IN THE SUPREME COURT OF BELIZE A.D. 2020

Claim No 175 of 2020

IN THE MATTER OF Section 3(a) and 6(1) of the Belize Constitution Act, Chapter 4 of the Substantive Laws of Belize

AND

IN THE MATTER of Regulations 7 and 10 of the Defence (Officer) Regulations, Chapter 135 of the Substantive Laws of Belize and section 19 of the Defence Act, Chapter 135 of the Substantive Laws of Belize.

AND

IN THE MATTER OF Statutory Instrument, No 64 of 2016 Defence (Officer)(Amendment) Regulations, 2016

BETWEEN

Ian Cunha

Claimant

AND

THE BELIZE DEFENCE FORCE

1ST Defendant

THE ATTORNEY GENERAL OF BELIZE

2nd Defendant

DECISION ON STRIKE OUT APPLICATION

1. This is an application of the Defendant by Notice of Application filed on 5th June 2020 along with the Affidavit of Victor Briceno to have the Claimant's constitutional motion struck out on the grounds that there is no prospect of success, it is an abuse of process and delay. It is being dealt with as a preliminary point.

2. By fixed date claim form and supporting affidavit filed on 18th March 2020, the Claimant brought constitutional proceedings against the Defendant for the following declarations:

    i. That the inconsistent application of Statutory Instrument No 64 of 2016 Defence (Officer) (Amendment) Regulations, 2016, amounts to a violation of the Claimant's constitutional rights to protection under the law and equal protection of the law pursuant to section 3(a) and 6(1) of the Belize Constitution Act, Chapter 4 of the substantive laws of Belize.
    ii. A consequential order directing the 2nd Defendant to void Statutory Instrument No 64. Of 2016 Defence (Officer) (Amendment) Regulations, 2016 on the basis that same is discriminatory to the Claimant in relation to his age of retirement.
    iii. Damages for loss of seniority by the Defendant's breach of Regulations 7 and 10 of the Defence (Officer) Regulations, Chapter 135 of the substantive laws of Belize, Section 19 of the Defence Act, Chapter 135 of the substantive laws of Belize and Statutory Instrument No 64. of 2016

Claimant's Evidence

3. The Claimant was commissioned in the 1st Defendant on 11th August 2000, and is currently a Major with the 1st Defendant. The Claimant indicates that prior to Statutory Instrument No 64. Of 2016 (Officer) (Amendment) Regulations, 2016 ('the SI') Regulation 10(1) of the Defence (Officer) Regulations, Chapter 135 ('Principal Regulations') provided that the officers in the rank of Lieutenant Colonel, retired at the age of 45, while officers who are Majors and below ranks, retired at the age of 42. The SI revoked the Principal Regulations and replaced with the new retirement age for both Lieutenant Colonels and Majors, 50.

4. The Claimant alleges that two other persons, a Lieutenant Colonel J Requena and Major T Cal who entered the service before the SI, retired pursuant to the revoked Regulation. It is on this basis that the Claimant alleges that the SI is being inconsistently applied and perpetuates discrimination. The Claimant indicated if not for the Regulation he would have retired this year 2020 as he has turned 42.

5. The Claimant further claims that prior to the SI Regulations 7 and 10 of the revoked Regulations and Section 19 of the Defence Act governed promotion and prolongation of service in the 1st Defendant. The Claimant alleges that Majors Ismael Romero and Ricardo Leal who underwent training courses at the expense of the State, prior to their date of retirement signed two-year bonds with the Government of Belize extending

their service. The Claimant alleges that the prolongation of service in the 1st Defendant is governed by section 19 of the Defence Act and two-year bonds to facilitate training courses were not lawful and by reason of that extension of service he lost his ability to be promoted to the next rank of Lieutenant Colonel. He alleges that if they were retired in accordance with Revoked regulations he would have been promoted.

6. The Claimant indicated that he made numerous requests for an interview with the Commander of the 1st Defendant to discuss his non-promotion and the promotion of Lieutenant Colonel Romero but to no avail.

Defendant's Evidence

7. The Defendant filed an affidavit of Victor Briceno in support of the application on the 5th June 2020. Mr Briceno, the Adjunct (Human Resource Manager) of the 1st Defendant pointed out that Regulation 4(2) of the SI specifically provided that an officer or soldier enlisted in the regular force prior to the commencement of the new regulations may retire at the age specified prior to the coming into force of the new regulations. He further pointed out that the new Regulations also provided at 4(3) that an officer or a soldier enlisted in the regular force who is due to retire under the new regulations who is desirous of further employment in the Force may apply to the Defendant Board to be considered for further employment in the Force. The Defendant therefore indicated that the Claimant had the option to retire at the age specified prior to the coming into force of the SI 2016. Mr Briceno indicated that there were several officers including the Claimant who never indicated they wished to retire and as a result they have remained for further employment in the Force. He also indicated that Colonel Requena and Major Cal did indicate their preference to retire at their previous retirement age and so was retired pursuant to Regulation 4(2) the SI.

8. In relation the promotion of the Claimant, Mr Briceno stated that Regulation 7(1) of the Principal Regulations states that an officer shall not be promoted to the substantive rank of Captain or Major unless he has previously qualified for such promotion at such professional examinations or tests for that rank, while 7(2) provides that an officer shall, subject to paragraph (1) be eligible for promotion to the higher substantive rank on completion of the following periods of commissioned service: to Lieutenant, after 2 years as a Second Lieutenant; to Captain, after 4 years as a Substantive Lieutenant; to Major, after 7 years as a Substantive Captain.

9. Mr Briceno pointed out that the Claimant was promoted to Second Lieutenant on the 22nd August 2000 when he was commissioned. Two years later, on the 11th August 2002 he was promoted to the Lieutenant and on the 1st day of October 2005 he was

promoted to Acting Captain. On 11th August 2006 he was promoted to Substantive Captain and 11th August 2013 he was promoted to Substantive Major. Mr Briceno contends that in 2016 the Claimant held the rank of a Captain and therefore was not eligible to be promoted to Major until 7 years after, which was in 2013, The Claimant was promoted to Major in 2013. He contends that the Claimant's promotional timeline was consistent with the law.

10. In relation to Majors Leal and Romero, who were promoted to Lieutenant Colonel in March 2015 and February 2017 respectfully, Mr Briceno indicated that their promotions were in accordance with regulation 7(5). Mr Briceno also indicated that the Claimant did not lose seniority or was bypassed for promotion but rather he was not eligible for promotion. Mr Briceno indicated that there were vacancies in 2017 and 2018 but the Claimant was not eligible because of poor performance. Mr Briceno outlined a number of warnings and the Claimant was convicted of three different offences, two being in 2016 and one in 2017. Mr Briceno indicated that as a result the two dates in 2017 and 2018 where the Claimant could have been promoted to a Lieutenant Colonel, he was ineligible because of poor performance.

11. The court makes no findings of fact but has narrated the facts as set out by the Claimant and the Defendant to provide important background information for the purpose of understanding the claim and the competing arguments.

Defendant's Submissions

12. By its Application and written submissions, the defendant's main contentions are as follows:

    (i) The claimant has no real prospect of succeeding on the Claim; as the Claim discloses no reasonable ground for bringing the claim;
    (ii) That the Claim is an abuse of process of the Court on the following grounds:
        a. that there was no contravention of any human right or fundamental freedom,
        b. that the defendant's actions were susceptible to adequate redress by a timely application to Security Services Commission or to the court in its non-constitutional jurisdiction, by the claimant challenging the actions complained of via judicial review.
        c. that there has been inordinate and unexplained delay in instituting this action almost 3 to 4 years after his cause of action accrued making it an abuse of process.

Issues

13. The issues for determination are as follows;

i. Whether the fixed date claim and affidavit of the claimant discloses no grounds for bringing or defending the claim;

ii. Whether there was an alternative remedy available to the claimant at the time he chose to proceed by way of Administrative Claim pursuant to the Constitution having regard to the true nature and substance of his claim; and

iii. Whether there has been inordinate and unexplained delay in instituting this action making it an abuse of process

Whether the fixed date claim and affidavit of the claimant discloses no grounds for bringing or defending the claim.

14. Part 26.3 (1)(c) of the CPR provide as follows;

> *26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -*
>
> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*

15. This is considered a nuclear option and the rule ought not to be used except in the clearest of cases.[1] Where an arguable case is presented or the case raises complex issues of fact or law its use is inappropriate and so the burden of proof in this regard is on the applicant.[2] The Defendants, as applicants, must satisfy the Court that no further investigation will assist it in its task of arriving at the correct outcome.

16. The Claimant seeks a declaration that his rights under s 6(1) of the Constitution (equal protection of the law without discrimination) in conjunction with s 3(a) (protection of the law) were breached as a result of the unequal application of the SI whereby he was not allowed to retire under the revoked regulations. In advancing his argument on equal protection the Claimants cited the treatment of Lieutenant Colonel J Requena and Major T Cal as actual comparators who were able to retire at the ages under the revoked legislation.

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[1] ***Brian Ali v. The Attorney General of Trinidad and Tobago***, CV 2014 02843 Kokaram J at para 13

[2] ***Tawney Assets Limited v East Pine Management Limited and Ors*** [2012] ECSC J0917-4

17. The case law provides that in order to sustain a claim for discrimination there must be different and less favourable treatment[3] based on an identifiable characteristic, that is capable of amounting to discrimination. Moreover, in order for it to be discriminatory under the Constitution there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.[4] Further, such a difference in treatment is discriminatory if it has no objective and reasonable justification; that means, if it does not pursue a legitimate aim, there is not a reasonable rational connection between the means employed and the aim sought or the means employed is not proportional or is the least restrictive means to achieve the aim.[5]

18. The State usually enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject-matter and the background. A wide margin is usually allowed to the State when it comes to general measures of economic or social strategy. This is due to the fact that the State's direct knowledge of the society and what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choices unless it is "manifestly without reasonable foundation."[6]

19. It is clear to the Court that Regulation 4(2) of the SI gave the Claimant the ability to retire at the retirement age before the SI. Section 4(2) expressly provides *"An officer or a soldier enlisted in the regular force who has been employed prior to the commencement of these Regulations may retire at the age specified prior to the coming into force of these Regulations."* The Claimant's affidavit provides no evidence that he sought to exercise this option under the SI. He also provided no evidence that Lieutenant Colonel J Requena and Major T Cal did not exercise their right under this option.

20. The Claimant therefore cannot succeed in proving that he was being treated differently or less favourably from another similarly circumstanced comparator. The SI applied to all persons who joined the 1st Defendant prior to the SI and he was not treated less favourably as he was permitted to retire at the age when he enlisted under the SI. Further, he has not cited any similarly situated comparator. Thus his constitutional claim that there was unequal application of the SI under the equal protection clause fails at the first hurdle. In relation to the constitutional relief sought

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[3] ***AG v Jones*** (10 May 2004) KN 2008 CA 3

[4] ***Bhagwandeen v AG*** [2004] UKPC 21, (2004) 64 WIR 402 (T&T); See also ***Wade v Roches*** (9 March 2005) BZ 2005 CA 5.

[5] ***Webster v AG*** [2015] UKPC 10; ***Wade v Roaches*** (supra);

[6] ***R v Julie Delve et al and the Secretary of State for Work and Pensions*** [2020] EWCA Civ 1199

in this regard, it is clear to the court that the claimant does not have an arguable case and no grounds for bringing the claim on this ground.

21. The Claimant also indicated that the promulgation of the Regulations has allowed Major Romero and Major Leal who were due to retire in 2015 to continue in the service and he was therefore bypassed for promotion. The evidence from the Claimant himself was that the extension of service of Major Romero and Major Leal was not as a result of the SI but rather as a result of them being bonded to the Government of Belize as both having taken training courses previously. This extension therefore was not occasioned by the SI or a retroactive application of same or an unequal application of the SI. The claimant therefore does not have an arguable case or any ground for bringing the claim on this basis.

22. The third aspect of the Claimant's claim revolves around his promotion to Lieutenant Colonel. The Claimant has indicated as a result of the extension of time, Majors Romero and Leal were able to be promoted and he was bypassed for promotion. The Defendant's indicated that the Claimant was not bypassed and he was not promoted due to disciplinary and behavioural problems. This aspect of the Claimant's claim will involve serious questions of fact that would not be appropriate to be determined at this stage of the claim. Therefore, the Claimant's claim that he was not promoted is not one that is completely without merit and can form the basis of an arguable claim. That however is not the end of the matter.

Whether there was an alternative remedy available to the claimant at the time he chose to proceed by way of Administrative Claim pursuant to the Constitution having regard to the true nature and substance of his claim

23. The Defendant also submitted that this claim should be struck out as an abuse of process since the Claimant had a parallel remedy available.

24. CPR Part 26.3 (1) (b) states:

In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

25. The Claimant's argued that since the proviso in the Belize constitution was removed from the redress clause, the concept of alternative remedy no longer applies in Belize. A similar reasoning was adopted by Wit J in his dissent in ***Stephen Edwards v AG &***

Public Service Commission[7] where the Guyana's proviso similarly was removed after reforms. That reasoning did not find favour with the majority who made it clear that in not dealing with that point was not to be taken to mean they accepted it. In the case of ***Lucas and Carillo v The Chief Education Officer et al***[8] an appeal from Belize, the Appellants had challenged the constitutionality of their suspension from the Escuela Secundaria Técnica de México School by the Chief Education Officer. The majority dealt with alternative remedies in relation to Belize. The majority stated:

> *[132] The cases of Thakur Persad Jaroo v A-G [2002] UKPC 5, [2002] 5 LRC 258 and A-G v Ramanoop [2005] 4 LRC 301, [2006] 1 AC 328 restate a principle that where there is a parallel remedy, a citizen should not seek constitutional relief unless the circumstances of which complaint is made include some feature which justifies resort to a claim for breach of a fundamental right. This principle is buttressed in some Caribbean constitutions by a specific proviso that mandates the court to decline constitutional redress where a parallel remedy exists. (See for example Constitutions of The Bahamas 1973, art 28(2); Barbados s 24(2); Bermuda s 15(2); and Turks and Caicos s 21(2).)* ***The Belize Constitution has no such proviso but few will doubt that Belizean courts are still expected to disapprove of needless resort to the redress provision of that Constitution (ie s 20). (emphasis mine)***

26. Further, this is underscored by the fact that some Constitutions like that of Trinidad and Tobago do not have such a proviso but the principle still upholds. The Court therefore accepts that the principle that where there is a parallel remedy, a citizen should not seek constitutional relief is still a part of Belizean constitutional law.

27. It is well established that the right to apply to the Supreme Court pursuant to section 20 of the Constitution should be exercised only in exceptional cases where there is a parallel remedy.[9] In ***Jaroo***, the Privy Council reverberated its salutary warning that the right to apply to the High Court under the Constitution should be exercised only in exceptional circumstances where there is a parallel remedy. ***Harrikissoon*** concerned the case of a teacher who was transferred from one school to another and sought redress under the Constitution. The Privy Council was resolute in stating that

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[7] [2008] CCJ 10 (AJ)

[8] [2015] CCJ 6 (AJ)

[9] ***Thakur Persad Jaroo v The Attorney General of Trinidad and Tobago*** [Privy Council No. 54 of 2000]; ***Harrikissoon v Attorney General of Trinidad and Tobago*** [1980] AC 265; ***Chokolingo v Attorney General of Trinidad and Tobago*** [1981] 1 WLR 106 at pp. 111-112 and ***Hinds v The Attorney General*** [2001] UKPC 56.

constitutional redress could not be used as a substitute for judicial control of administrative action. Lord Diplock at p. 268 said:

> *"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle an applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."*

28. The CCJ in ***Lucas (supra)*** summed it up by stating:

> *[133] … Courts will frown on the filing of a constitutional motion in lieu of a judicial review action when the latter is perfectly capable of yielding all the relief the litigant requires. Proceeding by constitutional motion may well be an impermissible strategy either for unfairly jumping the litigation queue or evading the scrutiny of a judicial review judge charged with filtering out groundless or hopeless cases. A similar principle is applied where the litigant has adequate recourse in private law but chooses to proceed by way of constitutional motion. In those instances the courts will entertain a constitutional action only if the circumstances disclose some 'special feature' that justifies going beyond private law remedies and invoking the constitution.*

29. The Court is aware however, that the mere existence of an alternative remedy does not automatically warrant excluding constitutional proceedings. The crux is their adequacy. As stated by Sharma CJ in ***Belfonte v A-G***[10] and relied on in ***Lucas (supra)*** at [138] *"the determining factor in deciding whether there has been an abuse of process is not*

[10] (2005) 68 WIR 413 at [18]

merely the existence of a parallel remedy, but also the assessment that the allegations grounding constitutional relief are being brought 'for the sole purpose of avoiding the normal judicial remedy for unlawful administrative action'.

30. The power to decline jurisdiction arises only where the alternative means of redress is considered to be adequate. If there is an adequate parallel remedy, constitutional relief is only appropriate where some additional "feature" presents itself. This includes, without being exhaustive, arbitrary use of state power[11] or where there are breaches of multiple rights.[12]

31. There have been a number of cases in which constitutional claims have been struck out when judicial review was an adequate alternative remedy. In ***Gregory Rogers v Attorney General***[13]**,** the claimant's constitutional claim was struck out on the ground of abuse of process. The claimant, a firefighter claimed that his constitutional rights including right to equality were breached. Justice Des Vignes as he then was found that the appropriate remedy available to the claimant was by way of an application for judicial review. The Court stated:

> *"The claimant has failed to set out in his affidavit or in the affidavit of Sharon Nicholas-Charles any facts that amount to exceptional circumstances which justify allowing him to seek constitutional relief at this stage. He had available to him the alternative remedy of judicial review to challenge the actions or inactions of the Chief Fire Officer and/or Public Service Commission within three months of the issue of the relevant Orders on August 30, 2010. He failed to do so and to permit him to seek constitutional relief based on facts set out in support of his claim would amount to an abuse of process."*

32. In ***Trevor Bailey v Attorney General***[14] the Claimant, a police officer resumed duties after a charge of fraud against him was dismissed. He alleged that the State breached his constitutional rights to equality before the law and right to the enjoyment of property by not bringing the charges against him to trial within a reasonable time. He also claimed that he was treated unfairly and unequally by the Commission which failed to promote him while promoting other similarly circumstanced persons. Justice

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[11] ***Attorney General of Trinidad and Tobago v Ramanoop*** [2005] UKPC 2005; Takitota v AG

[12] ***Belfonte v Attorney General*** [1968] W.I.R. 416 (CA TT)

[13] ***CV2014-01341 - In re The Constitution of the Republic of Trinidad and Tobago. In re an application for redress by the applicant Between Rogers, Gregory v The Attorney General of Trinidad and Tobago, (unreported)*** Justice De Vignes 08.12.2014

[14] ***CV2015-02443 Trevor Bailey v AG, (unreported)*** Justice Pemberton 05.07.2016

Pemberton as she then was found that the claimant had a parallel remedy in judicial review available to him and therefore struck out his constitutional action as an abuse of process.

33. In ***Curtis Applewhite v Commission of Police & AG***[15] the Claimant, a police officer who resumed duties after suspension and alleged that the State breached his constitutional rights to equality before the law and the protection of the law by virtue of the failure and/or refusal of the Commissioner of Police of Trinidad and Tobago to promote him to the Rank of Corporal retroactively and the failure of to interview him for promotion. The Court struck out his claim holding that the crux of the claimant's claim was the Commissioner's failure and/or decision not to promote him retroactively to the rank of Corporal and the the appropriate remedy was for him to apply for judicial review pursuant to Section 5 of the JRA.

34. Likewise, this Court holds that the crux of the claimant's claim is the failure and/or decision not to promote him to the rank of Lieutenant Colonel. Consequently, upon an evaluation of the facts deposed by the Claimant, the appropriate remedy available to him at the time was that of an application for judicial review. The claimant in his submissions did not set out any facts to establish that an application for judicial review would not have sufficed to address his grievances.

35. Consequently, the court finds that the claimant had available to him the alternative remedy of judicial review to challenge the actions and/or inactions of the 1st Defendant. He failed so to do and has failed to provide any evidence upon which the court could at this stage find any special feature that would excuse him from doing so. The Court further finds the Claimant having failed to do so, it would be an abuse of the process of the court to allow him to seek constitutional relief and evade the scrutiny of a judicial review action.

36. Having regard to the ruling of the court on this issue, it follows that the entire claim must be struck out and therefore the court will not make unnecessary orders in relation to the the issue of delay.

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[15] ***CV2017-00815 Curtis Applewhite v Commission of Police & AG, (unreported)*** Justice Ricky Rahim, 23.01.2018

Conclusion

The order of the Court is therefore as follows;

i. The fixed date claim filed on the 18th March 2020 is struck out.
ii. The claimant shall pay to the defendants the costs of the application, to be assessed in default of agreement.

Dated this 19th October 2020

Westmin R.A. James
Justice of the Supreme Court (Ag)