

IN THE SUPREME COURT OF BELIZE, A.D. 2022

CLAIM No. 440 of 2020

BETWEEN

LAURENCE LORENZO

APPLICANT

AND

**THE ATTORNEY GENERAL OF BELIZE,
THE SECURITY SERVICES COMMISSION,
THE BELIZE DEFENCE FORCE**

RESPONDENTS

BEFORE The Honourable Madam Justice Patricia Farnese

Hearing Date: March 11, 2022

Appearances

Mr. William A. Lindo, for the Applicant

Ms. Leonia Duncan and Mr. Lionel Olivera, for the Respondents

DECISION ON FIXED DATE CLAIM

Introduction

[1] Maj. Lorenzo (ret.) was formally disciplined in 1996 and his punishment included 6 months loss of seniority. In 2001, when Maj. Lorenzo learned that loss of seniority was not a permitted punishment under s. 73(8) the *Defence Act*, chap. 106, he wrote to the Commandant of the Belize Defence Force (BDF) asking for his seniority to be restored. He also requested that his date of promotion be adjusted. The Commandant forwarded Maj. Lorenzo's requests to the Security Services Commission (SSC). After conducting a review, the SSC confirmed that Maj. Lorenzo was entitled to have his seniority restored, but they rejected his claim that delays in his promotion

were related. The SSC communicated these decisions to Maj. Lorenzo in a letter to him dated 15 September 2003. The SSC clearly stated in that letter that their review found that his promotion was delayed because of his performance. The Defendants did not direct that his loss of seniority be rescinded until 2017. They did not offer compensation to Maj. Lorenzo until two years later.

[2] Maj. Lorenzo claims that the incorrect seniority date influenced the timing of his promotions throughout his career. He also claims that he was overlooked for career advancement opportunities and promotions because others were incorrectly identified as having more seniority. In addition to damages and costs, he is seeking 3 declarations:

- That the Security Services Commission abused its process by causing inordinate delay in handing down its decision in respect of the Claimant;
- That the penalty of loss of seniority occasioned by the 2nd and 3rd Defendants breached the Claimant's legitimate expectation to be promoted in accordance with their policies and practices; and,
- That the Claimant is entitled to damages for the loss of seniority and promotional opportunity occasioned by the 2nd and 3rd Defendants together with any associated benefits and/or allowances.

[3] In addition to disputing the Maj. Lorenzo's entitlement to the declarations, the Defendants assert that Maj. Lorenzo is seeking a declaration to circumvent the three-month deadline prescribed in Supreme Court (Civil Procedure) rule 56.5(3) to apply for permission to file an application for judicial review. They claim that asking the court to reconsider these decisions now is an abuse of process.

[4] After reviewing the evidence and submissions of the parties, I find that Maj. Lorenzo is entitled to a declaration that the Security Services Commission abused its process by causing inordinate delay in handing down its decision in respect of the Claimant's right to have his seniority restored, because he has established that (1) such a declaration would not be an abuse of process, (2) that a declaration is warranted because there was inordinate delay, and (3) that the declaration is more than an academic exercise. He is not entitled to declarations related to his promotions as his applications are out of time and would be an abuse of process to consider them at this late stage. Damages in the amount of \$22,958.75 are owed to Maj. Lorenzo for lost wages, reputational harm, and loss opportunities. As all parties had some success in this matter, no order as to costs is made.

Issues

[5] Two issues arise in this case: (1) whether Maj. Lorenzo is entitled to the declarations he seeks and (2) what damages, if any, are owed to Maj. Lorenzo. The first issue raises the preliminary question of whether the applications for declarations should be dismissed because they are an abuse of process.

Analysis

[6] Whether granting a declaration is warranted or would be an abuse of process depend on the procedural history of this matter and the nature of the specific declaration sought. Although Maj. Lorenzo seeks three declarations, the declarations relate to decisions on two matters – seniority and promotion. Each type of declaration will be analysed separately before deciding what damages, if any, Maj. Lorenzo is owed.

(a) Seniority

Abuse of Process

[7] The Defendants assert that Maj. Lorenzo’s application is an abuse of process because he is attempting to circumvent the three-month time limit for applying for permission for judicial review. The Defendants’ failure to implement their 2003 decision to restore Maj. Lorenzo’s seniority effectively kept that decision ‘open’ thereby continuing his right to apply for judicial review until the decision was complete. The February 2019 letter from the SSC to Maj. Lorenzo outlining the compensation he would be paid ‘completed’ the 2003 decision and triggered his right to seek judicial review. Maj. Lorenzo did not file his claim until July 2020.

[8] Maj. Lorenzo’s application for a declaration related to his seniority, although filed after the three-month time limit, is not an abuse of process. Rule 56.5(3) allows me to extend that deadline for good reason. The Defendants practice of taking significant time to respond to Maj. Lorenzo’s inquiries is a good reason to extend the deadline. Maj. Lorenzo sought the assistance of a lawyer to first understand and then challenge the compensation offered in the February 2019. The lawyer wrote to the Defendants 3 times between March and August 2019 and received no response. It would be unreasonable to hold Maj. Lorenzo to the strict three-month deadline given the Defendants’ past practice of responding many months after his inquiries. Maj. Lorenzo’s had good reason to expect that his lawyer’s inquiries would garner a delayed response.

[9] This case mirrors *Mark Sewell & Duane Sewell v. The Minister of Foreign Affairs & Attorney General*¹ where Awich J. considered whether the kind of abuse of process that was alleged was actually present. Awich J. found that no abuse was present because permission for judicial review would have been granted. The claimant in *Sewell* was not seeking a declaration because she was barred from seeking judicial review. Had Maj. Lorenzo applied for judicial review, it would have been granted despite exceeding the three-month deadline.

¹ Belize Supreme Court Claim No. 291 of 2007.

Inordinate Delay

[10] The Defendants have failed to provide an adequate justification for the inordinate delay in restoring Maj. Lorenzo's seniority. As early as 2003, the Defendants acknowledged that they imposed an unlawful punishment. The parties agree that all that was required to correct Maj. Lorenzo's seniority was for the Force Adjutant to publish the rescindment of the punishment in the Record and Pay Orders. The Defendants also do not contest that the Force Adjutant published corrections of seniority for other officers in the Record and Pay Orders during this time. That other officers had their seniority corrected speaks to the unreasonableness of the delay.

[11] I do not accept that Maj. Lorenzo's repeated attempts to have the SSC's 2003 decision reconsidered justifies the delay. Maj. Lorenzo's grievance has always involved two issues – the loss of seniority and the delayed promotion. There is no evidence that the Defendants reconsidered their 2003 decision to restore Maj. Lorenzo's seniority. Their subsequent reviews and investigations focused on Maj. Lorenzo's persistent complaint that his promotion dates were unfairly delayed because of the seniority loss. Correcting the seniority would not have been prejudicial to the Defendants in the later reviews of Maj. Lorenzo's ongoing complaints about his promotion.

[12] I also find it unreasonable to suggest that Maj. Lorenzo contributed to the delay by failing to publish the rescindment of his seniority loss in the Record and Pay Orders while he was Force Adjutant. To have published a rescindment that would have the effect of increasing his salary, even if he was so authorized, would have had an appearance of impropriety that I do not doubt Maj. Lorenzo did not want to create.

Declaration is not academic

[13] For Maj. Lorenzo to be entitled to a declaration, the court must also be satisfied that a declaration would not be an academic exercise even though no abuse of process is found. Maj. Lorenzo is retired and there is no longer any practical benefit to the Record and Pay Orders accurately reflecting his seniority. By offering Maj. Lorenzo compensation, the Defendants have conceded that this decision has financial consequences. In this case, the public, especially other employees in the public service, have an interest in deterring unjustified delay in remedying errors in seniority because of the relationship between seniority and compensation. Moreover, the Defendants' delay in correcting an unlawful exercise of disciplinary powers warrants a response. While one cannot expect that mistakes will not be made, for the Defendants to delay correcting an unlawful act contributes to the erosion of public confidence in government.

(b) Promotion

Abuse of Process

[14] The Defendants' delay in restoring Maj. Lorenzo's seniority does not entitle him to ask this court to reconsider multiple findings that his promotions were not affected by the seniority loss in order to issue declarations. The Defendants' promotion decisions were final when the promotions were implemented. Maj. Lorenzo's request for declarations is out of time and would be an abuse of process to grant.

[15] The SSC's 2003 decision is disciplinary in nature. The decision rescinds a punishment imposed after a disciplinary process that was initiated under the *Defence Ordinance of 1980*. That decision also considered and rejected Maj. Lorenzo's claim the disciplinary decision influenced the timing of his promotion. A process for appealing disciplinary decisions is outlined in sections 110D and 111(2) of the *Belize Constitution*. The SSC correctly reviewed Maj. Lorenzo's punishment. The Belize Advisory Committee (BAC) could have heard an appeal of the 2003 decision and BAC's decision would have been subject to judicial review. Maj. Lorenzo did not appeal at that time.

[16] A review of the pleadings and submissions before me reveals that the true nature of the request for declarations is to have this court reconsider the SSC's 2003 finding that the wrongful loss of Maj. Lorenzo's seniority did not influence the timing of and potential for promotion throughout his career. Maj. Lorenzo has characterized this application as a request of redress rather than a review of a disciplinary decision. He argues that a request for redress is not subject to the prescribed timelines in the *Security Services Regulations* and the *Belize Constitution (Public Service) Regulations* because the regulations only apply to appeals of disciplinary decisions.

[17] I reject Maj. Lorenzo's characterization of this application as a non-disciplinary request for redress. Maj. Lorenzo cannot ask that this court find that an unlawful disciplinary decision breached his legitimate expectations of the timing of his promotions and then ask the court to disregard the disciplinary nature of the decision for the purpose of deciding the process he must follow to determine whether he is entitled to seek that remedy in the first place. The nature of the decision does not depend on the desired outcome.

[18] Maj. Lorenzo did not attempt to appeal the 2003 decision to the BAC until 2011. When a subsequent promotion was also delayed, Maj. Lorenzo attempted to revive his previous grievance by linking the delay in his first promotion to his second delayed promotion. The BAC declined to hear that appeal because he was out of time. Maj. Lorenzo did not apply for judicial review of the BAC's 2011 decision and is not entitled to do so now. He also did not appeal the timing of his final promotion. The parties do not dispute that promotion decisions consider more criteria than

seniority. Each promotion decision provided the opportunity for Maj. Lorenzo to assert that he met the criteria and should have been promoted sooner.

[19] That Maj. Lorenzo is seeking declarations rather than a prerogative order does not allow the court to entirely disregard timelines for judicial review. Unlike the seniority decision, the court does not have good reason to extend the time for granting leave for judicial review of his promotion decisions. Maj. Lorenzo has not provided an acceptable reason for the delay. Maj. Lorenzo was repeatedly informed that he was promoted when he met the criteria for promotion and that performance issues alone were responsible for the delay. That he did not accept those explanations and continued to believe that his loss of seniority was responsible, is not an acceptable reason that would allow the court to revisit a decision almost 20 years later.

[20] Judicial review applications are to be brought promptly by design. That courts are to sparingly use their discretion to extend those time limits and that prejudice and detriment are reasons why applications ought to be refused are well-established principles.² It would be prejudicial to the Defendants to revisit these decisions at this late date when nothing, other than Maj. Lorenzo's belief that his seniority loss and promotion timing were linked, prevented him from following the established process to formally appeal the 2003 promotion decision and every other promotion decision at the time they were made. All factors considered in discretionary decision are not captured in the surviving written record as clearly outlined in the affidavit evidence. To establish such a precedent would impose an unreasonable burden on the Crown, given the volume of similar decisions they make, to extensively document every factor considered in discretionary decisions. The three-month time limit increases the likelihood that those who made the discretionary decision are available to explain and be cross-examined about their actions.

[21] If Maj. Lorenzo wished to dispute the assessment that his performance did not meet the promotion standard when he was first eligible for promotion, his avenue was to the SSC, followed by an appeal to the BAC. Nonetheless, Maj. Lorenzo succeeded in having the circumstances of his promotions investigated multiple times by his superiors including Commander D.O. Tapia (ret.), Commander Cedric Borland (ret.), and Lieutenant Colonel Ruberto Ramirez (ret.). Nothing in the record indicates that they found any reason to question that not meeting the promotion standard was the reason he was not promoted at the scheduled time. Rather, each was satisfied that Maj. Lorenzo's seniority was not the reason for delay.

[22] It is unfortunate that the Defendants sometimes chose to communicate Maj. Lorenzo's not meeting the promotion standard as "poor" performance. The written record of the Defendants' evaluation of Maj. Lorenzo's performance throughout his career does not support that characterization. Not meeting a promotion standard does not necessarily equate with poor performance. The standard clearly contemplates that the published promotion timeline is merely

² *Myvett v. Comptroller of Customs and Excise et al.* Belize Supreme Court Claim No. 761 of 2019.

a target date. If that were not the case, failing to meet the standard at that set time would preclude someone from ever being promoted. There are many reasons why someone does not meet the standard that has nothing to do with the quality of their performance. For example, someone may not have had the sufficient opportunities to develop or demonstrate a skill that is required. It is also unrealistic to expect that one would be able to easily master each skill. Some skills require practice and insight gained through failure to develop. By using a target date, rather than a firm date for promotion, the process recognizes that individuals are expected to meet the promotion standard at different times.

[23] Maj. Lorenzo is likewise not entitled to a declaration that his legitimate expectations to be promoted in accordance with the Defendants' policies and practices were breached when he was not among the candidates considered for promotion to the highest ranks of the BDF. Maj. Lorenzo's application is out of time. He was entitled to plead his case when those decisions were made. For the same reasons that it would be an abuse of process to reconsider his personal promotion decisions, it would be an abuse of process to revisit these senior BDF appointments. There is also good reason not to extend the three-month time limit for review of this type of appointment.

[24] It is not clear that Maj. Lorenzo would be entitled to a declaration that his legitimate expectations were breached in any event. Maj. Lorenzo has not established that he was not considered for further promotions. He has only provided evidence that he was not personally consulted. He may have been considered and his candidacy dismissed at an early stage of the process. Promotion to the highest ranks of the BDF necessarily has a political component and raises issues of national security that may justifiably narrow who is consulted for such appointments. The judiciary should be circumspect when deciding to reconsider those decisions without the prescribed avenues of appeal first being exhausted.

[25] That a senior officer once noted that he had the potential for high office in the future is neither "an express representation" nor "a promise to consult" sufficient to create a legitimate expectation that gives rise to the creation of substantive rights.³ Courts have been cautious when deciding to impose a duty to consult on public bodies where democratically elected officials have not done so. There is good reason not to recognize a substantive right to consultation in these circumstances. It is difficult to imagine a situation where senior leadership of the BDF would be selected from an external candidate. It is essential that those in leadership positions identify early, within their ranks, those who may be their successors in the future so that those potential candidates can receive the necessary training and experiences. It is in the public interest that the widest group of individuals be identified and prepared for potential candidacy to senior leadership of the BDF. If that process gave rise to substantive rights to consultation every time an appointment is made, one could expect that the pool of eligible candidates would be narrowed.

³ *Haylock v Prime Minister of Belize et al.* Supreme Court Claim No. 43 of 2021.

(c) Damages

[26] Because seniority is linked to compensation rates in the BDF, Maj. Lorenzo is entitled to general damages of \$10,458.75 for lost salary. The Defendants have calculated that amount to be \$9,184.89 based on the amount he should have received, less the amount he actually received, during times when his salary did not correctly reflect his seniority. Maj. Lorenzo suggests that the amount owed is \$97,492.28 before interest. Maj. Lorenzo's calculation, however, is not helpful because it reflects earlier promotion dates. As I have already concluded, Maj. Lorenzo is out of time to challenge promotion decisions.

[27] In support of their calculation, the Defendants have provided a salary adjustment registry (registry) as an appendix to the affidavit of the First Class Accounts Clerk who prepared the registry. The Clerk explains that he adjusted the salary after reviewing the Pay and Records Order and finding places where Maj. Lorenzo's salary was incorrect. The registry operates much like a balance sheet with lines reflecting changes to the salary amount paid to Maj. Lorenzo for raises and increments. I have not been provided with any explanation for how the system of increments operates. I can infer from the registry that increments are awarded annually as a matter of course, but also due to promotions and acquiring post-secondary credentials, but I do not know if there are other reasons why increments may be awarded. This information is relevant because the registry indicates that Maj. Lorenzo received an increment by mistake in 2016-2017 and the Clerk deducted the surplus amount from the total owing. Without an explanation how the Clerk determined the increment was an error, that amount should not be discounted.

[28] I have not been provided with an explanation for how increments are calculated to verify that the amounts listed in the registry as the salary Maj. Lorenzo should have received are correct. Maj. Lorenzo has similarly not provided me with an explanation for how he determined the increment amounts he believes he was entitled to receive. Where the amounts differ, I prefer the amounts listed by the Defendants because Maj. Lorenzo's have been adjusted to reflect his belief that he was entitled to be promoted earlier. I, likewise, have no explanation for the discrepancies in the amounts listed by the parties as actually received by Maj. Lorenzo. I have not been provided with pay stubs to verify if the amounts listed as "actually received" are only salary amounts. It may be that Maj. Lorenzo is relying on total amounts he received that may have included other amounts routinely found on pay cheques such as reimbursements or allowances for expenses. Where the amounts differ, I also prefer those provided by the Defendants as it is reasonable to assume that a trained accounts clerk would know to compare like amounts.

[29] I also find that Maj. Lorenzo is entitled to general damages of \$12,500 to reflect lost opportunities and reputational harm. That Maj. Lorenzo lost opportunities that may have better prepared him to demonstrate that he met the criteria for promotion to a new rank is reasonably

contemplated as a natural consequence of the Defendants' failure to rescind Maj. Lorenzo's seniority. That seniority often determines who is selected for training and workload assignments in the BDF is uncontested. He is entitled to damages not because he has proven that the seniority loss had an impact on his promotion. Rather, he is entitled to damages because he lost opportunities that others were provided that may have had an impact on meeting the criteria for promotion sooner.

[30] In a highly hierarchical organization, where the chain of command and one's position among colleagues are often reflective of one's seniority, having junior colleagues supersede you is also not insignificant or without consequence. Maj. Lorenzo was disciplined very early in his career. Because his loss of seniority was not rescinded, the punishment followed him throughout his career. The loss of seniority undoubtedly caused reputational harm of a greater extent than those who have been disciplined for similar conduct, but who did not receive an enduring punishment.

[31] The amount of \$12,500 represents approximately 20% of Maj. Lorenzo's annual salary at retirement. I determined this amount after considering the evidence before me of the harm done by the Defendants' conduct. The evidence demonstrates that Maj. Lorenzo was granted promotions throughout his career and was selected for specialized trainings and for leadership positions. While the seniority loss had an impact, there is no evidence that the impacts permanently limited his career. An award of damages in the amount of 20% of Maj. Lorenzo's annual salary is necessary to recognize that more than lost wages were affected by the Defendants' inordinate delay in rescinding Maj. Lorenzo's seniority loss.

Disposition

[32] The Court makes the following orders:

1. It is declared that the Security Services Commission abused its process by causing inordinate delay in handing down its final decision in respect of the claimant.
2. It is declared that the claimant is entitled to damages for loss of seniority occasioned by the 2nd and 3rd Defendants.
3. The sum of \$22,958.75 is awarded as general damages for lost wages, lost opportunities, and reputational harm.
4. Interest is owing on the total award at the assessed rate of 6% per annum from the July 15th, 2020, to the date of judgment herein and thereafter at the statutory rate of 6% until the sum is paid in full.
5. No order as to cost is made.

Patricia Farnese
Justice of the Supreme Court