

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 9 OF 1987

BETWEEN:

GALWAY DONOVAN

Appellant

and

THE ATTORNEY-GENERAL

Respondent

Before: The Rt. Honourable Sir Vincent Floissac - Chief Justice
The Honourable Mr. Justice D. Byron J.A.
The Honourable Justice Monica Joseph J.A.(Ag.)

Appearances: Mr. Derek Knight Q.C. for the Appellant
Mr. Dennis Lambert, Solicitor-General for the
Respondent

1992: July 10th;
November 9th

JUDGMENT

BYRON, J.A.

The appellant was a member of the Public Service of Grenada from 9th July 1968. By letter dated 30th June, 1987, he was required to retire from the Public Service, with effect from 1st September, 1987, pursuant to the provisions of the Public Service Re-organisation Act 1987.

St. Paul J. dismissed his application for declarations that the Public Service Re-organisation Act of 1987 was ultra vires the Grenada Constitution Order of 1973 and for certain ancillary orders pertaining to his pensionable emoluments.

In this appeal, the issues that were raised by the appellant can be briefly stated as follows: -

- (1) whether section 3 of the Public Service Re-organisation Act of 1987 was inconsistent with section 84(8) of the Grenada Constitution; and
- (2) whether section 4 of the said Act was inconsistent with section 83(13) of the Grenada Constitution.

The background to this litigation is that the Government of Grenada had embarked upon a retrenchment programme for the General Re-organisation of the Public Service in order to achieve fiscal viability as outlined in the Budget Speech of 20th February, 1987. At that time there were provisions under the existing law to accommodate the implementation of that policy. The emoluments

payable to a public officer who is required to retire for reorganisational purposes were prescribed in section 84(8) of the Constitution, and the Pensions Ordinance as amended and the procedure to be followed to effect such retirement was regulated by the Public Service Commission Regulations 1969.

The reason for the legislation which caused this litigation was explained by the Chairman of the Public Service Commission who deposed that his Commission was aware of Government's retirement programme, but that the numbers were so great as to: -

"Make it manifestly impracticable for them all to be given an opportunity of being heard by the Commission"

as was required by regulation 46 of the Public Service Commission Regulations.

He went on to state that: -

"The Commission therefore decided to suspend the operation of regulation 46 for the purpose of the General Re-organisation."

Unfortunately, this statement was inaccurate because the Public Service Commission did no such thing. Instead, Parliament enacted the Public Service Re-organisation Act of 1987.

This Act was very brief. There were three enacting sections only. Section 2 did no more than re-state the power of the Public Service Commission to require any public officer to retire for the purpose of re-organisation of Ministries and Departments of Government, already set out in the Public Service Commission Regulations 1969.

Section 3 of The Public Service Re-Organisation Act 1987 prescribes as follows:

"An officer who is required to retire under this Act shall be entitled to pension and retiring benefits in accordance with the Pensions Ordinance as amended."

This provision appears superfluous. It would have no legislative effect if it does no more than restate entitlements already conferred by legislation in force. But Counsel for the appellant submits that it is inconsistent with section 84(8) of the Constitution which reads: -

"Every officer who is required to retire on abolition of his office or for the purpose of re-organisation of his Ministry or Department shall be entitled to pension and retiring benefits as if he had attained the compulsory

retiring age."

No one submitted that it was open to the Court to construe the Pensions Ordinance to include the provisions of section 84(8) of the Constitution, in accordance with schedule 2 section 1(1) of the Constitution which reads: -

"The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Court Order."

The preamble to the Act stated: -

"Whereas in order to effect greater efficiency and economy in the public service it is necessary to undertake a Retrenchment Programme without prejudice to the accrued entitlements of public officers."

This paragraph of the preamble differs from section 84(8) of the Constitution in that it bespeaks an intention to protect accrued entitlements of public officers whereas under the Constitutional provision the officers required to retire would obtain benefits under the laws which existed at the commencement of the Constitution as if those officers had attained the compulsory retiring age. Those benefits are not confined to accrued benefits.

On the facts of this case, the appellant was 55 years old. Under the Pensions Act Cap 214 section 8(a) the compulsory retiring age is 60 years. His pension and retiring benefits were not computed as if he had reached the compulsory retiring age. It was his contention that the computation of his pension and retiring benefits would have been more favourable if the constitutional provisions had been applied in his case.

It was clear from the evidence that the officers implementing the Government's Retrenchment programme did not compute the appellant's pension as if he had reached the compulsory retiring age. I would be reluctant to conclude that the legislative intent of section 3 of the Act under review was to alter the effect of section 84(8) of the Constitution by removing the benefit it created in relation to officers required to retire under the Act, but whatever the intent, we must determine whether it is inconsistent with the Constitution.

The Accountant General in her affidavit deposed that the appellant was given additional benefits in accordance with the Provisions of Regulations 22(2) of the Pensions Regulations, and he

had drawn his gratuities and commenced drawing his pension.

Pension Regulation 22 states that: -

"If an officer holding a pensionable office retires from the public service in consequence of the abolition of his office or for the purpose of facilitating improvements in the organization of the department to which he belongs, by which greater efficiency or economy may be effected, he may -

(2) If he retires from service under the Government of the Colony, be granted an additional pension at the annual rate of one sixtieth of his pensionable emoluments for each complete period of three years' pensionable service:

Provided that -

(a) the addition shall not exceed ten-sixtieths; and

(b) the addition together with the remainder of the officers' pension shall not exceed the pension for which he would have been eligible if he had continued to hold the office held by him at the date of his retirement, and retired on reaching the age at which he may be required to retire without the approval of the Secretary of State, having received all increments for which he would have been eligible by that date."

The learned Solicitor General submitted that in practical terms, there was very little, if any difference, in the amount of money that the appellant would have received if computation of his entitlements had been made under section 84(8) of the Constitution.

In determining the validity of this legislation, the issue of the adequacy of the payments made to the appellant is unimportant. The relevant question is: Can Parliament amend a provision of the Constitution by passing an ordinary Act which is inconsistent with the provisions of the Constitution?

My task in answering this question was considerably eased when Learned Counsel for the Respondent conceded that the answer should be in the negative. I think that he had little choice because the answer was provided by the Constitution itself in the clear and unambiguous provisions of Section 106 which states that: -

"This Constitution is the supreme law of Grenada and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

The meaning is too clear to warrant further explanation. It mandates the Court to declare any law that is inconsistent with

provisions of the Constitution void to the extent of such inconsistency.

In this case, the application of section 3 of the Public Service Re-organisation Act 1987 was inconsistent with section 84(8) of the Constitution to the extent that it deprived the appellant of the right to have his pension and retiring benefits computed as if he had attained the compulsory retiring age, instead of at his actual age.

That leaves to be considered whether there was an amendment to the Constitution because Parliament is not without power to amend the Constitution.

Section 39(1) of the Constitution provides:

"Parliament may alter any of the provisions of this Constitutionin the manner specified in the following provisions of this section."

My task has been once again lessened by the concession of learned Counsel for the Respondent, that the provisions of the section were not followed. I do not therefore propose to do more than state that: -

- (i) there was no indication on the face of the Act that it was an Act to alter the Constitution
- (ii) there was no indication that the Act was supported by the votes of not less than two-thirds of all the members of the House of Representatives
- (iii) there was no indication that when the Act was submitted to the Governor-General for his assent that it was accompanied by a certificate from the Speaker of the House that the relevant provisions of section 39 had been complied with.

This act therefore was not an Act which was clothed with the power to amend the Constitution conferred by section 39 of the Constitution. For the reasons above stated the learned trial judge was wrong to refuse to declare that section 3 of the act under review was void, to the extent that it was inconsistent with section 84(8) of the Constitution.

Section 4 of the Public Service Re-Organisation Act 1987 provides as follows:

"The Provisions of regulation 46 of the Public Service Commission Regulations 1969 shall not apply to a person who is retired under this Act."

Regulation 46 sets out the procedure to be followed upon the compulsory retirement of an officer to facilitate the Re-organisation of his Ministry or Department. It provided inter-alia for the Commission to consider reports from the Permanent Secretary or Head of Department and to provide an opportunity for the officer to make representation to the Commission, which was given the power to transfer him instead of retiring or removing him.

The legislative intention of Section 4 of the Act under review, was to alter, amend or modify regulation 46 of the Public Service Commission Regulations 1969 by removing its application to persons retired under the Act, thereby denying the appellant an opportunity to make representations to the Public Service Commission.

The issue here is an important one: Can Parliament amend the Public Service Commission Regulations?

The power to make regulations affecting the procedure of the Public Service Commission was conferred by section 83(13) of the 1973 Constitution as follows:

"The Commission may by regulation or otherwise regulate its own procedure and, with the consent of the Prime Minister, may confer powers or impose duties on any public officer or on any authority of the Government of Grenada for the purpose of the exercise of its functions."

Section 83(13) clearly enacts that it is the Public Service Commission itself which has the power to regulate its own procedure. It is a basic legal proposition that this power includes the power to make any amendment, modification or alteration.

It is relevant to note that the Constitution clearly demonstrated the intentions; (i) that members of Parliament should not be involved in the exercise of any of the powers of the Public Service Commission by stipulating in section 83(2)(a) as follows:

"A person shall not be qualified to be appointed as a member of the Commission if he is a Senator or a member of the House of Representatives."

and (ii) that the Commission should be independent of Parliament by providing in section 83(12) as follows: -

"The Commission shall, in the exercise of its functions under this Constitution, not be subject to the direction or control of any other person or authority."

On this issue as well there was no contest because in the face

of these provisions of the Constitution Learned Counsel for the Respondent conceded that the only entity empowered to alter the Public Service Commission Regulations was the Public Service Commission itself.

By enacting section 4 of the Act under review, Parliament usurped the powers conferred on the Public Service Commission by section 83(13) of the Constitution.

No attempt was made to give Constitutional authority to this enactment because the provisions of section 39 of the Constitution were not invoked to amend the Constitution. In any event the Act did not purport to contain any provision to empower Parliament to regulate the Procedure of the Public Service Commission.

It is ironical that the affidavit of the Chairman of the Public Service Commission deposed that it approved of the suspension of regulation 46, because any such amendment to the Public Service Commission Regulations could have been made by the Public Service Commission itself in accordance with the specific authority conferred by section 83(13) of the Constitution.

The conclusion is therefore inescapable that section 4 of the Act is ultra vires, having been made without Constitutional authority.

In the only case cited to us, a similar conclusion was reached. In the Barbados case, **ATTORNEY-GENERAL V SMITH** [1984] 38 WIR 33, the High Court had to consider the effect of section 65(1) of the Education Act of 1981, (which was passed by Parliament in the ordinary way) by which teachers in a school were deemed to have been appointed in accordance with the provisions of the Constitution relating to the appointment of public officers. The learned Judge, **WILLIAMS J.**, as he then was stated on p. 46, letter B-E: -

"There is no statement in the Act of 1981 that it is an Act for the purpose of altering the Constitution so that, following section 49(6) of the Constitution, I cannot construe it as an Act for that purpose. Moreover, following section 49(5), I must construe references to altering as including references to modifying it by amending or overriding any of its provisions or otherwise. Against this background it is my opinion that section 65 of the Act of 1981 will fall to the ground as being contrary to the provisions of sections 90 and 94 of the Constitution. Members of Parliament being Constitutionally incapable of being members of the Public Service Commission, and Parliament

having no Constitutional power to make appointments to the public service, section 65 (which deemed teachers to have been appointed to the public service) could in my opinion only have been a valid provision if there had been compliance with the procedure for altering the provisions of Chapter VIII of the Constitution. For, if Parliament cannot make appointments to the public service, it cannot deem persons to be so appointed."

At the conclusion of his submissions before us Counsel for the appellant withdrew his claims for reinstatement to the Public Service and for compensation for contravention for his Constitutional rights. This makes the question as to whether the appellant's Constitutional and other legal rights were contravened by his compulsory retirement purely academic. Accordingly, no Orders are made.

In the circumstances, the appellant is entitled to the following relief:

- (1) A declaration that section 3 of the Public Service Re-organisation Act of 1987 is void to the extent that it deprives the appellant of his rights to pension and retiring benefits as if he had attained the compulsory retiring age as prescribed by section 84(8) of the Constitution.
- (2) A declaration that section 4 of the said Act is void because the Public Service Commission, not Parliament, is the rule making authority for the Public Service Commission by virtue of section 83(13) of the Constitution.
- (3) A declaration that the appellant is entitled to the pension and retiring benefits provided by section 84(8) of the Constitution.

The appeal is allowed with costs here, and the Court below.

(Signed)

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C. M. D. BYRON
Justice of Appeal

(Signed)

I concur

.....
SIR VINCENT FLOISSAC
Chief Justice

(Signed)

I concur

.....
MONICA JOSEPH
Justice of Appeal (Ag.)