

ST . VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

Civil Appeal No.6 of 1994

Between:

(1) Police Service Commission

(2) The Attorney-General of Saint Vincent and the Grenadines

Appellants

Elroy Nash

and

Respondent

Before: The Rt. Hon. Sir Vincent Floissac

Chief Justice

The Hon. Mr. C. M. Dennis Byron

Justice of Appeal

The Hon. Dr. Nicholas J.O. Liverpool

Justice of Appeal

Appearances: Hon. P. Campbell, Attorney-General, Mr. D. Brown Solicitor

General and Ms. D. Robertson for the Appellants

Mr. S. Commissioning for the Respondent

1994: July 20th;

October 3.

Judgment

BYRON, J. A .

This is an appeal against the judgment of Cenac J. delivered on 17th January 1994 overruling the appellants' objection in limine that the Court had no jurisdiction to hear the respondent's application as it had been brought out of time.

The proceedings had been instituted on 2nd June 1993 by Originating Motion pursuant to Rule 8 of the Supreme Court Constitution Redress,,. - St.Vincent and the Grenadines - Rules 1980 (S.R.O. No. 42 of 1980). The respondent was seeking redress for

his removal from office as an Inspector of Police on the 6th day of February 1991, in circumstances which he alleged to be unconstitutional and contrary to the rules of natural justice.

way:

The learned Attorney-General summarized the case for the appellants in this

"The sole legal issue in this appeal is whether the retirement of a police officer in the public interest, if done in contravention of the Constitution of St.Vincent and the Grenadines, amounts to a continuing contravention of the Constitution so as to render inapplicable the stipulation that actions Police, was informed that the Police Service Commission directed his retirement from the public service effective on 6th February 1991 at the end of 193 days leave.

The respondent initially sought redress through correspondence. On 9th May

· 1990 the Cabinet Secretary, in reply to the respondent, informed him that the decision of the Commission was final and no question of redress through Cabinet arose . On 28th March 1991 the first named appellant, in reply to a letter from the respondent's solicitor, informed the respondent that it stood by its decision and considered itself "*functus officio*" in the matter. On 6th February 1992 The respondent's solicitors served a notice of intended prosecution to the Commission, which stated that it was issued pursuant to the provisions of the Public Officers Protection (Amendment) Act, 1988, giving notice of his intention to initiate legal proceedings for wrongful dismissal.

It was not until a year and four months later that the threatened legal proceedings were commenced by Originating Motion filed on 8th June 1993. At that time some two years and four months had already elapsed from the date on which the respondent had been dismissed . The grounds for the application were that the first named appellant acted in breach of the rules of natural justice and in contravention of its own procedural rules thereby contravening section 85 of the Constitution..

The re.could have been no doubt that these proceedings were brought under section 96 of the Constitution because the Notice of Motion was entitled -

"In the Matter of the Section 84, 85 and 96 of the Saint Vincent and the Grenadines Constitution Order 1979.....•

and ended with the following endorsement :

"THIS APPLICATION is made pursuant to Rule 8 of the Statutory Rules and Orders 1980 Number 42. •

Section 96 of the Constitution makes provision for the High Court to give redress

for alleged breaches of the Constitution. The procedural rules with respect to the time within which any application for relief under section 96 of the Constitution may

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be commenced dre regulated by section 96(4) which reads:

"The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on the Court by or under this section, Including provision with respect to the time within which any application under this section may be made. •

The Chief Justice did make rules, namely; the Supreme Court Constitution Redress - St.Vincent and the Grenadines - Rules 1980 (S.R.O. No.42 of 1980).

Rule 8 of these Rules under which the respondent brought his motion is the provision being contravened, may be made either by motion to the High Court supported by affidavit or by filing a Writ of Summons claiming a declaration and praying for such relief as he may deem appropriate'.

"Rule 8(3): No application pursuant to section 96 of the Constitution shall be brought after the expiration of six months from the date of the contravention complained of, or in the case of an alleged continuing contravention, from the date when it ceased."

The learned trial judge found that in this case there was a continuing contravention of the constitution by the first named appellant, which had not yet ceased, and consequently the respondent's application was not barred by the limitation period in rule 8(3). This is the finding which the appeal challenges.

The respondent's argument, which found favour with the learned trial judge, was that the first named appellant acted unconstitutionally in purporting to direct the retirement of the respondent and that its action was a nullity and therefore continuing. The argument was based on the case of **The Public Service Commission and The Attorney-General v Ira Davis et al** . (Civil Appeal No. 6 of 1981 of Antigua). In that case there was a teachers strike in June 1978 which resulted in the arrest of the respondents and their being charged with criminal offences. While these proceedings were pending, the appellant contrary to the specific provisions of the Public Service Regulations, retired the teachers in the public interest, committed breaches of the rules of natural justice, and failed to follow the procedural steps set out in the Regulations. The teachers commenced proceedings after more than six months had elapsed from their dismissal. The appellants contended that they were entitled to rely on the provisions of section 2(a) of the Public Authorities Protection Act (Cap. 66 of the laws of Antigua and Barbuda) which reads:

'Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Ordinance, or any public duty or authority or of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof.'

This Antigua case decided that the Public Authorities Protection Act does not give rise to the protection of the Act. The distinction was drawn between an erroneous or mistaken attempt to exercise a jurisdiction which the Commission had, and the commission of a deliberate act which was clearly outside of its jurisdiction. In delivering the judgment of the court Robotham J.A. said at p 12:

"What in fact transpired here however was that a condition precedent to the Commission assuming jurisdiction namely the termination of the criminal proceedings had not been satisfied, and having improperly and/or prematurely assumed Jurisdiction they failed to follow their own procedure, and completely Ignored the rules of natural justice."

He concluded on p 13:

"Taken as a whole, I am of the opinion that the act of dismissal in each case was a nullity. That being a nullity, it can create no sanction nor can it give rise to the protection of the Public Authority Protection Act."

In direct contrast, rule 8(3) of the Supreme Court Constitution Redress -St.Vincent and the Grenadines -Rules 1980 does not require any consideration of the validity of the conduct alleged

to have constituted the contravention of the Constitution. The fact that an application is brought pursuant to section 96 of the Constitution and alleges contravention of its provisions brings the limitation period into operation. This rule is not intended to give protection to the appellant. It is intended to regulate the time within which any applicant must institute proceedings claiming relief for an alleged interference with his constitutional rights. It seems to me that adherence to these rules as to time is a requirement which was envisaged by section 96(4) of the Constitution itself.

Another point which distinguishes that case (under the Public Authorities Protection Acts) from this case is that the issue of a continuing contravention was not considered. The court did not decide that there was a continuing contravention. The case dealt with the question whether the act complained of was done in pursuance of a statutory or public duty. In my view, therefore, it was erroneous to conclude that if the conduct of the appellant which was alleged to have been wrongful was a nullity it was equivalent to being a continuing contravention on the authority of that case.

It is significant that in St. Vincent and the Grenadines there is no such protection for public authorities. The comparable legislation is the Public Officers' Protection Act (Cap 209 of the Revised Edition 1990). This Act is specifically limited to public officers and does not embrace public authorities within the ambit of its protection. In any event the appellant has not invoked any relief under that Act. It is also of some significance that in the Antigua case. (above). the relief sought by the dismissed.

In considering the meaning of "continuing contravention" it is instructive to examine the meaning attached to the phrase "continuance of injury or damage" in the Public Authorities Protection Acts. Darling J. considered this phrase in **Markey v Tolworth** (1900) 2 Q.B. 454 at page 458

"The proper construction of the Act is that there has been an injury done to the deceased, and that the remedy which he cannot himself exercise is given to his widow; the calculation of the six months runs from the time of the legal injury - that is, the giving of the dose or the appearance of its evil effects.....the words 'continuance of injury or damage' cannot mean that a case is taken out of the action and that an action can be brought at any time because the potential earnings of the husband must be considered as lost to the widow at any time before her death."

This point was explained in **Haque v Doncaster Rural District Council** (1908), 100 LT. 121 by Walton J. After considering the meaning attached to the words by Channell J. in **Carey v Bermonsdey Corporation** (1903), 67 J.P. 447 and Buckley J. in **Harrington v Derby Corporation** (1905) 1 Ch. 205. He concluded:

"It may be, and seems to be, that in such a case the act is continuous strictly. In this sense, that it is a continuous repetition of acts which cause a continuous repetition of damage, and in such a case Buckley J. held that if the last act in such a series causing damage is within six months before the date of the action, the action is brought within time, and the plaintiff may recover the whole of the damage he has suffered by reason of the continuing or constantly recurring causes of action.

In the case of **Morris v Winter** (1930) 1 K.B. 243 Horridge J also expressed the same view as follows (at page 248):

"In **Freeborn v Leeming** it was held that the right view to put on the words of the statute as to continuance of the injury or damage was that expressed in **Carey v Bermondsey Borough Council** by Lord Halsbury LC. when sitting in the Court of Appeal, that 'continuance of the injury or damage' means the continuance of the act which caused the damage."

These cases indicate that the expression 'continuance' refers to the repetition of the impugned conduct.

In the context of the phrase 'continuance of injury or damage', time starts to run when the conduct causing the injury or damage ceases. It is not measured by reference to the cessation of the injurious or damaging effect of the conduct.

The effect of those cases is that under the Public Authorities Protection Acts, the act of wrongful dismissal could not cause continuance of or injury damage because,

Another phrase which has close connection to 'continuing contravention' is 'continuing cause of action'. This phrase has been defined in **Hole v Chard Union** (1894) 1 Ch. 293 by Lindley L.J. (at 295) thus;

'What is a continuing cause of action? Speaking accurately there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought.'

This point was refined in the case of **National Coal Board v Galley** (1958) 1

W.L.R. 16. Pearce L.J. analysed the meaning of the term after considering **Hole v Chard Union**. He explained that the term did not include all repetitious conduct but that it was a question of degree whether separate acts are so knit together, so close in time and quality, as to be properly described in the words 'a continuing cause of action'. He demonstrated the point thus (at page 26):

'For example, a contract of service for a specified term might contain a stipulation that the employee should not during the period of his service carry on or be concerned in any other business of the same kind as the employer's business. If the employee, in breach of such a stipulation, did proceed to carry on some other business of the kind in question, the breach would, we think, clearly be a continuing one, in that the employee would *de diem in diem* be continuously in breach of the stipulation so long as the prohibitive business was carried on. But where a contract requires payments to be made on stated dates (for example, a contract to pay an annuity of £1 000 per annum in equal monthly instalments on the first day of each calendar month) failure to pay the instalment due on February 1 is not, we should have thought, a continuance of the cause of action constituted by failure to pay the instalment due on January 1, but a distinct cause of action arising for the first time on February 1 and at no earlier date.'

He concluded at page 27:

- A continuing cause of action is not in our view constituted by repeated breaches of recurring obligations nor by intermittent breaches of a continuing obligation. There must be a quality of continuance both in the breach and in the obligation.

These authorities require the existence of persistent conduct, closely connected in time and quality, whether of a tortious or contractual nature for the remedies or relief accompanying the concept of continuity to attach. In my view when the wrongful conduct is unconstitutional the concept of continuity must have the same connotation of repetition of conduct closely knit together. The phrase 'continuing

distinction between a completed act and one where there is ongoing or repeated conduct which is alleged to infringe the constitutional rights of the applicant. When the words of rule 8(3) are construed in the context of rule 8(1) it is clear that the requirement of repetition of the acts or omissions which contravene the Constitution was intended to be necessary for a contravention to be regarded as continuing. I think that the intention is clearly that the application for relief must be filed before the period of six months has expired from the completion of the conduct alleged to have contravened the Constitution .

The facts alleged in this case are quite obviously not in the category of a continuing contravention. The first named appellant took a decision on a specific date which had the effect of terminating the respondent's employment on the 6th February 1991. That was a completed act which was not repeated. There was only one contravention. It relates to the conduct of the said appellant in terminating the respondent's employment. In my view this is clearly a case where the respondent complained of a 'contravention' and not of a 'continuing contravention'. It was therefore the duty of the respondent to make this application, being an application under section 96 of the Constitution, within six months of the 6th February 1991. His failure to do so brings the prohibition of rule 8(3) into operation to deny him the power to bring the application at the time he did. In the circumstances the learned trial judge ought to have upheld the preliminary objection and dismissed the Motion for want of jurisdiction.

I would therefore allow this appeal, but would make no order as to costs.

C.M DENNIS BYRON

Justice of Appeal

I concur

SIR VINCENT FLOISSAC

Chief Justice

NICHOLAS J.O. LIVERPOOL

Justice of Appeal