September 29, 1994

[102] On April 23, 1993 he was summoned before the CDS, Commodore Brady and given a hearing which resulted in his discharge from the JDF as of April 30, 1993. This was recorded in Part 1 Orders Serial No. 75 dated April 28, 1993. It is this order which Mr Clarke sought to have quashed.

[103] In support of his application for certiorari, Mr Clarke argued that the order was unlawful as being in breach of the Defence Act and Regulations and the rule against double jeopardy applied as the applicant had served his sentence and was being punished twice. The first submission did not find favour with the court given the statutory power conferred upon the Chief of Defence Staff.

[104] On the second submission the question for the court was whether the discharge of the applicant was a sentence imposed by the Chief of Staff in addition to that imposed by the commanding officer.

[105] Section 22 (3) of the Defence Act provides -

> *"Except in pursuance of the sentence of a court martial a soldier of the Regular Force shall not be discharged unless his discharge has been authorised by order of the competent military authorities."*

[106] The competent military authority in respect of a charge of "Misconduct" is the Chief of Staff (see Regulation 6(2) and the Second Schedule Part II of the Regulations.

> *"The decision to discharge the soldier is not another sentence, but a determination that he is not a fit and proper person to remain in the Jamaica Defence Force. Whereas, a Court Martial is empowered as part of the sentencing function after a hearing to impose on any soldier a sentence of "discharge with ignominy from Her Majesty's Service" (see section 78 (1) of the Defence Act); neither the Commanding Officer nor the Chief of Staff as the competent military authority is authorised on the hearing of a charge to order the discharge of the soldier. Indeed, the charge in respect of the soldier was heard by his commanding officer. The Chief of Staff in deciding whether to discharge him or not was not hearing a charge."**... *The proceedings leading to the discharge are separate and*

apart from the original charge, conviction under which is only relevant at a later stage as an element affecting the decision-making in a separate enquiry as to whether a soldier is a fit person to remain in the Jamaica Defence Force or should be discharged."

[107] This case shows that the court may enquire into any alleged breach of the civil rights of a soldier and that the law has developed and expanded regarding the rights of members of the military.

[108] Mr. Lloyd lastly cited the case of **Alexander Okounghae v UTECH Jamaica**,[18] which does not assist him as the claimant in that case sought public law remedies from the court in what was a private law matter dealing with a private contractual relationship. The principles of natural justice therefore did not apply in that case.

[109] The Defendants' Submissions

Nature and scope of judicial review

[110] The JDF submits that the law is clear as to which administrative decisions are considered illegal. A decision is considered illegal if the public authority acts outside the powers conferred on it. This means that the task for the courts when determining whether . a decision is illegal is essentially one of interpreting the nature and extent of the statute conferring the duty or power upon the decision-maker. They submit that the objective of the courts when exercising this power of construction is to enforce the rule of law, by requiring administrative bodies to act within the "four corners" of their powers or duties.

[111] Further, that it is also well established that the standards of fairness are not immutable, will change over time, are flexible and are dependent on the factual, legal and administrative context. Procedural fairness depends on the facts and circumstances of each case and, in considering what procedural fairness in the present context requires, account must first be taken of the interests at stake.

[18] [2014] JMSC Civ 138

[112] Reliance is placed on the cases of **Council of Civil Service Unions v Minister of State for Civil Services**[19]and **Secretary of State for the Home Department ex parte Doody**[20] and Wade and Forsyth on Administrative Law, 10th edition at page 481.

Order for Certiorari

[113] The JDF assert that Mr Lloyd's discharge was done in keeping with procedures laid down in the Act and the Regulations and that there was no breach of procedural fairness. The AF B130 form is an administrative document used to record the fact of the discharge, but it is not the authority for the discharge. The legal authority for the discharge of a member of the JDF emanates from section 22 of the Act. The Second Schedule of the Regulations makes it clear that where the discharge is on the ground of termination of engagement, the Commanding Officer is the competent authority. It is section 20 of the Act which gives the Commanding Officer the authority to approve the application for re-engagement of a soldier. It is for this reason, argued the JDF, that the completion of the AF B130 form is not mandated by the Act or Regulations.

[114] The provisions in the FSO with respect to the procedure for discharge and medical examination are not meant to enlarge the statutory provisions with respect to the discharge of a soldier from within its ranks. The request for a final medical on separation from the JDF is meant to ensure that, the soldier is in good health, and where there are any medical issues, the necessary assistance is given. This medical assessment is not only done in relation to persons who are being discharged, but also for persons whose term in the JDF have come to its natural end. As a consequence, neither the Act nor the FSO makes the completion of the medical assessment or examination a precondition for the discharge of a soldier.

[115] It is the position of the JDF that once it has been determined by the Commanding Officer that the soldier ought to be discharged, the soldier is for all intents and

[19] [1985] AC 374 at 408

[20] [1993] 1 All ER 151

purposes discharged unless a contrary decision is taken after the submission of a redress of complaint.

[116] They contend that at the date of Mr Lloyd's discharge on October 19, 2018, it was Mr Dacosta as the commanding officer who was empowered by the Act to authorize the approval of the application for re-engagement or discharge and this was done by him on that date.

[117] The JDF submit that the fact that Mr Lloyd was effectively discharged on October 19, 2018 is accepted by him in the very order that he is seeking, as it seeks to quash the decision of Mr Dacosta made on that date. The discharge of Mr Lloyd was effective on October 19, 2018 and notice of this was given to the Force and to the world by its publication in the Part 2 Orders. They contend that the fact that the administrative document was not signed by the authorizing officer does not affect the fact of discharge which was in accordance with the Act and Regulations and therefore legal.

Order for mandamus

[118] The JDF argue that Mr Lloyd is precluded from seeking an order for mandamus as he was never granted leave to apply for judicial review for such an order. Mr Lloyd having not sought leave to apply for an order of mandamus cannot now seek such on order before the judicial review court. Rule 56.3 of the Civil Procedure Rules establishes that a person seeking judicial review must first obtain leave. Accordingly, the JDF assert that Mr Dacosta cannot pursue this order and the court cannot consider it.

Declarations

[119] It is submitted on behalf of the JDF that in deciding whether to grant the declarations sought, the Court must ask itself whether or not there are real questions in relation to every declaration sought by Mr Dacosta. Even if the Court were to find that the issue in relation to any declaration is real, it still has discretion as to whether or not to grant it. A number of the declarations sought are repetitive and/or cannot in law be granted as they all allege a failure to follow the procedures laid down in the Act, Regulations and FSO. Declarations 5,7,10

and 1 are repetitive in nature and declaration 6 does not seek to enforce any rights being claimed but merely restates what is in a document. It is submitted the declarations 8, 9, 16 and 17 of the Amended Fixed Date Claim cannot be granted as these matters are not properly before the court.

Jurisdiction

[120] They argue that is accepted that the court can only interfere with matters of military law where the civil rights of the soldier may be affected. The issue of the performance appraisal of a soldier and rules of procedure are matters of military law as such, the court has no jurisdiction to make any ruling in respect of same. There is no allegation or evidence before the court that Mr Lloyd's civil rights were affected as it regards the subject performance appraisals. Furthermore, the said performance appraisals were never challenged using the process set up under military law. Mr Lloyd therefore cannot seek to do so in this court.

[121] It is submitted that declarations 13, 14, 15 and 19 should not be granted as the proper procedures were followed in the discharge of Mr Lloyd. The Commanding Officer declined to re-engage Mr Lloyd pursuant to section 20 of the Act. Mr Lloyd filed a redress of complaint as provided for in section 174 of the Act. The redress of complaint was sent for the consideration of the CDS who denied the complaint. The JDF contend that it is clear on the evidence that Mr Lloyd was given the opportunity to engage the relevant channels to challenge the decision of his commanding officer however, his challenge was unsuccessful. There are no provisions in the Act for a complaint of a soldier to be sent to the Defence Board. Accordingly, the JDF submit that the procedures surrounding the discharge of a member of the JDF were fully complied with, and Mr Lloyd was properly discharged.

The Law

The nature and scope of judicial review

[122] Part 56 of the Civil Procedure Rules deals with administrative law matters including applications for judicial review. Judicial review is the process by which the court exercises its supervisory jurisdiction over the proceedings and

decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but with ensuring that the bodies exercising public functions observe the substantive principles of public law and that the decision-making process itself is lawful[21].

[123] The grounds for judicial review were explained by Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Services**[22] where the learned judge discussed the principle of judicial review in relation to decision making powers and spoke to three heads -- illegality, irrationality and procedural impropriety. He states as follows:

> *"By illegality as a ground for judicial review, I mean that the decision–maker must understand correctly the law that regulates his decision–making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*
>
> *By irrationality I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it...*
>
> *I have described the third head as —procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the*

[21] Halsbury's Laws of England Volume 61A (2018))/1.

[22] [1985] AC 374, 410 F - H

legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

The balancing and weighing of relevant considerations is primarily a matter for the public authority, not the courts (per Lord Green MR in Wednesbury, at page 231; and per Lord Hailsham in Chief Constable of the North Wales Police at page 1160 H). However, if there has been an improper exercise of power, it will be viewed as unreasonable, irrational or an abuse."

[124] Furthermore, in **Chief Constable of The North Wales Police v Evans**[23], Lord Hailsham of St. Marylebone L.C explained the purpose of judicial review. He opined as follows:

"But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law."

The court's jurisdiction in matters concerning the military

[125] The approach of the court in this claim is in the exercise of its supervisory jurisdiction. The role of the court is to review the decision-making process and not the correctness of the decision itself. Given this limited role, in determining this case, it is not for this court to substitute its own views on the decision made.

[126] The authorities have indicated that the court can only interfere with military authorities and matters of military law where the civil rights of a soldier may be

[23] [1982] 1 WLR 1155, at page 1160 paragraphs F-G

affected. This proposition was examined extensively in **Re: Ian Hugh Clarke**[24] by Rattray CJ (Acting) (as he then was) who said:-

> *"Although no submissions were made to us by either party on the question of the court's jurisdiction in relation to the decisions of military authorities, we consider it appropriate to take the opportunity in this judgment to indicate our views particularly as the previous application for an Order of Certiorari in Suit M94 of 1192 had been granted by a Full Court.* ***In Council of Civil Service Workers and Other v. Minister of the Civil Service*** *[1984] 3 All England Report 935 it was made clear that the question whether a decision or action was non-justiciable. (Lord Fraser at page 942 Lord Scarman at page 949) More directly, however, as is stated in Judicial Review of Administrative Action by S.A. Desmith (4th Edition page 146) –*
>
> > *"Special considerations apply where procedural errors have been committed by authorities administering military discipline. The courts have always shown a marked aversion from seeming to interfere with the proceedings of military authorities except where the civil rights of an individual have been infringed …"*
>
> *There is abundant authority of respectable vintage and sufficient consistency to support this proposition.*
>
> *In re Mansergh (1861) 1 B & S page 400 at page 406 Cockburn, C.J. stated:*
>
> > *"I quite agree that where the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction this court ought to interfere to protect those civil rights, example, where the rights of life, liberty or property are involved, although I do not know whether the latter case could occur. Here, however, there was nothing of the sort,*

[24] Suit No: M91 of 1993, Judgment delivered on September 29, 1994

and the only matter involved was the military status of the applicant - a thing which depends entirely on the crown, seeing that every person who enters into military service engages to be entirely at the will and pleasure of the Sovereign."

Mansergh was an application to the Queen's Bench for an Order of Certiorari to bring up the judgment of a Court Martial that it should be quashed on the grounds of lack of jurisdiction of the particular Court Martial which tried the applicant and dismissed him from the Army.

In R. v. Army Council ex parte Ravenscroft [1917] LTR page 300 — the applicant for Mandamus, Colonel Ravenscroft complained that regulation made under the Army Council Act, 1888 in respect of the holding of a court of enquiry and the giving of notice to him had been complied with, and obtained a rule nisi for a mandamus directed to the Army Council commanding them to cause a court of Enquiry to reassemble to hear and determine his case according to law.

In discharging the rule nisi, Lord Reading, C.J. stated at page 307 –

"I have no doubt that this court as a Civil Court has no power to intervene in matters which concerns military conduct and purely military law affecting the rules and regulations prescribed for the guidance of officers or their military discipline. I am entirely in accord with what Wills, J said in the case of Dawkins v. Lord Rokeby (4F &F 806) — these are his words -

"It is clear that with respect to those matters placed within the jurisdiction of the military forces so far as soldiers are concerned military men must determine them …. with respect to persons who enter into the military state who take Her Majesty's pay and who are content to act under her commission, although they do not cease to be citizens in respect of responsibility, yet they do try a compact which is intelligible and which requires only this statement of it to recommend it to the consideration of anyone of common

sense who becomes subject to military discipline …. they are subject to a test of law different to that administered in Civil Courts."

[127] Finally, in **Regina v Jamaica Defence Force ex parte Granville Williams Pitter**[25], Smith J stated that:-

"it is my view that this case concerns matters of military law and rules of procedure. This court can only interfere with military courts and matters of military law in so far as the civil rights of the soldier may be affected."

[128] However, moving on in time, Sir Clive Lewis in Judicial Remedies in Public Law 5th ed at paragraph 6-014 set out the modern position adopted by this court below:

"There is old authority stating that the courts cannot intervene in matters of military conduct and purely military law affecting military rules for the guidance of officers on matters of discipline unless the actions of military authorities affected the ordinary civil rights of the soldiers. That approach does not reflect the modern attitude of the courts. In general, the courts are likely to be prepared to review exercises of statutory powers or prerogative power relating to the armed forces, even in matters involving questions of discipline and conduct, providing that the issues raised are justiciable ones. … The courts will judicially review the decisions of the Defence Council. The Divisional court has for example, granted a quashing order to quash a decision of the Army Board, acting for the Defence Council, dismissing an allegation of racial discrimination as the board had failed to observe the requirements of natural justice in carrying out its statutory obligations … In the area of military discipline, the courts have granted judicial review of a decision of the Admiralty Board of the Defence Council rejecting a petition against the severity of a sentence imposed by a court martial which had found a sailor guilty of misconduct and ordered that he be dismissed from the navy."

[25] Suit No: M66 of 1995, Judgment delivered on May 30, 1997

[129] In **Regina v Army Board of Defence Council, ex parte Anderson**,[26] Anderson complained of race discrimination. His service complaint had been dismissed without an oral hearing.

[130] In his application for judicial review he challenged the procedure which the Panel had used to dismiss him. Taylor LJ said:

> "*The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision-making bodies other than courts and bodies whose procedures are laid down by statute, are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing."*

[131] **Anderson** and **De Smith** show the direction the courts have taken since **Re Mansergh**. The approach to be taken will be to review the exercise of the power given to the JDF, in its administrative functions relating to the discharge of a soldier and the exercise of the statutory power given to officers for that purpose. While the military may be considered the master of their own procedure, the court will look for fairness in the application of that procedure. This court finds that the old authorities grounded in dismissal at pleasure and which expressed a reluctance to trespass upon the prerogative of the military must now yield to the modern principles of fairness.

[132] In order to determine what areas of the JDF concern military law the court looked at section 9 of the Defence Act. Operational matters are the responsibility of the CDS.

> *9.-(1) There shall be a Jamaica Defence Board which shall, subject to the provisions of subsection (2), be responsible under the general authority of the Minister for the command, discipline and administration of, and all other matters relating to, the Jamaica Defence Force.*
>
> *(2) The responsibility of the Defence Board shall not extend to the operational use of the Jamaica Defence Force, for which use responsibility shall be vested in the Chief of Staff subject to the overall direction of the Cabinet…"*

[26] [1991] 3 All ER 375

[133] The power to make Regulations under the Defence Act is given to the Defence Board by the provisions of section 212 of the Defence Act. The Defence Board is given a wide power to make Regulations governing a comprehensive area including -

"providing for matters required by this Act to be prescribed"

[134] and under sub-section (a) –

"the enlistment of persons into and the discharge of persons from the regular Force…

[135] This court could find no statutory bar to the claim. The discharge of a soldier of the JDF falls within the scope of public law and is justiciable. As I see it, the statutory guarantees and safeguards against improper discharge have been provided for in the Act, Regulations and FSO for all soldiers of the JDF.

Performance appraisal

[136] Mr Lloyd argues that at the time of his application for re-engagement, he had received a rating of "Exemplary" for his military conduct. He said that he has never received a performance appraisal where his overall rating was below the accepted standard except for the one performance appraisal generated for October 2016 to September 2017 marked RD2 which shows an overall assigned score of 28/60, with a rating level of "Inadequate (below standard)" and with prospects for promotion – "Unsatisfactory."

[137] The FSO show that a performance appraisal is captured in a confidential report. The original FSO states in Chapter 3 Instruction C, at paragraph 1, that a confidential report on every soldier is to be submitted annually. At paragraph 3 the FSO states that for soldiers above the rank of Corporal, Form AF B 2048 (Revised 1961) should be used for this report. It goes on at paragraph 7 to state that for substantive Sergeants and above, parts 1 will be completed by the officer under whose immediate command the soldier is serving, part 2 by the Commanding Officer, part 3 will be left blank and **part 4 by the CDS where the report is "of an adverse nature**." Paragraph eight says any remarks and/recommendation of a superior reporting officer which are more adverse than the original report must be shown to and initialled by the soldier

concerned. Paragraph 9 states that a soldier may make notes from his confidential report, **but he will not be given a copy.** The right of appeal in section 174 of the Act is set out at paragraph eleven. (Emphasis mine.)

[138] The argument made by Mr Lloyd that he is entitled to a copy of the performance appraisal is therefore incorrect. So is the argument that he had not been provided with the performance appraisal for the period October 2015 to September 2016. He was aware of the contents of the report, he has cited its contents in his affidavit filed on April 30, 2021.[27] He did not challenge that confidential report on appeal, he cannot do so here.

[139] Mr Lloyd has challenged the failure of his Acting Commanding Officer Major Smith to have generated a confidential report over the 6-month assessment period in order to determine whether an extension would be granted. He argues that this breaches section 44 of the Act as it is in direct disobedience to the orders of Major Brown who was his Commanding Officer. He relies on the original FSO Chapter 3 Instruction C, at paragraph 1 which has been dealt with above.

[140] A 6-month period would not induce the generation of an annual report, however paragraph 2 of Chapter 3 Instruction C does state that an interim confidential report may be furnished at any time it is considered necessary. On January 9, 2018, the Acting Commanding Officer met with Mr Lloyd to approve the 6-month extension as admitted by Mr Dacosta, however, there is no evidence that there was an interim confidential report to be discussed with Mr Lloyd, one which he would have had to be shown and to which his initials should have been affixed, and most importantly, one capable of being appealed.

[141] In April 2018, the Commanding Officer met with Mr Lloyd informing him verbally that his extension would not be recommended based on his lack of performance. The AF B2048 concerning this interview is marked RD2 and dated January 15, 2018. It is the report of Major McLeod. It recommends termination. Mr Lloyd nevertheless applied on January 26, 2018 to be re-engaged for 2 more years ending on October 20, 2020. In the original FSO Chapter 3 Instruction E, at paragraph 11 the Commanding Officer must conduct an assessment of military conduct in the following terms: a) Exemplary,

[27] Paragraph 18

b) Very Good, c) Good, d) Fair, e) Unsatisfactory. The AF B2048 ranked Mr Lloyd's military conduct as "Unsatisfactory". There is no evidence that part 4 of this confidential report was completed by the CDS given that the report is "of an adverse nature," as is required by paragraph 7(d) of Chapter 3 Instruction C of the original FSO. There was no further confidential report after September 2017.

[142] on June 15, 2018, Mr Lloyd met with his then Acting Commanding Officer Major Stewart and was informed that his application for re-engagement of January 26, 2018 was refused due to his failure to improve his performance and that his tenure in the JDF would not go beyond October 20, 2018. Major Stewart removed Mr Lloyd from a course which he had begun. Mr Lloyd in response submitted a redress of complaint under section 174 of the Act on the grounds of the failure to approve his re-engagement and the unauthorized removal from the course.

[143] The court notes that the last confidential report was adverse to Mr Lloyd. Major Smith did not assess the military conduct or performance of Mr Lloyd in a formal way by preparing an interim confidential report. This means that the last written report was one which was adverse to Mr Lloyd and other than verbal interviews, there was no written report shown to him. More importantly, there was no opportunity for this report to be reviewed by the CDS before the decision not to approve the application for re-engagement based on lack of performance was made. This was the state of affairs when Mr Lloyd appealed the decision of Major Stewart.

[144] Mr Lloyd alleges that the performance appraisal was incomplete, illegal, flawed, unenforceable and in breach of the FSO and the Act. Notwithstanding his argument, Mr Lloyd signed the confidential report on January 15, 2018. While this is not an indication that he was in agreement with its contents, it illustrates that he was at least aware of them. The AF B2048 states in addition to awarding Mr Lloyd an overall rating of 28 out of 60 that "*Sgt Lloyd is functioning well below the acceptable standard required and was given a final year to proceed on leave on 01 Nov 17 at the last re-engagement interview."* His military conduct was assessed as Unsatisfactory. This character assessment will become important later on in looking at the importance of setting out the correct ground on the instrument of authority relating to the discharge of a soldier.

The Jamaica Defence Force Standing Orders

[145] The general rule in civil proceedings is that he who asserts must prove. This rule was explained by Anderson, J in **Delroy Thompson v The Attorney General of Jamaica and Detective Douglas Taylor**[28] where he stated at paragraph 9 that *"...since at common law, in civil cases, the burden of proof on a particular issue, lies upon the party who affirmatively asserts that fact in issue and to whose claim or defence, proof of that fact in issue, is essential"*.

[146] Mr Lloyd asserts that while working with the JDF, he was presented with a document which he exhibits and describes as the amended FSO as a legally binding document with amendments dating as far back as 2007. He stated that his performance appraisal report was generated from the amended version of the FSO. To this end Mr Lloyd exhibited RD2 a performance appraisal report for the period October 1, 2016 to September 30, 2017 on Form AF B 2048 (Revised 2007). It was signed and dated January 15, 2018 by Mr Lloyd.

[147] In contrast, Mr Johnson, the Force Chief Clerk gave evidence on the JDF's behalf that the document exhibited by Mr Lloyd as the amended FSO is not authorized for use by the JDF and Mr Lloyd therefore cannot rely on its contents.

[148] Mr Williams, the Assistant Chief Clerk also gave evidence on behalf of the JDF. He stated that having reviewed the document exhibited by Mr Lloyd he can attest to the fact that the document is not authorised or promulgated for use by the JDF. The court has looked at what has been produced and marked "GL2", and labelled by Mr Lloyd as the "Amended version of the JDF's Forces[sic] Standing Orders and Exhibits."

[149] The court agrees with Mr Lloyd that the performance appraisal he has exhibited is indeed identical in form to the one set out in GL2 as AF B2048 (Revised 2007) to be found in the amended FSO at Chapter 5 part 12, 5.501, with the prescribed form contained in Annex L thereto. The AF B2048 (Revised 2007) from the amended FSO is what was used in the case of Mr Lloyd and not AF B2048 (Revised 1961) as is provided for in the original FSO. This is of some significance for two reasons, the first

[28] [2016] JMSC Civ 78, see also **– William Rainford v Opal Rainford (Personal Representatives in the Estate of Lloyd Rainford)** [2017] JMSC Civ 102, at paragraph 11

is, it significantly undermines the evidence that the amended FSO is not in use by the defendants and second, the instructions for completion of the AF B2048 are different in each of the FSO.

[150] Mr Lloyd pointed out further that the original FSO contains instructions for completing AF B 2048. The original instructions are contained in FSO 3C and speak to confidential reports. There is no distinction between the confidential report described in the instructions and the evidence of the performance appraisal report given by the claimant. It states that Form AF B 2048 (Revised 1961), and AF B 2066 (Annual Report and Employment Sheet) for substantive Corporals and above should be used.

[151] The instructions for substantive Sergeants and above state that parts 1 and 2 should be completed by the soldier's commanding officer. Part 3 should be left blank. Part 4 should be completed by the Chief of Staff (now CDS) in the case of a substantive Sergeant where the report is adverse in nature. The court notes that in the AF B2048 for Mr Lloyd, who was a substantive Sergeant, part 4 by the CDS.

[152] In the amended FSO at 5.502 there are instructions for the completion of the AF B 2048 (Revised 2007). It states that part 2 and 3 will be completed by the Commanding Officer. Part 4 will be completed by the Chief of Staff (now CDS) where a soldier receives a definite recommendation for a commission. It is plain that the instructions used to complete the AF B 2048 were the ones set out in the amended FSO which should not have been in use based on the evidence of the witnesses called by the defendants.

[153] The court agrees with Mr Lloyd that the instructions are significantly different and would have affected his confidential report as regards the failure of the Commanding Officer, having made an adverse finding in respect of a soldier with the substantive rank of Sergeant, to refer the matter to the CDS. This referral would be separate and apart from an appeal on the denial of an application for re-engagement. This deprived Mr Lloyd of the right to a hearing before the CDS before any decision was taken to refuse to re-engage him based on a lack of performance.

[154] The failure to follow the correct procedure as set out in the original Force Orders occasioned a breach of natural justice in that Mr Lloyd did not receive a hearing by the

CDS in respect of the adverse findings on his confidential report though he had attained the required rank. It is also a demonstration of taking into account irrelevant considerations in respect of the claimant and a failure to take relevant considerations in to account.

[155] It is noted with interest that Mr Lloyd relied on several aspects of the amended FSO in presenting his case. I take the view based on his evidence that as it was in use by the JDF, and that it was presented to him as a legal and binding document, that he too could rely on its provisions. However, he cannot have it both ways. In the same vein, neither can the JDF. It is their evidence that the amended FSO was in draft form and not in use.

[156] The court finds on a balance of probabilities that the amended FSO should not have been in use. Therefore neither side should have been using this document, nor can either side rely on it in this trial. The parts of the claim on which Mr Lloyd has relied on the amended FSO therefore fail and the parts of the defence in which the JDF has denied use of the FSO are rejected by the court.

[157] Breaches of the FSO are matters under military law. However, administrative matters which fall under the FSO are reviewable by this court as they are breaches of the Act and the Regulations. I find that this failure to follow the procedure for assessing the performance of a soldier as set down in the FSO can be construed as procedural impropriety.

Is termination the same as discharge of a soldier

[158] Here again, the original and amended FSO are different in respect of termination and discharge of a soldier. In the original FSO 3E, termination is set out in two categories: 1) normal termination and 2) premature discharge. In the amended FSO 15.065 is headed “Termination.” The amended FSO 15.068 deals with “Premature Termination” which is not found in the original FSO.

[159] Mr Lloyd argues that the amended FSO prescribes two categories for termination and two for discharge respectively. They are:

a. Normal termination

b. Premature termination

c. Premature discharge

d. Discharge of your own will

[160] Whereas the original FSO contains only one category of termination and one of discharge respectively, they are:

a. Normal termination and

b. Premature discharge

[161] Mr Lloyd asked the question, into which of these categories did he fall? Mr Lloyd argued that normal termination and premature discharge as indicated in the original FSO do not apply to him. He asked the court to reject the evidence of Mr Williams based on the clear evidence that the amended FSO is in use by the JDF. The court finds itself in agreement on the fact that there was use of the amended FSO. The evidence that the amended FSO is not in use is rejected.

[162] Mr Lloyd argued that termination and discharge are not the same. A soldier has first to be terminated before the commencement of the discharge.

The procedure for the discharge of a soldier

[163] The rule of law requires that the legality of the practice of the discharge of soldiers must be weighed against the provisions of the applicable statutory scheme. It is therefore necessary to analyse the practice in its constituent elements. In doing so a black-letter law approach is not the best.

[164] The approach is that submitted by Ms Hall who reminded the court that the standards of fairness are not immutable, will change over time, are flexible and are dependent on the factual, legal and administrative context. Procedural fairness depends on the facts and circumstances of each case and, in considering what procedural fairness in the present context requires, account must first be taken of the interests at stake.

[165] The Defence Act in conjunction with the Defence (Regular Force Enlistment and Service) Regulations and the Jamaica Defence Force Standing Orders prescribe the procedure for the discharge of a soldier of the regular force from the JDF.

[166] The relevant portions of section 22 of the Act state that:

> *22.-(1) Save as in this Act provided, every soldier of the regular Force upon becoming entitled to be discharged, shall be discharged with all convenient speed, but until discharged shall remain subject to military law under this Act.*
>
> *…*
>
> *(3) Except in pursuance of the sentence of a court martial,* ***a soldier of the regular Force shall not be discharged unless his discharge has been authorized by order of the competent military authority****. (Emphasis mine.)*

[167] Additionally, section 27 of the Act states that "*a soldier of the regular Force may be discharged by the competent military authority at any time during the currency of any term of engagement upon such grounds as may be prescribed*." This section suggests that there is no need for the competent military authority to await the end of a period of engagement before refusing an application to reengage a soldier as long as the grounds set out in the Regulations are met.

[168] The 'competent military authority' for the purpose of authorizing the discharge of a soldier is set out in the Regulations. Under the Second Part of the Second Schedule and by authority of the section 6(2) of the Regulations, the competent military authority for the discharge of a soldier for the reason of termination of engagement is his Commanding Officer.

[169] Mr Lloyd referred to the original FSO, citing Chapter 3 Instruction B Annex A at paragraph 10 for the special instructions regarding termination of engagement. He argued that the special instructions do not apply in his case.

[170] The court finds that the instructions set out in sub-paragraph (b) are qualified by paragraph 10(2) which makes the discharge of a soldier subject to any

regulations currently in force and to any restrictions imposed under the Defence Law of 1962 regarding times of war or offences warranting court martial.

[171] The original FSO guides the Commanding Officer as to the circumstances under which he can discharge a soldier for termination of engagement as there is no definition in the Act or the Regulations which sets out the meaning of the term. The relevant portion of the original FSO states:

"PREMATURE DISCHARGE

3. A soldier's Colour Service may be terminated prematurely by the competent military authorities given in the Defence (Regular Force Enlistment and Service) Regulations Second Schedule Part II for the reasons prescribed. Set out in Annex A are:

a. The prescribed reasons for discharge.

b. The competent military authority, and

c. Special Instructions for each serial.

…

7. A soldier being discharged prematurely will be seen by his Commanding Officer, prior to the occurrence being published who will explain to him the grounds on which he is being discharged and the circumstances leading up to the decision.

GENERAL (CONT)

9. Whether he is being discharged or transferred to the Reserve, every soldier on termination of his Colour Service is to be given a Certificate of Service. The Certificate of Service booklet is obtained on indent from the JDF Supply Depot.

DOCUMENTATION – DISCHARGE

19. a. All discharges are to be authorised on AF B130, a copy of which is attached as Annex B, except discharge by sentence of a Court Martial in which case the JF A9 will be the instrument of authority.

b. Only the competent military authority may authorise the discharge of a soldier for the appropriate serial.

c. In completing the AF B130, the reason for the discharge must be exactly as quoted for the relevant serial in Annex A. No variation is permitted."

CHAPTER 3 INSTRUCTION E ANNEX A

REASONS FOR DISCHARGE

10. TERMINATION OF ENGAGEMENT

a. Competent Military Authority ……Commanding Officer

b. Special Instructions: -

(1) This serial applies to:

(a) A solider (including a W01) who has completed his full time military service, including any continued service after 22 years.

(b) A soldier who is continuing in the service and has given notice of his wish to claim his discharge after the expiration of three months.

(2) Discharge is subject to any regulations currently in force and to any restrictions imposed under Defence Law 1962 sections 21 and 24.

[172] The court notes that the neither of the special instructions for each serial apply to Mr Lloyd. In the amended FSO, in Annex A to Chapter 15 under the heading "TERMINATION OF COLOUR SERVICE – REASONS FOR DISCHARGE" at paragraph 11 one comes across "Termination of Engagement." The paragraph

will be reproduced as it is further evidence that the amended FSO was in use in the case of Mr Lloyd despite the evidence in this court that it was not.

> *"11. Termination of Engagement*
>
> *a. Competent military authority: Commanding Officer*
>
> *b. Special Instructions:*
>
> *(1) This paragraph applies to:*
>
> *(a) ….*
>
> *(b) A soldier who is about to complete the period for which he has enlisted or re-engaged but whose application to re-engage has not been approved;*
>
> *(c), (d), (e)*
>
> *(2) Discharge under this paragraph is subject to restrictions imposed under the Defence Act sections 21, 24 and 26."*

[173] It is plain that the reason for discharge being termination of engagement does not and would not apply to Mr Lloyd under the original FSO. It is also plain that it was the amended FSO which was used to ground the reason for discharge as termination of engagement. This is unlawful and runs contrary to the sworn evidence given by the witnesses for the defendant.

[174] To follow the trail laid down by Mr Dacosta, had he acted in accordance with the procedure laid down by the law then, section 22 (4) of the Act mandates that every soldier of the regular force shall be given on his discharge, a Certificate of Discharge containing such particulars as may be described. Section 10 of the Regulations outlines the particulars of a Certificate of Discharge. This certificate of discharge was said to have been ready to be collected by the claimant, it was not produced to this court as would have been expected.

[175] The question now is if termination of engagement is not the correct reason for discharge, was Mr Dacosta vested with the legal authority to discharge Mr Lloyd. A close look at the Chapter 3 Instruction E Annex A which deals with "*Reasons for Discharge"* lists thirteen reasons for discharge, they are:

[176] *1. Inefficiency during the first 6 months*

2. Inefficiency at any other time

3. Services no longer required

4. Misconduct

5. Conviction by civil court

6. Medically Unfit

7. Compassionate Grounds

8. By purchase under section 28 of the Defence Law 1962

9. Unable to qualify for a trade

10. Termination of Engagement

11. Final Approval of Attestation Withheld

12. Improper Enlistment

13. False Answer on Attestation

[177] Having eliminated termination of engagement as a ground based on the inapplicable special instructions, the remaining twelve grounds when matched against the evidence of lack of performance could only fall under reasons one to three. Of those reasons, the competent military authority is the Chief of Staff for numbers two and three and the Commanding Officer for number one. The court went further, to look at number one. Inefficiency during the first six months means the first six months of service in the special instructions. There is therefore no reason which applies to Mr Lloyd. The Commanding Officer made a decision which is ultra vires.

Avenue of redress

[178] The court will return to the decision of the Commanding Officer not to reengage Mr Lloyd. The JDF has its own internal mechanism for dealing with failure to

follow procedure. Mr Lloyd appealed from the impugned decision to terminate his engagement by way of redress of complaint to the CDS. He also complains to this court that Mr Dacosta not only verbally discharged him but failed to forward the decision of the CDS to the Defence Board. The procedure for redress is set out below.

[179] Sections 173 and 174 of the Act govern redress of complaints by members of the JDF. Section 173 governs complaints by officers and section 174 governs complaints by soldiers. Both sections provide: -

> *"173.-(1) If an **officer** of the Jamaica Defence Force thinks himself wronged in any matter by a superior officer or authority and on application to his commanding officer does not obtain the redress to which he thinks he is entitled, he may make a complaint with respect to that matter to the Defence Board.*
>
> *(2) On receiving any such complaint it shall be the duty of the Defence Board to investigate the complaint and to grant any redress which appears to them to be necessary or, if the complainant so requires, the Defence Board shall make its report on the complaint to the Governor-General in order to receive the directions of the Governor-General acting on the recommendation of the Privy Council thereon.*
>
> *174.-(1) If a **soldier** of the Jamaica Defence Force thinks himself wronged in any matter by any officer other than his commanding officer or by any soldier, he may make a complaint with respect to that matter to his commanding officer.*
>
> *(2) If a soldier of the Jamaica Defence Force 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 any officer under whom the complainant is for the time being serving, being an officer not below the rank of colonel or corresponding rank.*

(3) It shall be the duty of a commanding or other officer to have any complaint received by him under this section investigated and to take any steps for redressing the matter complained of which appear to him to be necessary."

[180] In the definition section, section 2 defines soldier to mean:

"soldier" does not include an officer but, with the modifications contained in this Act in relation to warrant officers and non-commissioned officers, includes a warrant officer and a non-commissioned officer;

[181] It is not in dispute that Mr Lloyd having attained the rank of Sergeant was not an officer. The definition of soldier applies to him in respect of the redress of complaint. This means the applicable section is section 174 of the Act. There is no further appeal to the Defence Board.

[182] The denial of redress was conveyed verbally to Mr Lloyd by Mr Dacosta in an interview. In the original FSO regarding termination of colour service at Chapter 3, Instruction E, paragraph 7 it states that:

"A soldier being discharged prematurely will be seen by his Commanding Officer, prior to the occurrence being published, who will explain to him the grounds on which he is being discharged and the circumstances leading up to the decision."

[183] The Act allows for this procedure in section 213(2) which provides:

213.-(1) Any power conferred by this Act to make regulations, rules, orders or other instruments shall include power to make provision for specified cases or classes of cases, and to make different provisions for different classes or cases, and for the purposes of any such instrument classes of cases may be defined by reference to any circumstances specified in the instrument.

(2) Any such regulations, rules, ***orders*** *or other instruments as aforesaid may impose conditions, require acts or things to be performed or done to the satisfaction of any persons named therein whether or not such persons are members of the Jamaica Defence Force or of Her Majesty's*

> *forces,* ***empower such persons to issue orders either orally or in writing requiring acts or things to be performed or done or prohibiting acts or things from being performed or done****, and prescribe periods or dates upon, within or before which such acts or things shall be performed or done or such conditions shall be fulfilled and provide for appeal against any such order, requirement or direction*. (Emphasis mine.)

[184] The board's decision and that of the CDS are final, apart from the possibility of judicial review, there is no appeal from their findings. As the forum of last resort dealing with an individual's fundamental statutory rights, the procedure employed must achieve a high standard of fairness. The CDS was obliged to undertake his own review of the complaint filed by Mr Lloyd as well as the material presented to him by Mr Dacosta. The reasons presented by Mr Dacosta were set out in writing and have been served on Mr Lloyd. At the material time, the reasons for refusal were also set down in writing and presented to the CDS. The reasons for not approving the application for re-engagement are matters of military law. The court will not interfere as it has no jurisdiction to do so. The CDS had the power to reverse the decision of Mr Dacosta. He did not do so. There is no complaint about the process of review undertaken by the CDS and the court will not venture down that path. The fact is that the process as set down by section 174 was followed.

Was the discharge of Mr Lloyd valid in law

[185] The issue is now whether the verbal communication by Mr Dacosta to Mr Lloyd fulfilled the requirements of the section which states that a soldier ***shall not be discharged unless his discharge has been authorized by order of the competent military authority***. The law allows for the verbal communication of discharge of a soldier in an interview before publication. The question of whether the discharge was authorized by verbal communication remains.

[186] To *"authorize"* means *"1. To give legal authority; to empower. 2. To formally approve; to sanction."*[29] In order to give legal effect to the decision to discharge Mr Lloyd, there needed to be more than the verbal communication of the decision. Mr

[29] Black's Law Dictionary, 10th edn.

Dacosta argues that it is the publication of the part 2 orders which does this. Mr Lloyd argues that it is the AF B130 which authorizes the discharge.

[187] To effect the valid discharge a soldier of the regular force from the JDF, his discharge must first be authorized by the competent military authority. Prior to his discharge, the soldier must be seen by his Commanding Officer who is required to explain to him the grounds on which he is being discharged and the circumstances leading up to the decision to discharge him from the JDF.

[188] Second, all discharges must be authorized on the AF B130 which is the prescribed instrument of authority. The reason for the soldier's discharge must be stated exactly as quoted for the relevant serial on the instrument of authority. Variations are not permitted.

[189] Third, the soldier must be given a certificate of service[30] on the termination of his colours. This certificate of service must be dispatched not later than seven days before the soldier is due to leave his unit on terminal leave. The commanding officer is to complete the necessary parts and forward it to the OIC Pay and Records Office together with notification of the run out date and the date on which the terminal leave begins. RD6 is the Part 2 Orders (Soldiers), it states that the discharge of Mr Lloyd whose terminal leave of 28 days will commence on September 23, 2018 pending confirmation of his discharge by OIC Records *wef* October 20, 2018. There is no evidence that this certificate was ever prepared or dispatched. This, in the view of this court placed Mr Lloyd at a disadvantage and his evidence as to the hardship he has faced in his attempts to secure employment as a civilian are accepted by the court.

[190] Fourth, he must also be given on his discharge, a certificate of discharge[31] containing the prescribed particulars. The certificate of service is rather important for a soldier returning to civilian life, and this court has been shown no good or valid reason

[30] FSO 3E 22

[31] Section 22(4) of the Defence Act: "(4) Every soldier of the regular Force shall be given on his discharge a certificate of discharge containing such particulars as may be prescribed."

why in the case of Mr Lloyd, the provision of this all important document was not accounted for in the evidence from the JDF.[32]

[191] Fifth, Mr Dacosta failed to correctly state the correct reason for discharge. Based on the procedure for discharge, termination of engagement was not a valid reason in the case of Mr Lloyd.

[192] Sixth, the evidence disclosed that though Mr Lloyd received an assessment of "Unsatisfactory" in the confidential report marked AF B2048 produced to this court, on the AF B130 drawn up by Mr Dacosta it states Mr Lloyd's military conduct as being "Exemplary". This anomaly has not been explained by the JDF.

[193] Seventh, Mr Dacosta failed to execute the instrument of authority for the discharge which is the AF B130. Mr Dacosta states in his affidavit that he authorized Mr Lloyd's discharge by way of the Application for the Discharge of a Soldier. Mr Dacosta's signature is necessary for the instrument of authority to be given legal effect, his failure to execute the instrument of authority by which Mr Lloyd is to be discharged means that the discharge was not authorized by the competent military authority and not formally approved. His decision to discharge Mr Lloyd would have been evidenced by his execution of the AF B130 as this gives it validity and enforceability. The original FSO states that all discharges are to be authorized on the AF B130. Therefore, it cannot correctly be stated that the instrument of authority was authorized by Mr

[32] Certificate of Service –Form of Testimonial – a. The object of giving a soldier a character in testimonial form is to assist him to obtain civil employment when he leaves the Colours. This character should consist of a comprehensive statement of the salient points of the soldier's ability and qualifications and should be so worded that prospective employers can readily estimate the true worth of the man. The testimonial is to be in the handwriting of the Commanding Officer, or Company or equivalent Commander and is to be issued to the man free of erasures (see paragraph 23 below). No reference is to be made in the testimonial to any punishment awarded under the Defence Act.

b. The character in testimonial form is to be based on the Commanding Officer's or Company or equivalent Commander's personal knowledge of the soldier and on information supplied by Officers under whom the soldier's general or practical education and employment qualifications have been gained in the Army and after careful study of the soldier's documents.

c. When anything can truthfully be said in the soldier's favour in regard to trustworthiness, reliability, sobriety, tact, intelligence, power of command, total abstinence or proficiency in games it is to be stated, together with any other qualifications that might influence an employer. Reference to the physical condition of a soldier or any adverse comment thereon is in no circumstances to be made in the testimonial. If the soldier has been employed during his service in any capacity that may be useful in assisting him to obtain employment in civil life, this should be stated. For Warrant Officers and Non Commissioned Officers the period of service in each rank may often usefully be stated."

Dacosta when it was both incomplete and unsigned. This is particularly acute when the evidence of the response to redress of complaint by the CDS is considered. The salient parts of the response said:

> 1. *The request made in the redress submitted at Ref 'A' by the captioned other rank is not approved.*
>
> 2. *The Commanding Officer may, however, consider re-engaging Sgt Lloyd for a period sufficient enough to allow him to take all his accumulated leave and any other administrative processes.*
>
> 3. *For your information and action."*

[194] Eighth, the AF B130 states the military conduct as "Exemplary", Mr Lloyd said it was prepared by Captain Gayle with whom he never served, this evidence was not answered. It was not signed by the competent military authority who has been given the option to re-engage the soldier by the CDS.

[195] Ninth, the part 2 orders do not indicate that Mr Lloyd has been discharged. The defendants have not exhibited any part 2 orders which confirm the discharge.

[196] Tenth, there is no evidence to indicate that Mr Lloyd was provided with a certificate of discharge as prescribed by the Act or the certificate of service as directed by the FSO. The JDF contend that Mr Lloyd's certificate of discharge has been available for collection since 2018. However, neither certificate has been exhibited to this court. For all intents and purposes Mr Lloyd has been treated in fact as discharged even though the legal requirements have not been met.

[197] In the view of this court, for these ten reasons, the discharge procedure employed can be described as irregular and it certainly would be to the soldier concerned. Mr Lloyd having not been validly discharged pursuant to section 22(1) of the Defence Act, remains subject to military law.

Training and the JDF Service Liability Policy

[198] Additionally, Mr Lloyd gave evidence that he commenced a basic operational course in April 2018 and was later removed from it which offends the JDF service

liability policy. The original FSO states at chapter 13, instruction B, paragraph 1 that *"it is the JDF policy that where officers or soldiers undergo protracted or specialized training, particularly on long courses in Jamaica or overseas, they should be required to continue with the JDF for a reasonable period after their Course finishes."*

[199] It is not open to Mr Lloyd to argue that the JDF does not have the authority to remove him from a course or to terminate his engagement as the law clearly allows for this. What he can argue is that he ought not to have been allowed to commence the course if he had less than the required period of engagement at the material time. However, this is not his argument, therefore the court will render no decision on this point.

The right to a fair hearing

[200] Every Jamaican by virtue of their inherent dignity as persons and as citizens of a free and democratic society is entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law under section 16(2) of the Charter.

[201] The scope of the right to a fair hearing includes not only compliance with the principle of equality of arms but also the right to cross-examine witnesses, right of access to facilities on equal terms and to be informed of and be able to challenge reasons for administrative decisions.

[202] There is however the issue of the use of AF B 2048 (Revised 2007) and the use of the amended FSO to prepare the confidential report at RD2. This has been raised previously in the context of the irregularity in the discharge procedure. The original FSO Chapter 3 Instruction C sets out detailed instructions for the completion of AF B 2048 (Revised 1961) for soldiers of the rank of Sergeant and above. It specifically provides the following:

> *"d. Part IV will be completed by the Chief of Staff in cases where a Warrant Officer receives a definite recommendation for a commission or in* ***a case of substantive Sergeant or above where the report is of an adverse nature****."* (Emphasis mine).

[203] The confidential report exhibited in this court as RD2 has not been completed by the CDS as required.

[204] The original FSO further states:

> *The soldier has a right of appeal under section 174 of the Defence Act against a confidential report, alternatively he may submit a representation not amounting to a statutory appeal.*[33]

[205] The Commanding Officer Mr Dacosta said that verbal reports are part of the normal process. His evidence was that a soldier is called in and is verbally notified of findings and assessments. There is no record of the interview to hand to the soldier.

[206] It seems to me that Mr Lloyd conflated the interview process with the confidential report which is done annually and from which he lodged his redress of complaint

[207] Mr Lloyd said that it is the verbal performance appraisal of January 15, 2018, which re-engaged him for a further 6 months. Mr Dacosta contends that this verbal performance appraisal is not the same as a confidential report. Mr Dacosta explained that a Commanding Officer can provide verbal feedback, the formal appraisal had to been done every year. This interview process is not the same as the formal, written appraisal.

[208] This court finds that the confidential report or formal written appraisal is not the same as the verbal interview which comes after it. The two are not the same. The interview process did not replace the confidential report in this case.

[209] This matter concerns military law and military rules of procedure. It is settled that a court can only interfere with military courts and military law where the civil rights of a soldier may be or are being affected. (See **Secretary of State for War ex parte Martyn**[34].) In all the circumstances of the case, it is for the court to consider whether the procedure, when taken as a whole, was objectively fair.

---

[33] Original FSO Chapter 3 Instruction C, at 11

[34] (1949) 1 All ER 242

[210] In sum, the court finds on a balance of probabilities that there were several irregularities in the procedure set down in the Act, the Regulations and the FSO. The minimum standards of procedural fairness were not observed in the case of Mr Lloyd and this deprived him of a fair hearing.

1. The Commanding Officer Capt Nashon Smith did not prepare a confidential report for Mr Lloyd. This deprived him of an opportunity to see a written report of his performance, to discuss that performance in an interview with his Commanding Officer and to have his performance reviewed by the CDS if adverse comments had been made on this report.

2. The Commanding Officer Major Derrick Brown prepared a recommendation with no stated addressee but not a confidential report. He was the officer with whom Mr Lloyd had served the longest. This deprived Mr Lloyd of an opportunity to see a written report of his performance, to discuss that performance in an interview with his Commanding Officer and to have his performance reviewed by the CDS if adverse comments had been made on this report.

3. Mr Lloyd was not granted a hearing with the CDS by Mr Dacosta who based his decision not to approve the application for reengagement on adverse comments noted in the confidential report dated January 15, 2018 for the period October 1, 2016 to September 30, 2017. Mr Dacosta permitted only the option of redress of complaint. This deprived Mr Lloyd of the opportunity of a hearing with an officer superior in rank to his Commanding Officer before any decision to terminate his engagement had been made. This hearing is separate and apart from the right to appeal to the CDS under section 174 of the Act by way of redress of complaint.

4. The decision to discharge was never authorized as required by law. This had the effect of rendering his years of service to the JDF without utility in his life as a civilian.

[211] Judicial review is concerned with the review of the decision making process and not with the merits of the decision. This claim concerns the failure of the JDF to comply with the law governing the discharge of Mr Lloyd which has engaged the principles of natural justice. This court finds that the decision to discharge Mr Lloyd was invalid on the ground of procedural ultra vires. The court recognises that there is a common sense limit to what is justiciable in military law and can go no further than to grant the order to quash the decision to discharge Mr Lloyd with the consequential orders set out below. There was no evidence under the head of damages, the court cannot make an award without evidence. The court makes the following orders:

[212] Orders:

1. An order of Certiorari quashing the oral communication given to Mr Lloyd by the Mr Dacosta on the 19th of October 2018 in which Mr Dacosta verbally informed Mr Lloyd that his application for redress was denied and that he was no longer engaged to the JDF.

2. An Order that Mr Lloyd be paid all salary, pension and emoluments attached to the post of Sergeant from October 20, 2018 to October 20, 2020.

3. No order as to costs.

The court makes the following declarations:

4. It is hereby declared that the first defendant in discharging the claimant with effect from October 20, 2018 is in breach of the Defence Act, resulting in the said discharge being illegal, null, void and of no effect.

5. It is hereby declared that the decision to discharge Mr Lloyd was invalid on the ground of procedural ultra vires.

6. It is hereby declared that the failure to grant the claimant a hearing with the Chief of Defence Staff in respect of the adverse findings on his confidential reports pursuant to the original Force Standing Orders before the decision to terminate constitutes procedural ultra vires.

7. It is hereby declared that the failure to authorize a valid discharge of the claimant is unlawful.

8. It is hereby declared that the failure to render a certificate of discharge and a certificate of service to the claimant is unlawful.

9. It is hereby declared that the claimant, Gary Lloyd remains subject to military law.