1959

Apr. 15

Nov. 2

BETWEEN:

JOHN JAMES FITZPATRICK .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—National Defence Act R.S.C. 1952, c. 184, ss. 24, 36, 48(1)(2) and Regulations—Civil courts without jurisdiction to hear actions brought by enlisted men to recover pay and allowances.

Suppliant, a member of the Regular Forces of the Canadian Army, was held in civil custody on a criminal charge upon which he was convicted and sentenced to a term of imprisonment. For the period of time dating from his arrest to that of his conviction suppliant's pay account was credited with the sum of $510.30 but he did not receive that sum. Suppliant now brings his Petition of Right asking for a declaration that he is entitled to have payment made to him of that sum of $510.30, and also a declaration that the purported forfeiture of such pay and allowances by the Adjutant General of the Canadian Army is null and void.

Held: That the Court is without jurisdiction to grant the relief claimed.

2. That neither the *National Defence Act* R.S.C. 1952, c. 184 nor the Regulations passed thereunder relating to pay and allowances provide an enlisted man with the right to bring to the civil courts any dispute relating to such matters.

PETITION OF RIGHT brought by suppliant to recover from the Crown certain pay and allowances allegedly wrongfully withheld from him.

The action was tried before the Honourable Mr. Justice Cameron at Vancouver.

C. R. J. Skatfield for suppliant.

G. W. Ainslie for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (November 2, 1959) delivered the following judgment:

In this Petition of Right the suppliant, a former member of the Canadian Army, seeks to recover (*inter alia*) the sum of $510.30, said to be the amount of pay and allowances to which he was entitled for the period commencing September 8, 1955, and ending on November 29, 1955. The facts, for the purpose of the trial only, were set out in the document entitled "Admission of Parties", filed as Exhibit 1, and no oral evidence was tendered.

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From the admissions so made, it appears that the suppliant was enrolled in the Regular Forces of the Canadian Army on September 29, 1950 for a term of three years and served continuously from that date to September 28, 1953, when he was re-engaged for a further term of three years, and served continuously from that date until he was released on the 22nd day of February, 1956 at Vancouver, B.C. From September 8, 1955, to the date of his release, he was a member of No. 1 Field Squadron, Royal Canadian Engineers.

On September 8, 1955, the suppliant was arrested on a charge of rape and it is admitted that he was continuously held in civil custody from that date until November 29, 1955, when he was found guilty of indecent assault and sentenced to five years' imprisonment. The trial I infer was on an indictment preferred by the Attorney General of British Columbia, charging the suppliant with rape on September 8, 1955.

It is further admitted that between September 8 (the date of his arrest), and November 29 (the date of his conviction), the suppliant's pay account was credited with the sum of $510.30, and that he did not receive that sum. The admissions also refer to certain steps taken by the Army officers by which they purported to impose a forfeiture of pay and allowances for the period mentioned, the validity of such forfeitures being challenged by the suppliant. I find it unnecessary to say anything further about these forfeitures because of the Crown's plea that this Court is without jurisdiction to deal with the claim for pay and allowances, or with matters relating thereto.

By para. (*b*) of the prayer in the Petition of Right, the suppliant asked for "(*b*) a declaration or order that the suppliant is entitled to have payment to him of the aforesaid sum of $510.30".

Then paras. 7 and 8 of the Statement of Defence read:

7. In answer to the Petition of Right as a whole, he says that the Suppliant served in the Canadian Army on the implied condition that he had no right to pay or remuneration which can be enforced in a civil court of justice.

8. In further answer to the Petition of Right he says that this Honourable Court has no jurisdiction to grant the relief sought in paragraph (*a*) of the prayer for relief.

It is conceded by counsel for the suppliant that prior to the coming into force of the *National Defence Act,* Statutes of Canada 1950, c. 43 (now R.S.C. 1952, c. 184), no Petition of Right or any other proceeding against the Crown would lie in law for the recovery of military pay by an officer or soldier. The *National Defence Act* repealed the former *Militia Act,* R.S.C. 1927, c. 132, as amended, and in a number of decisions of this Court while the *Militia Act* was in force, the principle I have just stated was clearly established. Reference may be made to *Cooke v. The King*[1], which was cited with approval by the President of this Court in *McArthur v. The King*[2]; *Bacon v. The King*[3].

In the United Kingdom, the same principle applied at least until the coming into effect of the *Crown Proceedings Act,* c. 44, Statutes of 1947. I have not been referred to any case on this point in the United Kingdom since that statute was enacted.

In Halsbury's *Laws of England,* 2nd Ed., Vol. 28, at p. 599, it is stated:

> 1229. Officers and soldiers, being servants of the Crown, hold their positions at and during the pleasure of the Queen, and consequently the civil courts have no power to intervene in any dispute relating to military pay or pensions.

In Vol. 9 of Halsbury, 2nd Ed., under the heading of Petition of Right, the principle is stated thus at p. 692:

> Military, naval and civil officers of the Crown are dismissible at will, and no Petition of Right can be brought by them to recover pay, pension or other sums to which they claim to be entitled for their services, or damages in respect of their dismissal, even if contrary to the terms of an express contract of service.

Counsel for the suppliant submitted, however, that the former common law principle may be changed by statute, and no doubt that is so. He says that the *National Defence Act* 1950 effected such a change in regard to enlisted men, though not in regard to officers whose commissions are granted by Her Majesty during pleasure. His submission is that enlisted men in the Services are now enrolled under the Regulations for definite terms of service; that the Regulations confer on them a positive right to pay and allowances; that they cannot be dismissed at will but only for

[1] [1929] Ex. C.R. 20. [2] [1943] Ex. C.R. 77 at 118.
[3] (1921) 21 Ex. C.R. 25.

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the specific reasons stated in the Regulations; that consequently they have a contract with the Crown in regard to pay and allowances which they are entitled to enforce by a Petition of Right.

In reaching my conclusions in this case, I have specifically limited my consideration to the question of pay and allowances of men in military service and matters relating thereto. I have not considered the broader question of service pensions or of matters relating to other servants and employees of the Crown, such as civil servants, these matters not being before me.

The principle which I have stated above has been embedded in the law of the United Kingdom and of Canada for many generations and no case was cited to me in which that principle was not upheld. It follows, I think, that in construing the provisions of the *National Defence Act* I must apply the presumption that Parliament, when enacting that Act, did not intend to alter such a well established principle unless there be found therein language which in express terms or by clear implication leads to the conclusion that such an alteration was intended. An examination of the Act satisfies me that it contains no such express terms or any language which clearly implies that such an alteration was intended.

I have carefully considered those sections of the *National Defence Act* which counsel for the suppliant submits are sufficient to lead to the implication that Parliament intended to alter the law in this regard, and have compared them with similar provisions of the *Militia Act*.

His first point is that the suppliant, like all men, enlisted in the Regular Forces pursuant to Regulation 6.22 (passed under the *National Defence Act*), namely, for a term of one to seven years, "as the Chief of the General Staff may direct". In the case of the suppliant, his term of re-enlistment was for a period of three years. In the *Militia Act*, the enlistment of a man was also for a specified period, s. 15(1) being as follows:

> 15. (1) Men may be enlisted for continuous service in the Active Force for such period as the Governor in Council may prescribe but not exceeding a period of five years and may be enlisted for service in the Canadian Army other than for service in the Active Force for such period as the Governor in Council may prescribe but not exceeding a period of three years.

Then by Regulation it was provided:

290. (*a*) The period of first engagement for service in the Active Force pursuant to enlistment therein and attestation in consequence thereof shall be one of three years. The period of service required to be performed in respect of any re-engagement on such original enlistment and attestation shall be five years.

(*b*) The period of service required to be performed by men enlisted in the Canadian Army, other than for service in the Active Force, shall be three years.

In each case, therefore, enlistment was for a specified period so that there is no difference in this regard between the members of the former Active Militia and the members of the present Permanent Forces.

Secondly, it is submitted that under the *National Defence Act* an enlisted man has a positive right to pay and allowances at fixed rates. Again, I can find no substantial change effected by the provisions of the *National Defence Act* and the Regulations passed thereunder. Under the *Militia Act,* the following sections relate to pay and allowances:

48. (1) Officers, warrant officers and non-commissioned officers of the Active Force shall be entitled to daily pay and allowances at rates to be prescribed by the Governor in Council.

(2) The Governor in Council may, from time to time, fix the sums to be paid to privates of the Active Force, regard being had to length of service, good conduct and efficiency.

Then under the Regulations (Army) relating to pay and allowances, it was provided:

109. A soldier shall be entitled to pay at the rate prescribed for his rank or classification, group and service, in the table to this paragraph.

In the *National Defence Act,* provision is made for pay and allowances as follows:

36. (1) The pay and allowances of officers and men shall be at such rates and issued under such conditions as are prescribed in regulations made by the Governor in Council.

(2) The pay and allowances of officers and men shall be subject to such forfeitures and deductions as are prescribed in regulations made by the Governor in Council.

(3) Unless made in accordance with regulations prescribed by the Governor in Council, an assignment of pay and allowances is void.

In the Regulations passed therein it is provided:

204.30. The rate of pay for a man shall be as prescribed for his rank or classification, group, and service, in the table to this Article.

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It will be seen at once that there is no essential difference between the right to pay and allowances conferred by the two Acts and the Regulations.

Then it is said that under the *National Defence Act* and the Regulations thereunder, an enlisted man cannot be dismissed from the Service at will, but only for the reasons and under the conditions named.

The *National Defence Act* provides as follows:

24. The enrolment of a person binds that person to serve in the Canadian Forces until he is, in accordance with Regulations, lawfully released.

Then by the Regulations, it is provided:

15.01. (2) Except as provided in (3) of this article, an officer or man may be released, during his service, only for the reasons and under the conditions prescribed in the table to this article.

The table referred to consists of several pages, gives the reasons, some of which are applicable to officers, others to men and still others to both classes, and states the authority whose approval is required.

Under the *Militia Act*, s. 21 provides for the oath of allegiance to be taken upon enlistment and its effect.

21. (2) Such oath shall have the effect of a written engagement with the King, binding the person subscribing it to serve in the Canadian Army until he is legally discharged, dismissed or removed, or until his resignation is accepted.

Then, by the Regulations established thereunder and relating to discharge of members of the Permanent Forces, it is provided:

372. (*a*) The various causes of discharge, and the competent officers to authorize, carry out and confirm discharges are given in the following table . . .

Then follows the table referred to which, while it may vary in details, is of the same nature as the table referred to in Regulation 15.01 passed under the *National Defence Act*.

I am quite satisfied, after considering the provisions of the *National Defence Act* and the Regulations passed thereunder relating to pay and allowances, that they contain nothing which leads to the conclusion that an enlisted man now has a right to bring to the civil courts any dispute relating to such matters.

In my view, the law on this point is now the same as it was under the *Militia Act* and as stated in the cases in this Court to which I have referred above. The leading case on this point is *Mitchell v. The Queen*[1]. At p. 122, Lord Esher M.R., said:

> I agree with Mathew J. that the law is as clear as it can be, and that it has been laid down over and over again as the rule on this subject that all engagement between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract.

At p. 123 he continued:

> It has been decided over and over again that, whatever means of redress an officer may have in respect of a supposed grievance, he cannot as between himself and the Crown take proceedings in the courts of law in respect of anything which has happened between him and the Crown in consequence of his being a soldier.

And in the same case Fry L.J., said at p. 123:

> I am clearly of opinion that no engagement between the Crown and any of its military or naval officers in respect of services either present, past, or future can be enforced in any court of law.

While that case speaks of military or naval officers, it was made clear in *Leaman v. The King*[2] that the principle applies also to enlisted men.

The principle stated by Lord Esher M.R., is now somewhat limited by those provisions of our *National Defence Act* relating to appeals of servicemen and officers to the Court Martial Appeal Court from convictions at a Court Martial, but those provisions have no bearing on this case.

For these reasons, I have come to the conclusion that the Court is without jurisdiction to grant the relief claimed in para. (*b*) of the suppliant's Information.

The suppliant also prays that he may be granted "(a) a declaration that the purported forfeiture or cancellation by the Adjutant General of the Canadian Army, referred to in paras. 4 and 5 of this Petition, is null and void".

The relief so claimed is in respect of alleged forfeiture of pay which has been duly credited to the suppliant for the same period as referred to above. It is a matter which has arisen between the suppliant and the Crown in consequence

[1] [1896] 1 Q.B.D. 121. [2] [1920] 3 K.B.D. 663.

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of the former being an enlisted man. It is clear from the opinion of Lord Esher M.R., in the *Mitchell* case above referred to, that the suppliant cannot seek redress for such an alleged grievance in the civil courts. I must therefore find that the Court is without jurisdiction to grant the relief so claimed.

Reference may also be made to *Mulvenna v. The Admiralty*[1]. There, Lord Blackburn said at p. 575:

> These authorities deal only with the power of the Crown to dismiss a public servant, but they appear to me to establish conclusively certain important points. The first is that the terms of service of a public servant are subject to certain qualifications dictated by public policy, no matter to what service the servant may belong, whether it be naval, military or civil, and no matter what position he holds in the service whether exalted or humble. It is enough that the servant is a public servant, and that public policy, no matter on what ground it is based, demands the qualification. The next is that these qualifications are to be implied in the engagement of a public servant no matter whether they have been referred to when the engagement was made or not.
>
> If these conclusions are justified by the authorities to which I have referred, then it would seem to follow that the rule based upon public policy which has been enforced against militant servants of the Crown, and which prevents such servants suing the Crown for their pay on the assumption that their only claim is on the bounty of the Crown and not for a contractual debt, must equally apply to every public servant. . . .

Then, after citing a number of authorities, he continued:

> It also follows that this qualification must be read, as an implied condition, into every contract between the Crown and a public servant, with the effect that, in terms of their contract, they have no right to their remuneration which can be enforced in a civil Court of Justice, and that their only remedy under their contract lies "in an appeal of an official or political kind".

As this Court is without jurisdiction to grant any of the relief claimed, the Petition of Right will be dismissed with costs.

Judgment accordingly.

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[1] [1926] Scots Law Times Reports 568.