GRENADA

IN THE COURT OF APPEAL

Civil Appeal No. 17 of 1997

Between:

IRVIN McQUEEN

Appellant

and

THE PUBLIC SERVICE COMMISION

Respondent

Before:

The Hon. Mr. C.M. Dennis Byron	Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Justice Albert Matthew	Justice of Appeal [Ag.]

Appearances:

Mr. C. Bristol Q.C. and Mr. J. Bristol for the Appellant
Hon. Attorney-General Mr. Errol Thomas & Ms. Tamara Gill for the Respondent

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1998: February 26; 27; July14; September 15.

JUDGMENT

BYRON, C.J. [AG.]

This is an appeal against the decision of Alleyne J. delivered on 5th May 1997 in which he dismissed a motion that the appellant was entitled to receive a pension and retiring benefits in accordance with section 84(8) of the Grenada Constitution, on the abolition of his office.

Background facts

On the 1st March 1984 the appellant became a public officer when he was appointed to the post of Instructor II on the staff of the Grenada Technical & Vocational Institute in the Ministry of

Education. His career as a public officer ended on 2nd September 1996 when the Public Service Commission approved his retirement from the public service on the ground that the office of Local Government Coordinator, which he then held was abolished. The appellant claims to be entitled to pension and retiring benefits as if he had reached the compulsory retiring age as provided by section 84(8) of the Constitution. The respondents took the position, which the learned trial Judge adopted, that the retirement benefits to which the appellant was entitled did not include pension benefit, because he joined the service after the Pensions (Disqualification) Law of 1983 which provided that any person joining the service after its appointed date [as the appellant did] was not entitled to any pension gratuity and other benefits under the scheduled Acts which included the Pensions Act Cap.233.

Grounds of Appeal

The two grounds of appeal can be recited

"The learned trial judge erred in law in holding that: -

[a] Section 84(8) of the Grenada Constitutional Order 1973 does not create the right to a pension.

[b] The Pension (Disqualification) Law 1983 is not in conflict with the Grenada Constitutional Order 1973 and is thus valid and of full force and effect.

Ground 1

The Right to Pension on Abolition of Office

The Pensions Act Cap 233, passed on 3rd June 1950 for regulating pensions, gratuities and other allowances to be granted in respect of offices held in the public service, makes provision for retiring benefits on abolition of office in section 6 which provides;

"No pension, gratuity or other allowance shall be granted under this Act to any officer except on his retirement from the public service in one of the following cases-

[a] …….
[b] …….
[c] on the abolition of his office;
[d] on compulsory retirement for the purpose of facilitating improvement in the organisation of the department to which he belongs, by which greater efficiency or economy may be effected;
[e] ……...
[f] ……...
[g] …….."

Pension Regulation 22, under the said Act prescribes the method of calculating the pension in such cases as follows;

"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 -

[a] If he has been in the public service for less than ten years, be granted in lieu of any gratuity, under regulation 5 or regulation 12, a pension under regulation 4, 9, 10 or 11, as the case may be, as if the words "for ten years or more" were omitted from regulation 4;
[b] If he retires from service under the Government, be granted an additional pension at the annual rate of one sixteenth of his pensionable emoluments for each complete period of three years pensionable service:

Provided that-

(i) the addition shall not exceed ten-sixtieths; and
(ii) the addition together with the remainder of the officer's pension shall not exceed the pension for which he would have been eligible if his 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 one of Her Majesty's Principal

> Secretaries of State, having received all increments for which he would have been eligible by that date."

The argument of the respondents that the Pensions Act did not create an absolute right to pensions and retiring benefits is supported by Section 5 of the Act which provides;

> [1] "No officer shall have an absolute right to compensation for past services or to pension, gratuity or other allowance; nor shall anything in this Act affect any right of the Crown, the Governor-General or the public Service Commission to dismiss any officer at any time without compensation.

The 1967 Statehood Constitution ended the concept of dismissal at pleasure and of the pensions and retiring benefits being at the pleasure of the Crown. In Thomas v Attorney-General of Trinidad and Tobago (1981) 32 WIR 373 in Lord Diplock observed at page 381:

> "The whole purpose of Chapter VIII of the Constitution which bears the rubric "The Public Service" is to insulate members of the civil service the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the Government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person of authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service."

In Grenada, as in Trinidad and Tobago, the issues of pensions and retiring benefits was dealt with by ensuring that any withholding of retiring benefits required the approval of the autonomous Public Service Commission, and the observations of Lord Diplock are equally applicable.

On independence the 1973 Constitution of Grenada added a subsection, which had not been included in the 1967 Constitution. It was Section 84(8) which prescribed:

> "Every Public Officer who is required to retire on abolition of his office or for the purpose of reorganisation of his Ministry or Department shall be entitled to pension and retiring benefits as if he had attained the compulsory retiring age."

The first question in this appeal can be answered by determining the meaning of this subsection. In my view the language of this provision is clear and unambiguous. The term "every public officer" is not limited in relation to the date of joining the service. In particular it is not limited to those public officers who joined the service before 1983. This provision therefore applies to every public officer whenever he joined the service including the appellant. The limiting clause relates to those required to retire on abolition of office or for the purpose of reorganization. The operative verb "shall be entitled" is mandatory. There is nothing discretionary or conditional. It is a plain command. The phrase "pension and retiring benefits as if he had attained the compulsory retiring age" is also clear and unambiguous. There is no qualification. His entitlement is clearly spelt out.

When one compares this provision with the Pension regulation 22, the provisions in the Constitution are different and more favorable.

The argument that this provision of the Constitution does no more than protect and preserve existing rights clearly cannot be sustained because the rights referred to in section 84(8) did not exist before that provision came into being. It was a new right that was thereby created.

Although many years have elapsed since the Constitution came into effect no legislative steps have been taken to bring Regulation 22 into conformity with the Constitution. It seems clear,

however, that the Regulation 22 must be affected by Schedule 2 to the Constitution Order, (the Transitional provisions) and be construed with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring it into conformity with the Constitution.

It is trite that the Constitution is the Supreme Law of Grenada and as prescribed by section 106 of the Constitution "if any other law is inconsistent with the Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

The importance of Section 84 is emphasized by the fact that it is entrenched under section 39 of the Constitution. The effect is that it cannot be amended repealed or varied by ordinary legislation passed by Parliament. It can only be affected by legislation which amends the Constitution.

Stare Decisis

This section of the Constitution has twice been considered by this court in recent times and on each occasion the meaning of the Section was considered and declared. The finding of the learned trial judge is inconsistent with both of the said cases. I refer to Donovan v Attorney General (1993) 2 LRC145 in which we decided that the benefits conferred by section 84(8) of the Constitution could not be reduced by a statutory provision which did not amend the Constitution.

Duncan v Attorney-General Civil Appeal No.13 of 1997 in which we decided that the Constitutional rights conferred by section 84(8) of the Constitution were infringed by sending a public officer on indefinite leave which had the effect of requiring him to retire, for the purpose of reorganization of his department.

The effect of Section 92

It was argued that section 84 (8) should be interpreted in relation to section 92 [2][b], and that the law in force on the date on

which a period of service commenced shall be the law applicable to that period of service, which it was submitted.

Section 92 (2)

> "The law to be applied with respect to any pension benefits not being benefits to which subsection (1) of this section applies) shall –
> [a] ……
> [b] In so far as those benefits are wholly or partly in respect of a period of service as a judge or public officer that commenced after this section comes into operation, be the law in force on the date on which that period of service commenced, or any law in force at a later dated that is not less favourable to that person."

This section does not amend modify or vary the provisions of section 84(8). It identifies the method of determining the law to be applied with respect to pension benefits. At the time when the Constitution came into force the law applicable to section 92(2)(b) would be the Pensions Act read in conformity with the Constitution. In relation to the submissions made by the respondent one would have to answer the second question to determine whether there was any other law in force on the date when the appellants period of service commenced or at any later date.

In my judgment the answer to the first ground of the appeal is that section 84(8) of the Constitution creates Constitutionally entrenched rights in favour of public servants who are required to retire on the abolition of office or for the purpose of reorganization of their department or Ministry.

Ground 2

The Pension [Disqualification] Law 1983 and section 84[8] of the Constitution.

In 1983 The National Insurance Act, Peoples Act 24 of 1983 was enacted to establish a National Insurance Scheme *inter alia* for

the payment of age and other benefits. This legislation evinced the intention of the legislature to establish a contributory scheme.

The Act made provisions for its application to pensions for the public service by the following sections.

Section 46

> "This Act shall apply to persons employed by the Government and any public body in like manner as if the Government or such body were a private person, with such modifications as may be made therein by regulations for the purpose of adapting the provisions of this act to the case of such persons."

Section 47

> "[1] The Minister shall in relation to a public service pension scheme (hereinafter in this part called "the scheme") have power to make provision for the modification or winding up of the scheme or the repeal of any enactment relating to the scheme.

We were not pointed to the exercise of any powers under section 47 of the Act, and my own researches have not revealed any. The conclusion is that the public service pension scheme contained in the Pensions Act Cap 233 was not modified, wound up or repealed under the powers of the National Insurance Act.

Instead there was enacted The Pensions (Disqualification) Law 1983 Peoples Law No.24 of 1983.

The operative section of this brief Act was section 3 which prescribed

> "Any person who is appointed to a post in the service of the Government of Grenada on or after the appointed day shall not be entitled to any pension, gratuity or other allowance under any of the Scheduled enactments."

I should point out the obvious that the scheduled enactments included in the Pensions Act Cap 233 but not the Constitution.

The Pensions [Disqualification] Act, Peoples Law No.24 of 1983 was validated by the Peoples Laws, Interim Government Proclamation and Ordinances, confirmation of Validity Act 1985 No. 1 of 1985. We were not asked to adjudicate on the fact that Law Revision Commissioner declared that Peoples Law No.24 of 1983 that was spent, and omitted it from the 1990 Revised Laws of Grenada under the provision of section 9 of the Revision of Laws Act 1989.

What is clear, however, is that the statutory validation is effective only in so far as the law conforms to the Constitution. This has already received judicial pronouncement in Attorney-General v Derek Knight et al Civil Appeal No. 9 of 1988. Sir Frederick Smith said at page 8:

> "Under this Act the only effect it could have would be to validate those People's Laws Proclamations and Ordinances which were themselves in substance in conformity with the Constitution. In other words the act could only validate those Laws which Parliament could itself have enacted by its ordinary procedure as opposed to the procedure for constitutional amendment under section 39.
>
> The validation therefore of any law which conflicts with the Constitution is itself an alteration of the Constitution and unless the amendment procedure under section 39 is adhered to the act is void under section 106 to the extent of its inconsistency with the Constitution. The Act therefore is effective to validate any law which does not breach the Constitution but is void in respect of any Law that does."

People's Law 24 of 1983, which was passed when the Constitution was suspended, evinced the legislative intention to create new terms of employment for public servants employed after its appointed day by removing them from the Pension Scheme under Cap 233. It seems to me that the legislative intention was not fully executed because no orders have been made to create a new pensions regime for public servants under the National Insurance

Law or otherwise. In particular no provisions have been enacted to provide for the benefits conferred by section 84(8) of the Constitution for public officers employed after the appointed day. The various enactments to which we were pointed did not have that effect.

The Public Service Re-Organization Act,1987 Act No. 9 of 1987, which was the subject of the litigation in Donovan(*supra)* was intended to facilitate a retrenchment program. It provided that "every officer" (there was no distinction drawn between those employed before and after the appointed day, under People's Law 24 of 1983) who is required to retire under that Act is entitled to pension and retiring benefits in accordance with the Pensions Ordinance Cap233. In Donovan (*Supra*) we decided that this provision was inconsistent with entrenched provisions of section 84(8) of the Constitution.

The Pensions (Amendment) Act 1994 No.5 of 1994 amended the Pensions Act Cap233 to make provision *inter alia* for retirement on age fifty, and irrespective of age on completing 26 years service. It made the compulsory retirement age 60 years.

The Public Officers Special Severance Pay Act 1994, No.29 of 1994 made special provision for severance pay to public officers on termination of employment on account of redundancy or retrenchment. In this Act "Public officer" was defined to mean person who joined the public service after the appointed day in People's Law 24 of 1983. However it limited its application to the termination of service on the ground of redundancy or retrenchment. It did not make any provision for the Constitutionally protected case of an officer who is required to retire on the abolition of his post or for the reorganization of his department or Ministry. If it is arguable that the term redundancy and retrenchment could apply to situations of abolition of post and reorganization of

departments or Ministries one then has to look at the statutory remedy in section 4 of the Act as follows:

> "In the case of a public officer on the permanent establishment the amount of severance pay which he may be granted shall be calculated as follows:
>
> Up to 4 years continuous service – 5 weeks salary for each year, or proportional part thereof, of service.
>
> Over 4 years continuous service –7 weeks salary for each year, or proportional part thereof, of service."

The relief it provides is clearly inconsistent with the benefits conferred by section 84(8) of the Constitution. This is not an Act which amended the Constitution and we have already decided in Donovan [*Supra*] that the rights conferred by the Constitution cannot be reduced modified or revoked by ordinary legislation.

Once the distinction between an entrenched Constitutional Provision and statutory provision is recognised the answer is clear. A statutory provision cannot remove a benefit conferred by an entrenched clause of the Constitution. Such a benefit can only be removed by amending or altering the Constitution itself. The effect of section 106 of the Constitution, to which reference was made above is that the Pension [Disqualification] Act, Peoples Law No.21 of 1983 is void to the extent to which it is inconsistent with section 84[8] of the Constitution. The constitutional provision must prevail and assure the appellant of pension and retiring benefits as if he had attained the compulsory retiring age.

I therefore answer the second question by declaring that the Pension [Disqualification] Act is void to the extent that it is inconsistent with the benefits created by section 84[8] of the Constitution. For the avoidance of doubt I would add that the only legislation which could validly be employed under the Constitution to determine the entitlement of the appellant is the Pension Act Cap 233 read in conformity with section 84[8] of the Constitution.

Conclusion

I would therefore allow the appeal, set aside the order of the court below and declare that the appellant having been required to retire on the abolition of his office is entitled to pension and retiring benefits as if he had attained the compulsory retiring age.

Costs to the appellant.

C.M.D. BYRON
Chief Justice [Ag.]

I Concur

SATROHAN SINGH
Justice of Appeal

I Concur

ALBERT MATTHEW
Justice of Appeal [Ag.]