

**IN THE HIGH COURT OF BELIZE, A.D. 2023**

**CLAIM No. 514 of 2022**

**BETWEEN**

**CHARLTON ROCHES**

**CLAIMANT**

**AND**

**THE BELIZE DEFENSE FORCE**

**1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL**

**2<sup>ND</sup> DEFENDANT**

**DECISION OF THE HONOURABLE MADAM JUSTICE PATRICIA FARNESE**

**HEARING DATE:**

17<sup>th</sup> January, 2023

**APPEARANCES**

Mr. Dean O. Barrow SC and Mr. Adler G.L. Waight, Counsel for the Claimant.

Mrs. Samantha Matute-Tucker and Mr. Stanley J. Grinage, Counsel for the Defendants.

**DECISION**

**Introduction:**

[1] Lieutenant Colonel Charlton Roches claims that he was made to retire from the Belize Defence Force (BDF) before the mandatory retirement age of 50. When he retired, he and his superiors at the BDF were under the mistaken belief that 45 was the mandatory retirement age. Having now realised the error, Lt. Col. Roches asks the High Court for a declaration that the BDF acted unlawfully when they discharged him from service, and damages for loss of chance and

accompanying salary and benefits. The Defendants dispute that a mistake was made and argue that because Lt. Col. Roches was promoted to an Officer rank prior to the amendment to the mandatory retirement age, he was required to retire at 45.

[2] For the reasons provided below, I find the Defendants' interpretation of the *Defence (Officer) Regulations*<sup>1</sup> and the *Defence (Officer) (Amendment) Regulations*<sup>2</sup> untenable. Nonetheless, Lt. Col. Roches' request for a declaration and damages for loss of salary and chance is denied because this Claim is properly a claim for judicial review. He is required to exhaust all available remedies prior to seeking leave for judicial review. This matter is remitted to the Security Services Commission for consideration.

### **Background:**

[3] This dispute considers the legal effect of amendments to the mandatory retirement age of Officers in the BDF. The relevant provisions of the *Regulations* are:

10(1) Subject to the provisions of this regulation and Regulation 21 an officer of the regular force shall retire on attaining the age limit appropriate to his rank that is to say: lieutenant colonel at age of 45, major and below at the age of 42:

Provided that officers who have not been promoted to Captain after 10 year commissioned service shall be required to retire.

(2) An officer who has attained the age limit appropriate to his rank may on the recommendation of the Defence Commission be permitted to enter or continue in service subject to Regulation 14.

Regulations 14 and 21 do not apply to Lt. Col. Roches' circumstances.

[4] The *Amended Regulations* provide:

2. Regulation 10 of the principal Regulations is hereby revoked and replaced with the following:

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<sup>1</sup> Cap. 135 of the Subsidiary Laws of Belize, Rev. Ed. 2003 [*Regulations*].

<sup>2</sup> S.I. No. 64 of 2016 [*Amended Regulations*].

10 (1) Subject to the provisions of this regulation, the following retirement age shall apply to officers of the regular force:

<u>Rank</u>	<u>Retirement Age</u>
Commander	55
Colonel	55
Lieutenant Colonel	50
Major	50
Captain	48
Officers below rank of Captain	45

4 (1) Subject to sub regulation (2) below, these Regulations shall apply to all officers employed in the Force.

(2) An officer or 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.

(3) An officer or soldier enlisted in the regular force who is due to retire under these Regulations and who is desirous of further employment in the Force may apply to the Defence Board to be considered for further employment in the Force and the provisions of sub regulation (6) and (7) of regulation two of these Regulations shall, *mutatis mutandis*, apply to such application.

The Defendants argue that when read in context, the “may” in subsection 4 (2) of the *Amended Regulations* should be read as mandatory.

[5] As his 45<sup>th</sup> birthday approached, Lt. Col. Roches applied to the Belize Defence Board (the Board) for an additional 5 years of service. His request for extension reflects that he shared the same understanding of the legal effect of the *Amended Regulations* as the Defendants when he made the request. He wrote in his request to the Board:

I Lieutenant Colonel Charlton Roches hereby apply for Continuation of service in accordance with Statutory Instrument No. 64 of 2016, gazetted the 27<sup>th</sup> August 2016. In accordance with Section two of the aforementioned statutory instrument, Lieutenant Colonels retirement age is 50, consequently, I have the honor of applying for Five Years continuation of Service.

The Board considered and denied Lt. Col. Roches’ request on March 17, 2022. On April 29, 2022, Lt. Col. Roches received notice that his request for extension was denied in the form discharged orders that were to take effect on June 1, 2022, his 45<sup>th</sup> birthday.

[6] When he sought legal advice to challenge his discharge, Lt. Col. Roches learned that the *Amended Regulations* could be interpreted as having changed his mandatory retirement age to 50. He filed an Fixed Date Claim Form on August 26, 2022, seeking a declaration, damages, and costs. Lt. Col. Roches has not asked to be reinstated despite the desire he expressed prior to his retirement to continue to work after his 45<sup>th</sup> birthday.

**Issues:**

[7] The Parties do not dispute the facts. The dispute centres on the proper interpretation of the regulations that govern the retirement of Officers from the BDF and raises two issues:

- 1. Is this Claim an abuse of process because it has not come before the Court as an Application for judicial review?**
- 2. Do the 2016 amendments to the mandatory retirement age of Officers apply to persons who were already at the Officer rank when the amendments were made?**

**Analysis:**

- 1. Is this Claim an abuse of process because it has not come before the Court as an Application for judicial review?**

[8] The Court of Appeal has unequivocally established that Part 56 (1) (c) of the *Supreme Court (Civil Procedure) Rules 2005* (CPR) has created a “free standing” right to seek declaratory relief from the Crown or any other public body.<sup>3</sup> Notwithstanding this right, I have found no authority for an interpretation of Part 56 which allows a claimant to freely choose to proceed by either judicial review or declaration when both are possible. Rather, seeking a declaration to avoid the consequences of not meeting the leave requirements for judicial review has been characterized as an abuse of process.<sup>4</sup> It follows that it may also be an abuse of process to proceed by way of a request for a declaration if judicial review is not available for other reasons, such as the availability

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<sup>3</sup> *Belize Bank Ltd. v Association of Concerned Belizeans* Civ. App. No. 17 of 2007 at para 38 [*Belize Bank*].

<sup>4</sup> *AG (Belize) & Anor. v Isaac* [2018] UKPC 11 at para 34 [*Isaac*].

of an alternative remedy. Consequently, in some cases the Court must scrutinize the substance of the claim for declaration to ensure that a claimant is not abusing the process.<sup>5</sup>

[9] The Defendants ask that the Court find that Lt. Col. Roches' Claim for a declaration is an abuse of process because he seeks to avoid the judicial review process. They argue that the true nature of his Claim is that of a judicial review because he is challenging the process followed to make the decision to deny his request for continued employment after reaching the mandatory retirement age. If the true nature of this Claim is judicial review, the Defendants argue that Lt. Col. Roches required leave, which ought now to be denied because he has not acted promptly or within 3 months of the decision under review being made.<sup>6</sup> He also has yet to exhaust all the avenues of redress available to him because his appeal to the Security Services Commission has not been decided.

[10] Lt. Col. Roches argues that his Claim does not transform into an application for judicial review simply because he has requested declaratory relief from a public authority. Relying on CPR 56.1 (1) (c), he seeks declaratory relief as a free-standing right. That he has not asked for an order to quash the Board's decision to not permit him to continue working after reaching the mandatory retirement age or for reinstatement proves that his Claim is not for judicial review. If, however, the Court finds that this is a claim for judicial review, Lt. Col. Roches requested during oral submissions that the Court use its discretion to amend his Claim. He denies that he was out of time to request leave for judicial review when he applied for a declaration. He argues that this action commenced upon his retirement and not the earlier date when the Board denied his extension.

[11] To begin, I find that Lt. Col. Roches is challenging the Defendants' implementation of his mandatory retirement at 45 years and not the Board's decision against extending his employment past his 45<sup>th</sup> birthday. This Claim questions the lawfulness of the 1<sup>st</sup> Defendant's interpretation and implementation of the mandatory retirement age for Officers. If Lt. Col. Roches' Claim is properly a request for judicial review, he has not run afoul of the prescribed timelines for initiating

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<sup>5</sup> *GA Roe & Sons Limited v Commissioner of Stamps and AG (Belize)* Claim No. 78 of 2018 at para 19 [*GA Roe*].

<sup>6</sup> CPR 56.5(3).

the Claim. The Claim was triggered upon Lt. Col. Roches' retirement in June, 2022 and promptly commenced in August, 2022 before the 3-month limit prescribed in CPR 56.5 (3).

[12] This Claim is also not a private law matter that would fall outside the scope of judicial review.<sup>7</sup> While the Claim arises within the employment context, Lt. Col. Roches' retirement date is set by statute and not the terms of a specific employment contract. I find that Lt. Col. Roches had the option of commencing this Claim with an Application for judicial review. Whether he was required to apply for judicial review depends on an analysis of the true nature of the Claim.

[13] The Supreme Court, as it then was, has held that the remedy sought will generally identify the true nature of the Claim.<sup>8</sup> CPR 56.1 (3) contains a non-exhaustive list of remedies available upon a judicial review. A request for one of these remedies provides strong support for a finding that a claimant is pursuing judicial review despite framing the claim as one seeking declaratory relief. Nonetheless, going beyond the form of the claim may be required in some cases to determine its true nature.<sup>9</sup>

[14] In this case, Lt. Col. Roches seeks a declaration that the "1<sup>st</sup> Defendant acted unlawfully in discharging the Claimant from service." He also wants damages awarded for "the loss of chance and accompanying salary and benefits." Lt. Col. Roches makes it clear in his First Affidavit that he is not asking for a quashing order or an order for reinstatement because these remedies are futile. The BDF would have "moved irreversibly on" by the time the Court issued its decision.

[15] The Privy Council in *Isaac*, after acknowledging that the CPR does not provide much guidance, adopted the Court of Appeal's approach in *Belize Bank* to determine the true nature of a claim.<sup>10</sup> The approach compares the remedy sought against the remedies expressly listed in CPR 56.1 (3) as available in an application for judicial review. These authorities establish that Lt. Col. Roches will be obliged to bring his Claim by way of judicial review if the declaration he seeks has the same effect as issuing an order for *certiorari*, *mandamus*, or prohibition.

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<sup>7</sup> *Isaac* at para 24.

<sup>8</sup> *GA Roe* at para 19.

<sup>9</sup> *Isaac* at para 35.

<sup>10</sup> *Issac* at para 39.

[16] Like the claimant in *Belize Bank*, Lt. Col. Roches is not seeking an order to quash the Board's decision preventing his continued employment. Lt. Col. Roches is also not seeking a mandatory order to be reinstated.

[17] The *Belize Bank* case, however, can be distinguished from the present case with respect to the finding on prohibition. Although framed as only seeking a personal remedy, the declaration sought is only available if I find that the Defendants' interpretation of the *Amended Regulations* is unlawful. The effect of such a finding is to prohibit the continuation of an unlawful act, namely, the enforcement of mandatory retirement at aged 45 for Officers who held that rank prior to the *Amended Regulations* taking effect. The true nature of Lt. Col. Roches' Claim is judicial review because his Claim, in effect, is requestion the remedy of prohibition.

[18] The Court must now decide whether permitting Lt. Col. Roches to proceed by declaration is an abuse of process. I have already found that Lt. Col. Roches was not out of time to apply for leave to judicially review the Defendants' implementation of his retirement when he brought this Claim. He was required, however, to exhaust all avenues of redress. Lt. Col. Roches must appeal to the Security Services Commission before seeking leave of this Court unless that avenue of redress is inadequate or has a "feature" that would make it unjust to require Lt. Col. Roches to pursue.<sup>11</sup> These features include the arbitrary use of state power, breaches of multiple rights and a finding that:<sup>12</sup>

It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights.

It would be unjust to find that Lt. Col. Roches must bring his request for a declaration as an Application for judicial review if the Court has reason to believe that there are bars, other than the statutory leave provisions, to his realizing any remedy from a successful judicial review.

[19] In *Isaac*, the claimant was seeking a remedy after being constructively dismissed after allegations of wrongdoing. That context provided real doubt that the claimant could be reintegrated into the workplace if a judicial review resulted in an order to reinstate her into the

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<sup>11</sup> *Scott v AG (Belize)* Supreme Court Claim No. 297 of 2020 at para 6 [*Scott*].

<sup>12</sup> *Belafonte v AG* [1968] WIR 416 (CA TT) as quoted in *Scott* at para 6.

workplace. The facts presented in *Isaac* suggested that the employer and employee relationship had broken down. The unfounded allegations may also have undermined the claimant's ability to effectively resume her leadership position.

[20] In contrast, Lt. Col. Roches' request for an extension prior to his retirement indicates that he was willing and able to continue working. I have been presented no evidence that any reason other than a decision to strictly adhere to the mandatory age of retirement was the rationale for not offering Lt. Col. Roches an extension. While an Officer may now occupy the place that Lt. Col. Roches held immediately prior to his retirement, there is no evidence before this Court that suggests his reappointment is not possible. Lt. Col. Roches has merely asserted that the BDF has likely "moved on." His request for damages for lost opportunity indicates that Lt. Col. Roches viewed himself as well suited for promotion in the next 5 years. This pleading presupposes that such positions will be available. Lt. Col. Roches argues that a judicial review will be futile as reinstatement is not possible. I am not convinced that is the case.

[21] While I accept the Court of Appeal's direction that "The New Rules should be given a liberal rather than a restrictive interpretation," and that "Part 56 gives the court greater flexibility in dealing with claims for administrative orders," the Court must guard against this flexibility undermining clear and consistent guidance from the CCJ, and the Privy Council before, that "constitutional redress [can] not be used as a substitute for judicial control of administrative action."<sup>13</sup> Lt. Col. Roches' Claim for declaration is denied. He must allow the Security Services Commission to decide the matter before seeking judicial review if he is unsatisfied with their decision.

[22] The Security Services Commission is not only empowered by Section 110 (D) of the *Belize Constitution* to reconsider the 1<sup>st</sup> Defendant's actions, but is well-suited to identify the appropriate recourse if I find that the Defendants' interpretation of the *Amended Regulations* is incorrect.<sup>14</sup> Section 145 of the *Defence Act*<sup>15</sup> further gives the Security Services Commission broad authority to hear complaints from members of the BDF and to take any steps they deem necessary as redress if the retirement was unlawful. It may well be that reinstatement is not possible, but that

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<sup>13</sup> *Cunha v. AG (Belize)* Supreme Court Claim No. 175 of 2020 at para 27.

<sup>14</sup> Cap. 4 of the Substantive Laws of Belize.

<sup>15</sup> Cap. 135 of the Substantive Laws of Belize, Rev. Ed. 2000.

information has not been placed before the Court to decide. It would not be in keeping with the overriding objective of the Court to deal with cases justly which includes “ensuring, in so far as practicable, that the parties are on equal footing” for the Court to consider the remedy in the absence of this evidence.<sup>16</sup>

**2. Do the 2016 amendments to the mandatory retirement age of Officers apply to persons who were already at the Officer rank when the amendments were made?**

[23] Because full arguments were made on the correct interpretation of the effect of the *Amended Regulations*, I feel it necessary to decide the issue to assist the Security Services Commission with Lt. Col. Roches’ appeal.

[24] The Defendants argue that when read in context, the “may” in subsection 4 (2) of the *Amended Regulations* should be read as mandatory:

(2) an officer or 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 Defendants suggest that Section 58 of the *Interpretation Act*<sup>17</sup> “generally” applies and that there have been instances when shall has been interpreted as permissive. Section 58 provides:

58. In an enactment “shall”, shall be construed as imperative and the expression “may” as permissive and empowering.

The Defendants further argue that the permissive reading of “shall” is warranted because the primary rule for statutory interpretation is to ascertain the true intention of the legislation by looking at the legislation as a whole.

[25] The Defendants have provided no authorities for this rule or examples where this rule has been used to overcome the unequivocal directive in Section 58 of the *Interpretation Act*. They also base their interpretation of the intent of the legislation on the interpretation articulated in a 2021 Memorandum on mandatory retirement by the Chief Executive Officer of the Ministry of

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<sup>16</sup> CPR Rule 1.1(2)(a).

<sup>17</sup> Cap. 1 of the Substantive Laws of Belize, Rev. Ed. 2011.

Defence of Border Security, and not a logical reading of the legislation. The Defendants' argument is entirely unpersuasive.

[26] If I were to give effect to a permissive interpretation of "shall" in the face of unequivocal language in the *Interpretation Act*, it would only be in the rarest of circumstances. One of those circumstances may be where there appears to have been a legislative drafting error because no other interpretation is possible. I have no reason to find that such error was made in this case.

[27] The legislation is also not ambiguous; subsections 4 (2) and (3) do not mandate a mandatory retirement age of 45 for Officers who held that rank when the *Amended Regulations* were enacted. On its face, the purpose of subsection 4 (3) of the *Amended Regulations* is to "grandfather" an earlier retirement age for Officers who have anticipated retiring at age 45, may have put plans in place to transition out of the workplace. No other interpretation is logical.

[28] Contrary to the Defendants' assertion, the effect of subsection 4 (3) in the *Amended Regulations* was not limited to existing Officers. All Officers, regardless of when they obtained that rank, benefit from subsection 4 (3). Subsection 4 (3) provides:

(3) An officer or soldier enlisted in the regular force who is due to retire under these Regulations and who is desirous of further employment in the Force may apply to the Defence Board to be considered for further employment in the Force and the provisions of sub regulation (6) and (7) of regulation two of these Regulations shall, *mutatis mutandis*, apply to such application.

Subsection 4 (3) was necessary because the subsection 10 (2) in the *Regulations* which permitted continued service after reaching retirement age for all Officers was repealed by section 2 of the *Amended Regulations*. The benefit of subsection 4 (3) is not limited to Officers who held that rank when the *Amended Regulations* were enacted.

**Disposition:**

1. Lt. Col Roches' Claim for declarations and other relief is denied.
2. This matter is remitted to the Security Services Commission to determine the appropriate redress for the unlawful retirement of Lt. Col. Roches.

3. If necessary, Lt. Col. Roches is granted permission to amend or withdraw and refile his appeal to the Security Services Commission in light of this decision. The statutory timeframe for filing the appeal to the Security Services Commission will commence upon release of this decision.
4. No costs are awarded as there has been mixed success.

*Dated March 3, 2023*

**Patricia Farnese**  
**Justice of the High Court of Belize**