GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 9 OF 1998

BETWEEN:

ALLAN MICHAEL BENJAMIN

Applicant/Appellant

and

PUBLIC SERVICE COMMISSION

Respondent

Before:

The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Albert Matthew	Justice of Appeal [Ag.]

Appearances:

Mr. R. Benjamin for the Appellant
Miss K. Noel with Mr. Benjamin
Mr. Friday, Solicitor General for the Respondent

1998: July 16;
September 14.

JUDGMENT

REDHEAD J.A.

The Appellant, a Grenadian National, was trained as a medical doctor in Cuba. Upon completion of his training he returned to Grenada. He was first appointed on probation for two years, as Registrar at the General Hospital. That appointment was to take effect from 1st November, l991.

He was later appointed Obstetrician/Gynaecologist, on 29th June, l992 on probation for two years. That probationary period was to commence from 1st November, l991.

On 7th March, l995 the Appellant ‘s services were terminated by the Respondent with effect from 30th April, l995. The Appellant alleges that

his services were wrongfully terminated by the Respondent. As a result he brought a motion before the High Court seeking inter alia the following declarations and order:-

> "[1] A declaration that the failure of the Public Service Commission to confirm the appointment of Applicant in the office of Obstetrician/Gynaecologist on the staff of the General Hospital…….within two years of the 1st November, l991…….. is a contravention of the provisions of section 84[1] of the Constitution and the Public Service Commission Regulations 37[1] and 37[2] made pursuant to Section 83[13] of the Constitution.
>
> [2] A declaration that the failure of the Public Service Commission to implement and/or to follow and/or to carry out and/or to abide by the provisions of Regulations 37[1], 37]2] and 38 of the Public Service Commission regulations in respect of the appointment on the 1st November, l991 of the Applicant to the office of Obstetrician/Gynaecologist on the staff of the General Hospital……..amounts to a contravention of the said regulations.
>
> [3] A declaration that the Applicant's probation appointment [Sic] to the Office of Obstetrician/Gynaecologist on the staff of the General Hospital …….which took effect on 1st November, l991 ended on 31st October, l993 and that as of and from that date the Applicant's substantive appointment as Obstetrician/Gynaecologist took effect.
>
> [4] An order that the Applicant be allowed forthwith on the staff of the General Hospital in the Ministry of Health Housing and Environment of the Government of Grenada and be permitted to perform his duties in the said post."

This motion was supported by an affidavit deposed to by the Appellant.

Affidavits in opposition were filed on behalf of the Respondent. All these affidavits deposed to events post 31st October, l993. For example Donna Campbell, Theatre Nurse, deposed to an affidavit in which she said among other things that on the 4th October, l994 one Dr. Bilgele and Dr. Arivinda were in the operating theatre. The Appellant was carrying out an operation and throughout the entire case, Dr. Bilgele, who was not registered to practice in Grenada, assisted the appellant in carrying out the operation.

This was reported to the Medical Superintendent. It seems that this formed the basis of a complaint upon which the Respondent considered when they terminated the Appellant's services.

The gravamen of the Appellant's complaint before the learned trial judge was that as deposed in the affidavit viz:-

> "[6] During my period of probation the Public Service Commission failed and/or refused to apply the provision of regulation 37[2] of the Public Service Commission Regulations with respect to my probation in that no report on my performance during the first six months of my probationary period was made, neither were reports made as required by the regulation during each succeeding twelve months of my probationary period.
>
> [7] Neither the Permanent Secretary, Ministry of Health, nor the head of my department i.e. the Chief Medical Officer submitted the required report and recommendation one month before the end of my probationary period as mandated by regulation 37[2] of the Public Service Commission Regulation.
>
> [8] At no time during my probationary period was I tested as to my suitability for appointment nor was I subjected to continual and sympathetic supervision nor was it ever drawn to my attention in any writing by the Permanent Secretary or head of my department that I exhibited tendencies which rendered it doubtful that I am likely to become fit for confirmation in my appointment".

The Motion came before St. Paul J. who on the 28th May, l998 dismissed the Motion. The learned trial judge appeared to have followed the judgment of Lord Diplock in Kamrajh Harrikisson v Attorney General [1979] 31 W.I.R. 348.

Where Lord Diplock in delivering the opinion of the Board at page 349 said:-

> "The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under Section 6[1] the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is

> frivolous or vexations or an abuse of the process of the court or being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom"

After referring to the above passage in Harrikisson the learned trial judge in dismissing the motion concluded:

> "I am of the opinion that the approach by the applicant to the court under S.101 of the Constitution to be a misuse of that provision. S.91 of the Constitution provides for an approach to the Board in such a matter".

I interpret the reasoning of the learned trial judge, to be that having regard to Harrikisson, that the appellant having a right of appeal to the Public Service Board of Appeal had no right to come to the Constitutional Court under the provision of S.101 to seek relief, unless he had exhausted the appeal procedure provided by S.91 of the Constitution i.e. an appeal to the Public Service Board of Appeal.

But this is not what, in my view, Harrikisson decided.

First of all Harrikisson was considering an alleged breach of a fundamental right under chapter 1 of Trinidad and Tobago Constitution.

Secondly under S.6 of the Constitution which provides direct access to the High Court for a contravention or an anticipated contravention [if I may put it that way] of a fundamental right must not be abused because its value would be diminished. The constitutional court must therefore be vigilant in protecting this important constitutional remedy. If therefore there is a mere allegation of a breach of a fundamental right where none exists or if the complaint is purely unlawful administrative action which involves no contravention of any human right or fundamental freedom then the Constitutional Court should decline jurisdiction.

Section 91 of the Grenada Constitution provides as follows:

> "91[1] Subject to the provisions of this Section, an appeal shall lie to the Public Service Board of Appeal from any of the following decisions at the instance of the person in respect of whom the decision is made.
> [a……

[b] any decision of any person to whom powers are delegated under Section 84[2] of this Constitution to remove a public officer from office or to exercise disciplinary control over a public officer, [not being a decision which is subject to appeal to or confirmation by the Public Service Commission]".

The Public Service Board of Appeal Regulations made under Section 91 of the Grenada Constitution, in my view, merely regulates the procedure for bringing an appeal before that Board.

I now refer to the Public Service Commission Regulations 37[1] 37[2] and 38:

"37.[1] Except as otherwise provided in this part, on first appointment to the Public Service or on promotion in the Service from a non-pensionable to a pensionable office, an officer shall be required to serve on probation for a period of two years unless a shorter period is specified in his letter of appointment.

[2] At the end of the first six months and of each succeeding twelve months of the probationary period Permanent Secretaries and Heads of Departments shall submit to the Chief Personnel Officer a report on every officer so appointed or promoted on probation in their Ministries or Departments. One month before the end of every probationary period the Permanent Secretary or Head of Department shall submit a further report and a recommendation:-

[a] that the officer be confirmed in the appointment; or

[b] that the probationary period be extended; or

[c] that the officer's services be terminated; or

[d] that the officer revert to his former post [if any]

[3] Subject to the provisions of these Regulations, the appointment on probation of an officer may, at any time during the period of probation and without any reason given, be terminated upon one month's notice in writing or upon payment of one month's salary in lieu of notice;

Provided that the Governor-General, or the Commission [as may be appropriate] may specify a longer period of notice where it is reasonable so to do.

38.The following principles shall be observed for the treatment of an officer during his period of probation:-

[a] the officer on probation shall be given an opportunity to learn his work and be tested as to his suitability for it;

[b] he shall be accorded all possible facilities for acquiring experience in his duties;

[c] so far as the exigencies of the service permit, he shall be assigned to duty only where such observation is possible; and

[d] if at any time during his period of probation he exhibits tendencies which render it doubtful that he is likely to become fit for confirmation in his appointment, these

> shall at once be drawn to his attention in writing by the Permanent Secretary or Head of Department and he shall be given such assistance as may be possible to enable him to correct his shortcomings".

These provisions are mandatory.

[See Jones v. Solomon 41 W.I.R. 299]

The Appellant in his affidavit deposed that during the period which he was on probation as Obstetrician/Gynaecologist no report was submitted on his behalf to confirm him in his post or extend his period of probationary service. In that regard learned Counsel, Mr. Benjamin, argued on his behalf that there was a serious breach of the provisions of Sections 37 and 38 made under and by virtue of Section 101 of the Constitution of Grenada. He argued that as a result of that breach or failure by the Public Service Commission to observe these provisions of the regulations that the Appellant had, if no one else had, a relevant interest, because his rights were affected, to go to the Constitutional Court to seek redress under Section 101 of the Constitution. If that evidence is established, I agree entirely.

The learned Solicitor-General in arguing to uphold the learned trial judge's decision, submitted that the Appellant's application before the High Court was premature. In support thereof he referred to, inter alia:

Harriksson v A.G. 31 W.I.R. 384

A.G. v. K.C. Confectionary Ltd 1986 LRC [Cont] 172,

Sewlyn Aban v. A.G. Civil Appeal No. 3 of l992

I have looked at these authorities. I cannot agree with the submission of the Solicitor-General.

The complaint of the Appellant is that the Commission did not act or refuse to act in accordance with the provisions of Regulations 37[1], 37[2] and 38 of the Public Service Commission regulations thereby infringing his constitutional rights as enshrined in those Sections.

As I understand the argument of learned Counsel for the appellant these provisions are mandatory and the Public Service Commission is required to act in accordance with these provisions. That is to say,

receive a report or reports on the officer, at the time specified, and either confirm his appointment, extend the period of probation or dismiss him from the Service within the probationary period.

The Solicitor-General argued that when one is removed from office in the Public Service, he must be taken to be removed on disciplinary grounds.

In his skeleton argument Mr. Benjamin, learned Counsel, for the appellant referred to a passage in :

Richard Duncan v Attorney-General [Grenada Civil Appeal No. 13 of l997].

At page 9 Byron C.J. [Ag.] said:-

> "The qualifications which affect the power on the Public Service Commission include the obligation to act for reasonable cause and not to act whimsically or arbitrarily, to apply the constitutional provisions, confirm to the rules and regulations it administers and observe the rules of natural justice"

The learned Chief Justice [Ag.] then referred to a passage by Lord Diplock in:

Thomas v. Attorney-General [1981] 32 W.I.R. 375 at 384

> "In their Lordships' view there are overwhelming reasons why "remove" in the context of "to and disciplinary control over" police in Section 99[1] [and in the corresponding Sections relating to other Public Services] must be understood as meaning "remove for reasonable cause" of which the Commission is constituted the sole judge and not as embracing any power to remove at the Commission's whim to construe it otherwise would frustrate the whole constitutional purpose of chapter vii of the Constitution which their Lordships' have described. It would also conflict with one of the human rights recognised and entrenched by Section 1[d] of the Constitution, viz "the right of the individual to equality of treatment from any public authority in the exercise of any functions". Dismissal of individual members of a Public Service at whim is the negation of equality of treatment".

Mr. Benjamin argues, if I understand his skeleton arguments, is that the Public Service acted whimsically arbitrarily and did not apply the constitutional provisions in relation to the Appellant and therefore whatever measure the commission took in relation to the Appellant was not in keeping with the constitutional provisions.

Having regard to the evidence on the record whereby it is disclosed that the Respondent sat on the rights of the Appellant did nothing for a period of nearly three years, far beyond the probationary period and then purported to terminate his employment, I am firmly of the view that should be enough for the Appellant to take the matter to the Constitutional Court.

Section 101[1] of the Constitution provides:

> "Subject to the provision of Sections 22[2], 39[8], 49[4], 56 and 108 of this Constitution, any person who alleges that any provision of this Constitution [other than a provision of chapter 1] has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this Section.
> [6] The right conferred on a person by this Section to apply for a declaratory order in respect of the alleged contravention by this Constitution shall be in addition to any other action in respect of the same matter that may be available to that person under any other enactment of any rule of law"

There appears to be prima facie a constitutional infringement or put it another way, a serious allegation of a constitutional infringement by the Appellant of Section 84[1] of the Constitution and the Public Service regulations 37[1] and 37[2] made pursuant to Section 83[13] of the Constitution. It is clear that the Appellant has a relevant interest. I may add if no other person has a relevant interest, he has because he is personally affected. In my judgment therefore he is entitled under S.101[1] of the Constitution to go to the Contitutional Court to seek redress. Under Section 101[6] the Appellant is not debarred from going to the Constitutional Court because he may have available to him "other action in respect of the same matter".

The Solicitor-General argued that that right is not available to the Appellant under this Subsection 101[6] because the remedy available to him is under the Constitution and is not "under any other enactment or any rule of law"

I am not persuaded by this argument. Moreover I do not think that S.101[6] of the Constitution could be construed so narrowly to mean that even if a Civil Servant complains of a gross violation of a constitutional

provision he cannot go to the Constitution Court before he goes to the Public Service Board of Appeal.

I therefore hold that the Appellant has a right under S.101 of the Constitution to seek constitutional redress.

I would therefore allow the appeal with costs to the Appellant to be taxed if not agreed.

The Appellant seeks declarations and an order from this court as referred to above.

This Court is unable to grant him those declarations and the order because the learned trial judge did not decide the case on its merits. All he said was that the Appellant was not entitled to go to the Constitutional Court to seek redress because S.91 of the Constitution provides for an appeal to the Board in such a matter.

The matter is therefore remitted to the High Court for a hearing on the merits.

ALBERT J. REDHEAD
Justice of Appeal

I Concur

SATROHAN SINGH
Justice of Appeal

I Concur

ALBERT MATTHEW
Justice of Appeal[Ag.]