(18)

SAINT VINCENT

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 of 1984.

BETWEEN:

AGNES ELEANOR CATO - Appellant

and

ATTORNEY GENERAL for St. Vincent and The Grenadines - Respondent

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Williams (Acting)

Appearances: O.R. Sylvester for Appellant
Honourable Attorney General for the Respondent, with him C.L. Joseph.

1985: March 27, 28,
July 15.

JUDGMENT

ROBOTHAM, C.J.

The appellant Agnes Eleanor Cato retired from the post of Senior Magistrate in the Judicial Service of St. Vincent and the Grenadines on January 28, 1980. She had served with distinction in the post of Magistrate from April 14, 1972.

Upon her retirement, she sought to have her service in the St. Vincent Civil Service between the years 1943-1957 linked up with her service over the years as Magistrate, so as to make an aggregate of twenty-three years public service, for the purpose of computation of pension benefits. This the authorities refused to do, and on November 6, 1980 she brought a motion pursuant to section 96 of the Constitution in which she sought the following relief:-

(1) A declaration that she is entitled by virtue of section 89 of the Constitution and under

/the.....

the provisions of the law relating to the grant of pension, to certain pension benefits in respect of the full period of her service in the public service of St. Vincent, which period amounted to twenty three years.

(2) A declaration that in refusing to grant the said benefits, her constitutional rights as set out in section 89 of the Constitution were being and continued to be violated.

(3) An order for the computation of the said pension benefits to which she is entitled and payment of the amount found to be due and payable upon such computation.

On September 28, 1984, Renwick J dismissed the motion. In seeking redress her motion was supported by an affidavit, from which the following chronological table of events in her career, can be established.

November 23, 1943.

She was appointed a clerk in the permanent and pensionable establishment with effect from November 9, 1943.

1949 (Date uncertain)

After the introduction of the new Pension Law 16 of 1948 she exercised an option for her service to continue to be governed by the old Pensions Act, Cap. 136.

June 1, 1957.

(a) She tendered her resignation from the service in order to proceed to England to join her husband, the effective date of such resignation being August 28, 1957.

/(b) She applied.....

(b) She applied for a marriage gratuity under the Pensions Act No. 16 of 1948 under which Act she asked that an option be recorded. In effect this was a re-option on her part, she having previously opted to be governed by Cap. 136.

June 25, 1957.

Executive Council approved the payment of a gratuity to her of $2,592.00 together with 63 days vacation leave.

Mrs. Cato thus finally and irrecovably terminated that period of her services with the Government of St. Vincent and the Grenadines and received a gratuity in respect thereof. She joined her husband in England, eventually got called to the Bar at one of the Inns of Court, and returned to St. Vincent in or about the year 1969.

June 1, 1969.

She was appointed Deputy Registrar of the Supreme Court, a pensionable post in the service.

July 12, 1970.

She resigned the post of Deputy Registrar.

April 14, 1972.

She was appointed a Magistrate in the Judicial Service of the State, and promoted to the post of Senior Magistrate on August 31, 1977.

January 28, 1980.

Having attained the age of retirement, she retired from the service.

In the interim, on May 20, 1975, whilst she was serving as a Magistrate, she applied to the Attorney General for the following periods of service to be linked up for pension purposes with her service as Magistrate:-

/(a) 1943 - .....

(a) 1943-1957 as Clerk, St. Vincent Civil Service for which she had already been paid a gratuity, and

(b) 1969-1970 as Deputy Registrar.

On April 12, 1977 she was advised by the Chief Personnel Officer that Cabinet had given approval for the period of service as Deputy Registrar between June, 1969 and July 12, 1970 to be taken into account, but regretted that they were unable to approve a similar course for the years 1943-1957. Her application was renewed on February 21, 1980, and on March 11, 1980, she was advised that the decision of Cabinet remained unchanged. On March 11, she was further advised that a computation of pension for the period 1st June, 1969 to January 28, 1980, (i.e. the two periods as Deputy Registrar and Magistrate) had been finalised and awaited collection by her.

This computation amounted to $16,626.55, but to date the appellant has refused to collect it.

Before proceeding to deal with the main body of the appeal, there is one point which was raised by the respondent in the course of the appeal which can shortly be disposed of. It was contended by the Attorney General that the appellant had no right to come to the Court for redress under section 96 of the St. Vincent Constitution Order of 1979. There was he said a procedure laid down in section 19(1) of the Pensions Act 16 of 1948 whereby "any difficulty" in connection with the application of the Ordinance to any exceptional case can be resolved by the Governor General making an order for the removal of such difficulty as he may consider necessary.

This provision is nothing more than a grievance procedure and I do not think it was intended to delimit the constitutional right which a person has to come to the High Court for redress under section 96, alleging that his rights to have his pension calculated in accordance with the law

/in force...

in force at the date of the commencement of the Constitution as provided by section 88 of the Constitution were being infringed, provided also that he can show that he has a relevant interest.

This Court is not in agreement with the submission of the learned Attorney General and is unanimously of the view that the appellant was properly before the Court under section 96 of the Constitution.

The trial Judge in dismissing the motion made a finding that it was ill-conceived. He made no finding as to whether or not the appellant could properly have had her service between 1943-1957 linked up to her service as Deputy Registrar and Magistrate. This is the crux of the appeal and I will deal with this separately at a later stage.

It is not clear whether the trial Judge in dismissing the motion was holding that the appellant could not properly come before the Court under section 96, or whether he was saying that the matter was not properly before him, it not having been established that the Public Service Commission had concurred in the withholding of the appellant's pension in accordance with section 89 of the Constitution. His actual words in dismissing the motion were:

> "Power to withhold pensions, etc. does not rest in the High Court but with the concurrence of the Public Service Commission. In the circumstances I hold the notice of motion to be ill-conceived and it is hereby dismissed."

However, in-so-far as it may have related to the right to come under section 96, I have already indicated the Court's view thereon and this effectively disposes of grounds 4, 5 and 7 in the appellant's favour. The substance of these three grounds was that the trial Judge was wrong in holding that the motion was ill-conceived.

In-so-far as his finding related to the non-concurrence of the Public Service Commission in the withholding of the pension, that was the subject

/of ground....

of ground 1 which reads:

> "The learned Judge erred in law in holding that pension benefits are determined not by the High Court but with the concurrence of the Public Service Commission."

In coming to this finding the Judge reasoned that there was nothing in the correspondence before him to indicate that the concurrence of the Commission was sought or obtained in denying the appellant her right to have her service from 1943-1957 included for the purpose of calculating the pensionable benefits to which she was elegible. Her entitlement to have this period linked up aside, I will now deal with the question of consent of the Public Service Commission.

Section 89 of the Constitution reads:

> "89(1) Where under any law any person or authority has a discretion:
>
> (a) to decide whether any pension benefits shall be granted or
>
> (b) to withhold, reduce in amount or suspend any such benefits that have been granted
>
> those benefits shall be granted and may not be withheld, reduced in amount or suspended unless the Public Service Commission concurs in the refusal to grant the benefits or, as the case may be in the decision to withhold them, reduce them in amount, or suspend them."

Counsel for the appellant submitted that it was clear that the Commission was not consulted and that what was conveyed to the appellant was the decision of Cabinet that the period 1943-1957 could not be considered in the computation. There is no dispute on this. In not allowing this period, he said they were in effect withholding the benefit and the Commission ought to have been consulted. This failure to do so he submitted rendered the decision of the Cabinet an unlawful one, as they were in breach of their duty to consult.

> (Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd - [1972] 1 All. E.R. 280)

/(Grunwick.....

(Grunwick Processing Laboratories Ltd and others v Advisory, Conciliation and Arbitration Service and another [1978] 1 All E.R. 338).

I am unable to agree with the submission being advanced by Mr. Sylvester for the appellant. In my view, before any question of granting, withholding, reducing or suspending a pension can be considered, the entitlement to it must have been established. The provision being somewhat penal in nature a safeguard is provided against the arbitrary use of the power to withhold etc., the pension benefits once the right thereto has been established. To place on it the interpretation being advanced by Mr. Sylvester, would mean that in every case where a dispute arises as to what period should be regarded as continuous service, the responsible authority before it could reject a period being claimed, would have to consult with the Commission. I do not think that could be the intention of section 89. The refusal to consider a disputed period would not leave the person seeking the entitlement without rights, as they could seek redress under section 89 of the Constitution as the appellant in this case has done.

What Cabinet did in the case of Mrs. Cato did not in my view amount to a withholding of a pension in respect of the years 1943-1957. What they were saying is that that period was not qualifying service for the purpose of computation of pension. There was therefore no necessity in my view for them to have consulted under the circumstances with the Commission.

At the outset of this appeal Mr. Sylvester after stating the facts said that there were four questions which arose for consideration:-

(1) Can Cabinet withhold, reduce in amount, or suspend pension benefits without the concurrence of the Public Service Commission?

(2) Can the Court intervene to control the exercise by Cabinet or any other authority of the powers conferred upon it by the Constitution?

/(3) Was the...

(3) Was the procedure adopted in the Court below the proper procedure in the circumstances?

These three have already been dealt with. The fourth and most crucial one will now be considered and that is (4) - Can Estoppel of any kind override the law of the land to the extent that the provision of the Pensions Act No. 16 of 1948 as amended can be nullified thereby?

The starting point is to determine what in law is regarded as "qualifying service", and "continuous service". Regulations 14 and 15 of the regulations for the granting of pensions, gratuities and other allowances are contained in the First Schedule to the Pensions Act 16 of 1948, as amended by the Pensions (Amendment) Regulation S.R.O. No. 20 of 1971, gazetted on April 20, 1971.

Regulation 14 states:

> "Subject to the provisions of these regulations in the case of an officer who was in the public service on the 1st day of January, 1969, or who entered, or enters the public service after that date, qualifying service shall be the aggregate of the periods during which the officer drew salary in respect of public service and shall include any period during which the officer was absent on leave whether at half pay or full pay."

Regulation 15:

> "All public service under the Government of St. Vincent shall be taken into account as qualifying service in respect of an officer who is in the public service on or after the 1st day of January 1969 whether or not such service has been continuous and all pensionable service of an officer shall be taken into account as pensionable service whether or not such service has been continuous."

In presenting his arguments Counsel for the appellant readily conceded that in 1957 when Mrs. Cato resigned to join her husband in England, she would have been entitled to nothing by way of gratuity or otherwise, she having opted in 1949 for her service to continue to be governed by the old pension law, Cap. 136. It would seem that she was not unaware of this because when she wrote her letter of resignation on

/June 1,....

June 1, 1957, she included paragraph 3 which reads:

> "I ask that consideration be given to awarding me a gratuity under Pensions Legislation No. 16 of 1948 under which I beg to record my option."

No mention was made of the fact that as stated in her affidavit in support, paragraph 3 -

> "In or about the year 1949 I validly exercised an option for the Pensions Act, Cap. 136....to apply to my public service."

I do not entertain the slightest doubt that when this letter of June 1 was written in which she asked for the gratuity and exercised a re-option Mrs. Cato acted in good faith although at the time there was no provision in either law for re-opting. This power was given by the Pensions Amendment Act No. 20 of 1960.

Equally, the Government of the day acted in good faith, and never questioned Mrs. Cato's re-option, notwithstanding the fact that they must have been aware that she was entitled to nothing under Cap. 136. They paid her a gratuity in accordance with the approval of Executive Council taken on June 26, 1957. The sum paid was $2,590.00 and was the equivalent of one year's pensionable emoluments. It is recorded as having been computed under "Ordinance 16/48 - First Schedule, sec. 6". This regulation deals with marriage gratuities.

Before us Mr. Sylvester submitted that all service of the appellant whether continuous or not, had to be taken into account as qualifying service. That he submitted would include the period from 1943-1957, despite the fact that a gratuity in respect thereof had already been computed and paid from as far back as 1957.

Although he concededed that she was entitled to nothing under Cap. 136, he submitted that since there was no provision then existing in law for her to have re-opted to be governed by the new pension law

/16 of 1948....

16 of 1948, the payment made to her was therefore contrary to law. Since estoppel cannot override the law of the land, (Phipson on Evidence 7th edition page 705) the respondent is precluded from alleging that the gratuitous payment to the appellant, which was made outside of and contrary to the law as it was in 1957, overrides the pensions law and now disentitles the appellant to have this period 1943-1957 regarded as part of her continuous service with the Government of St. Vincent. To use the words of Mr. Sylvester:-

> "All her service was qualifying service in contemplation of the pension law, and whether it was gratuitous or otherwise, regular or irregular, since it was outside the Pension Act such a payment is irrelevant insofar as the appellant's qualifying service is concerned."

On behalf of the respondent, it was submitted that under section 5 of the Pensions Law 16 of 1948, no officer has an absolute right to compensation for past services, or to pension, gratuity, or other allowance. This provision ~~however~~ as I have already shown is qualified by the right of redress which an officer has if his rights under the Constitution are being breached. The granting of a gratuity to Mrs. Cato in 1957 was a discretion which the Government exercised. In this respect, I would add that when Mrs. Cato resigned in 1957, it was not within the contemplation of either party that she would have rejoined the service in a professional capacity.

The Attorney General pointed out that in making the discretionary payment to Mrs. Cato, she was overpaid in that two years of service when she was under 20 years of age was taken into account when it ought not to have been. This amount has never been repaid, nor indeed has any portion of the $2,592.00 received. She therefore had a discretion exercised in her favour, and even benefited by way of an erroneous calculation.

The Attorney General pointed out that section 8(3) of 16 of 1948

/(the very....

(the very same law under which she opted later to be governed) required a female officer to be compulsorily retired upon marriage. When therefore she rejoined the service in 1969 as Deputy Registrar, it was not continuing employment and she had to acquire qualifying service after that date.

It would seem that he was prepared to concede that if she had not been paid a gratuity in 1957, she may have been able to benefit under regulation 14. He however submitted that whatever may be the true position, the matter is laid to rest by the proviso to section 16 of 1963. Section 18(1)(b) reads:

> "18(1) The provisions of this Ordinance shall apply:-
>
> (b) to every officer who is serving in the Colony at the appointed day.... unless not later than 12 months from the appointed day.....he gives notice in writing .....that the provisions of the Ordinance and regulations referred to in section 20 shall apply to him....."

The Ordinance and regulations in section 20 are the old Pension Law cap 136 and the amendments.

> "18(2) If any officer who shall have given notice under paragraph (b) of the preceeding sub-section is thereafter reappointed to the service of the Colony the provisions of this Ordinance shall apply to him in respect of his whole service."

Then comes the proviso which reads:

> "Provided that except where such officer shall eventually become eligible for a pension or gratuity under the Ordinance in respect of his service both before and after his re-employment, a pension or gratuity granted to him solely in respect of service prior to such re-employment shall not be re-computed."

Mr. Sylvester's answer to this provision was that if on the respondent's own contention the gratuity was wrongly computed, either on the basis of there being no legal foundation for it or because of an over-calculation, or both, then it was no computation at all.

/There can....

There can be no doubt that in 1957, the Government exercised a discretion to pay a gratuity to Mrs. Cato. Whether or not the right to have re-opted existed, there can also be no doubt that both the Government and Mrs. Cato acquiesced in the course being adopted, and that the gratuity was freely given and gratefully received. The Attorney General submitted that in order for the applicant to succeed, she would have had to show that it was an improper exercise of that discretion, improper here meaning unfair.

At the hearing of the appeal, no mention was made by anyone of the fact that the very exercise of the re-option in 1957 to be governed by the Pension Act 16 of 1948 the legality of which has been questioned, now forms the basis of the declaration sought by the appellant

The appellant is well known to all the members of this Court. Her sterling service as Magistrate over the years is well recognized. Whilst I entertain no doubt as to the bona fide belief of Mrs. Cato in the validity of her claim, I regret that I am forced to accept the arguments advanced by the Attorney General in opposition to the motion, and to hold that the declarations sought cannot be granted.

I would dismiss the appeal therefore, with no order as to costs in this Court.

L.L. ROBOTHAM,
Chief Justice

E.H.A. BISHOP,
Justice of Appeal

L. WILLIAMS,
Justice of Appeal (acting)