



IN THE MATTER OF THE HUMAN RIGHTS ACT 1981

IN THE MATTER OF THE BERMUDA HUMAN RIGHTS TRIBUNAL

BETWEEN:

Andre Hypolite

Complainant

-v-

(1) Michael Christopher

(2) Philip Downey

Respondents

J U D G M E N T

Mr Darrell Clarke, Darrell Clarke, for the Complainant.

Mr Peter Sanderson, Wakefield Quin, for the First and Second Respondents.

Background

1. The background to this matter is clearly set out in the Preliminary Judgment dated 13 January 2015 (**Preliminary Judgment**). We do not propose to repeat it here.
2. The Tribunal ordered in the Preliminary Judgment that the Substantive Hearing (**Hearing**) would proceed and determine whether or not the First and Second Respondents breached Section 8(d) Human Rights Act 1981 (**Act**). Specifically, did they intimidate, coerce or impose any pecuniary or other penalty upon the Complainant in order to prevent him from making a complaint or disclosure or from testifying or

participating in a proceeding under the Act, or penalise him for having made any such a complaint or disclosure.

The Substantive Hearing

3. On 12 November 2015 the Hearing took place and the Tribunal heard detailed witness evidence from the Complainant and the Respondents.
4. The Complainant's case was that he was penalised as a direct result of his communications with the Human Rights Commission, and/or because the Respondents knew he intended to complain to the Human Rights Commission. The specific treatment alleged was that over the period of September to December 2011 (**Period**) he:
 1. was subjected to more strip searches than other inmates; (**Allegation 1**)
 2. during a strip search, was asked to squat over a mirror that was placed on the Second Respondent's shoe (to observe his genitalia) (**Allegation 2**); and,
 3. during a search, was bent over his prison bed and touched in a sexual manner. Specifically, the Respondents grabbed the Complainant's genitals and commented "my God Hypolite" and "caressed" his buttocks (**Allegation 3**).

We deal with each of these Allegations below.

Allegation 1

5. Under cross examination it was put to the Complainant that he had a history of hiding contraband during his detention, and as such, if there were any additional searches that were conducted they were reasonable in the circumstances.
6. Specifically, it was put to the Complainant that:
 - In 2002 he was found to be in possession of a razor blade, after another inmate alleged he was trying to cut him;

- On 28 December 2006 the Complainant tested positive for cocaine (a prohibited substance);
 - On 19 November 2007 the Complainant was found to have a cell phone in his cell;
 - On 12 April 2008 a cell phone was found strapped to the Complainant's testicles; and,
 - On 12 May 2010 the Complainant tested positive for opiates (a prohibited substance).
7. Being questioned on these issues clearly upset the Complainant, as he did not consider them relevant to his Complaint before the Tribunal. The Tribunal found him to be combative and evasive when providing evidence in this regard.
 8. The Complainant stressed throughout the cross examination that he felt he was generally targeted for searches and that it was discriminatory and prejudiced. He alleged that other prisoners were treated differently as other methods were used (such as a K9 unit) to search for contraband. The Complainant could not provide any evidence that his searches were linked to a Human Rights complaint or communications with the Human Rights Commission – save that he believed that was the case.
 9. Both Respondents denied that they conducted any searches on the Complainant as a result of any communications to the Human Rights Commission (or as a result of their belief that the Complainant intended any such communications). In fact, both Respondents alleged they had no knowledge of any communications the Complainant had with the Human Rights Commission (or intended communications) whatsoever until they became aware they were named in his formal complaint in 2012.
 10. The Respondents' evidence was that all the searches of the Complainant were for valid reasons. Firstly, every three months all inmates at the Complainant's security level must be stripped and searched at least once. Secondly, above and beyond this standard approach, searches can be carried out on a more frequent basis if there was any

information to suggest that it was required. This tends to be based on intelligence provided by entities (such as the police) or members of the public. For example, in respect of the Complainant's cell phone search in 2008, the prison received intelligence that the Complainant was making harassing calls late at night. Using that information, the Complainant was strip searched and a cell phone was found.

11. The Tribunal noted that there were no adequate records of the strip searches that were conducted. In particular, none of the strip searches were recorded (audio or otherwise), and there were no clear chronological reports setting out the full process and reasons for the strip searches that were carried out. The Tribunal appreciates given the size of the prison and resources, documenting and recording the searches may be difficult. However, this lack of clear evidence led us to having to rely largely on witness evidence on this specific point.

Findings

12. On hearing the evidence we find as a matter of fact that the Complainant was found to be in possession of the illegal contraband as listed in paragraph 6 above.
13. We disagree with the Complainant's position that these issues are irrelevant to Allegation 1. To the contrary, such conduct is directly relevant as to the reasons to why the Complainant was on occasion potentially subjected to strip searches over and above the routine strip searches that take place once every three months.
14. Whilst the Tribunal appreciates that the Complainant subjectively feels he was targeted we find that the Complainant was subjected to the strip searches during the Period either due to the prison's general strip search policy, or because the Respondents (or their superiors) reasonably thought it necessary to do so. It may well be that the Complainant was searched more times than other prisoners during the Period (or outside of it), but there is no evidence before us that this was in any way related to him communicating with (or intending to communicate with) the Human Rights Commission.

15. As such the Tribunal finds that the Respondents did not subject the Complainant to strip searches in response to any form of complaint or communication made (on intended to be made) to the Human Rights Commission.
16. Allegation 1 is therefore not upheld.
17. As a side note, there was some debate during the hearing as to when the Complainant initially contacted the Commission. However, given our findings above, this is not relevant.

Allegation 2

18. None of the parties remembered with any great clarity the placement of a mirror in any particular strip search of the Complainant.
19. The Complainant's evidence, in cross examination, was that he recalled that a mirror was moved from a wall and that he was told to squat over it, but he could not provide any further details.
20. Mr Clarke did not question either Respondent in any detail on this issue in cross examination. However, in their evidence in chief the Respondents submitted that inmates are often asked to squat once they have been stripped due to the possibility of illegal items being stored in body cavities, but they did not admit to using a mirror on the Complainant during the Period.

Findings

21. Clearly, a strip search in a prison setting is an intrusive search. On the balance of probabilities the Tribunal finds that at some point the Respondents may have used a mirror to observe the certain private body parts of the Complainant.
22. However, no evidence was put before us that this occurred during the Period, and we do not find that any such action (in the Period or otherwise) was as a result of the Complainant communicating with (or intending to communicate with) with Human Rights Commission.

23. Allegation 2 is therefore not upheld.

Allegation 3

24. In cross examination, the Complainant admitted that neither of the Respondents grabbed the Complainant's genitals or buttocks or made the alleged comments. It was likely another prison officer not named in these proceedings.

25. Allegation 3 is therefore not upheld

Summary and Costs

26. During Mr Clarke's closing submissions, Mr Clarke fairly submitted that based on the evidence before the Tribunal at the Hearing the Complainant's position that there was a breach of 8(d) of the Act by the Respondents was "tenuous".

27. The Tribunal agrees, and the Complainant's claim is dismissed.

28. On considering the Complainant's evidence, the Tribunal does not consider that the Complainant brought his complaint on purely vexatious grounds. However, the complaint was misconceived, and it was clearly apparent that there was no link at all between any of the strip searches conducted in the Period and any communications (or intended communications) with the Human Rights Commission.

29. It is our preliminary view that each party bear their own costs in this matter. However, if requested the Tribunal will hear counsel on the issue of costs subject to an application being made within 7 days from the date of this Judgment.

DATED this 19 day of MAY, 2016.



MICHAEL HANSON, CHAIRMAN



DONNA DANIELS, PANEL MEMBER



DWAYNE THOMPSON, PANEL MEMBER