

COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 7 OF 1997

BETWEEN:

ROSEMOND JOHN

Appellant

and

**THE PERMANENT SECRETARY
MINISTRY OF EDUCATION**

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. A. Sheppard, Mr. A. Lawrence and Miss E. Darwton
for the Appellant

The Honourable Attorney-General, Mr. A. LaRonde
for the Respondent, Mrs. H. Felix-Evans with him

1998: September 15,16;
November 23.

JUDGMENT

ALBERT REDHEAD J.A.

During his argument learned Counsel for the appellant referred to this case as ~~A~~ a test case@ I would say that whatever decision this court arrives at, would have important implications throughout the Eastern Caribbean States with a Constitution and General Orders similar to that of Dominica.

The simple issue, if I may encapsulate it, is that if a Civil Servant goes on strike and his pay is deducted for the days in which he is on strike whether this is a disciplinary matter. If indeed, it is a disciplinary matter then it is a matter, for the Public Service Commission which is the sole body that is responsible for discipline of Civil Servants. On the other hand, if, as the respondent maintains, it is a matter purely of a contractual nature and not one of discipline, that is to say, that if the Civil Servant works only then he earns his contracted salary, then it is not a matter for the Public Service Commission. To emphasize this point the respondent claims that when the appellant was employed she was given a letter, which said that her employment was subjected to General Orders.

General Order 3.27 states as follows:

ASalaries and wages of Officers who go on strike will not be paid for any day or portion of a day during which they are on strike. Thus if an officer or employee merely reports for work on any day of a strike but does not work for the day, he will receive pay in respect of that day; if he works only for a part of any day of a strike he will not be paid for that period of the day during which his services were withheld@.

This General Order was incorporated in her letter of appointment. The respondent alleges that as a result this forms part of her contract.

The argument of the appellant is that she has a legitimate right to her salary, as her salary Ais a reward for the tenure of her office and not for carrying out the functions of that office@ [See **Miles v Wakefield Metropolitan District Council** 1985 1 ALL ER. 905].

The appellant brought an originating Summons before the High Court seeking the following declarations:

A1Y..that the decision of the Permanent Secretary, Ministry of Education contained in a letter dated 30th October, 1996 that

deductions would be made from the plaintiff=s salary is unlawful, unconstitutional, null and void;

2Y that any deduction made from the plaintiff=s salary consequent upon the letter of 30th October, 1996 is unconstitutional, unlawful, null and void and that the said amount be refunded to the plaintiff;

3Y..damages, including exemplary damages;

4Y..such consequential and other relief as the court deems fit;

5Y Costs@.

The matter came before Cenac J on 20th March, 1997 and he agreed with the respondent=s contention that:-

A The deduction from or non payment of salary during the period that Rosemond John was on strike is truly supported by General Order 3.27 of the Public Service. The non payment of salary or wages during the strike does not amount to deprivation of property as no property was earned or acquired during that period and as such the provisions of the Constitution were not contravened@.

The learned judge also agreed that salaries and wages of officers and employees who go on strike should not be paid for any day or portion of a day that the officer is on strike.

The appellant appeals to this court against the judge=s decision.

Four [4] grounds of appeal were filed on behalf of the appellant:

- [a] The court erred in finding that General Orders were and formed part of the Appellant=s appointment.
- [b] The court erred in not finding that Permanent Secretary in deducting pay was exercising a disciplinary power.
- [c] The Court further erred in not finding that the deduction of pay was a deprivation of property in breach of the

provision of the Constitution of the Commonwealth of Dominica.

- [d] The court further erred in not finding that as the deduction of pay was in respect of a period during which the appellant performed her office the deduction was illegal, null and void.

Mr. Sheppard, Learned Counsel, for the Appellant in his skeleton argument drew attention to the fact that the respondent's contention before the learned trial judge, that is to say, that the General Orders, being administrative orders and instructions in use and in force prior to the commencement of the Civil Service Act 1991 are deemed to have been prescribed under Section 39[1][a] of the Public Service Act.

Mr. Lawrence argued that in so doing the learned trial judge was praying in aid Sections 39 and 42 of the Public Service Act 1991.

Section 39[1][a] of the Public Service Act reads as follows:-

Subject to subsection [2], the Minister may after consultation with the Chief Personnel Officer and the Representative Body, make regulations prescribing all matters that this Act are required or permitted to be prescribed or that he considers necessary or convenient for giving effect to this Act and, in particular [c] for regulating the duties and conduct of Public Officers@

Section 42 provides:

The Civil Service Act 1973 is hereby repealed save that B [a] all Orders, Rules and Regulations that continued in force under it in so far as they are not inconsistent with this Act, shall continue in force until revoked by Regulations under this Act; and [b] any administrative orders and instructions in use and which were in force immediately prior to the commencement of this Act shall be deemed to have been prescribed under Section 39[a] of this Act@

Mr. Sheppard also referred to Section 30 of the Civil Service Act 1973 which provides:

30[1] The Governor may make Regulations and issue administrative orders and instructions for the Civil Service prescribing all matters which are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out, or giving effect to this Act and in particular for the following, namely@

Thereunder are listed ten matters. I shall only refer to those which I think bear more relevance to the issues under consideration:-

- 30[a] for prescribing the terms of and conditions of employment in the Civil Service;
- [b] for prescribing the procedures for the recovery of any penalties from a Civil Servant;
- [c] for regulating the hours of attendance of Civil Servants and the keeping and signing of records of attendance or for prescribing other method of recording attendance;
- [f] for regulating the duties of Civil Servants;@

In my opinion 30[a] above is the one which bears more relevance to this subject under discussion. However, it is quite conceivable that a matter of discipline can arise from the other matters mentioned:-

30[2] unless otherwise in any enactment provided; the General orders of the Windward Islands, the Colonial Regulations and the Financial and Store Rules shall remain applicable to all Civil Servants in Dominica in respect of matters of conduct, procedures and discipline@.

Mr. Sheppard then submitted that for the General Orders to have effect they must have been saved by Section 42 of the Public Service Act 1991. There must either have been an order that continued in force under the provisions of the Civil Service Act 1973 or orders which were in use and in force prior to the commencement of the Public Service Act 1991.

Learned Counsel, Mr. Sheppard, argued that prior to the Public Service Act 1991, Administrative Orders could have obtained legal authority in two ways:-

- [i] by virtue of Section 30[1] of the Civil Service Act 1973 which gave the Governor General power to issue such orders [and instructions] or;
- [ii] by virtue of Section 30 of the Civil Service Act which saved Colonial Regulations of the Windward Islands.

Mr. Sheppard submitted that General Orders on its face indicate that it was not made by the Governor. Hence it could not have been in force pursuant to S.30[1] of the Civil Service Act 1973.

He then contended that there is no proof that the General Orders presented are that of the Windward Islands, and that a perusal of the text shows clearly that they are not; it is a document specific to Dominica.

Mr. Sheppard then submitted on behalf of the appellant that even if General Orders may have been in use they were not in force in that they did not have the force having originated from a legal source.

Learned Counsel further submitted that even if General Orders applied by virtue of S.30[2] of the Civil Service Act 1973 they do so only in matters of conduct, procedures and discipline. This takes the matters to which they refer back to the realm of the Public Service Commission=s jurisdiction.

From the foregoing it seems to me that there is no proof that the Governor exercised his power given him under S.30[1] of the Civil Service Act 1973. The powers given under that Section are in my view much wider than those contained in Section 30[2] which is only in respect of matters of conduct, procedure and discipline. It seems therefore that under Section 30[2], the General Orders of the Windward Islands, the Colonial Regulations and the Financial and

Store Rules were of limited applicability to Civil Servants in Dominica that is to say, in respect of matters of conduct, procedure and discipline only.

In my view, therefore, if anything was saved by S.42[1] of the Public Service Act 1991, the General Orders of the Windward Islands etc. which had limited applicability i.e to do with matters of conduct procedures and discipline.

I therefore agree with Mr. Sheppard that these General Orders do govern the conduct and discipline of Civil Servants which are matters for the Public Service Commission.

I turn now to examine the question of whether deducting the Appellant=s pay in the circumstances of this case was a disciplinary matter.

S.85[1] of the Constitution of the Commonwealth of Dominica reads:-

ΔThe power to appoint persons to hold or act in offices in the Public Service [including the power to confirm appointments] and, subject to the provisions of Section 93 of this Constitution, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Public Service Commission@.

Mr. Sheppard submitted that the wording of S.85 clearly supports the view that if deducting the salary of teachers involved in a strike is a disciplinary matter then only the Public Service Commission has the authority under that Section of the Constitution to make the deductions. The Permanent Secretary would have acted ultra vires unless he lawfully carried out a function lawfully delegated to him by the Commission.

General Order 3.27:

ΔSalaries and wages of officers and employees who go on strike will not be paid for any day or portion of a day during which they are on strike. Thus if an officer or employee merely reports for work on any day of a strike but does not work for the day, he will not receive pay in respect of that day; if he works only for a part of any day of a strike he will not be paid for that period of the day during which his services were withheld@.

General Order 3.4

ΔAn officer who absents himself from duty without permission, except in the case of illness or other unavoidable circumstances, shall render himself liable to disciplinary action@

Section 11 of the Public Service Act 1991 reads:

A public officer who without reasonable excuse, does an act which:

- Δ[a] amounts to failure to perform in a proper manner any duty imposed upon him;
- [b] contravenes any of the provisions of this Act or any Regulations made thereunder;
- [c] is prejudicial to the efficient conduct of the Public Service or tend to bring the Public Service into disrepute;
- [d] is liable to disciplinary proceedings for misconduct in accordance with the provisions of the Public Service Commission regulations in respect of misconduct@.

Mr. Sheppard argued that the appellant=s case fell within 11[a] or 11[b] above. He contended that absence from one=s duties without reasonable excuse would be a failure to perform a duty imposed upon an officer.

So too, argued Mr. Sheppard, assuming that the appellant=s submission that the General Orders are of no legal effect fails, then the General Orders are deemed to be regulations made under the Act by virtue of Section 42. Therefore anything done in contravention of General Orders is a disciplinary matter.

I take the view that everything depends upon whether the officer is acting without reasonable excuse. If the officer goes on strike for instance, can it be said in the context of S.11 that he is doing something with reasonable excuse? I think not.

If for instance, the Hon. Attorney-General's contention that S.11 of the Dominica Constitution gives one the right to strike were correct, that would certainly put the matter beyond contention, but I do not accept that is the case.

S.11 of the Constitution merely gives the citizen, among other things, the right to form or belong to trade unions or other association for the protection of his interest.

In my view S.11 [c] of the Public Service Act bears greater relevance on this matter. As when the officer goes on strike, it is inevitable that his action along with his colleagues will disrupt the efficient conduct of the Public Service and therefore prejudicial to its efficiency. This would, in my view render the officer liable to proceedings for misconduct unless, of course it would be regarded as reasonable excuse.

There cannot, in my view, be any linguistic difference or differences in reasoning between General Orders 3.27 and 3.4. The former mandates that officers and employers who go on strike will not be paid. Whereas the latter states that an officer who absents himself from duty without permission is liable to disciplinary action.

When one goes on strike it goes without saying that one absents himself from work. Unless the view is that when one goes on strike one absents himself from work but with permission, that would indeed be an absurd view to hold.

In my view the effect of General Orders 3.27 and 3.4 is to provide a vehicle for discrimination among members of the Public Service, in that the Permanent Secretary could arbitrarily choose one

order, as opposed to the depending on the political complexion of the
 aOffender@ or any other extraneous reason.

**In Thomas v Attorney-General of Trinidad and Tobago
 Ac.113 at page 124**

Lord Diplock said:

aThe whole purpose of Chapter viii of the Constitution which bears the rubric aThe 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 person or 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@.

If I am correct that there is nothing in the language of both orders nor in reason to distinguish one from the other, then in my view Order 3.27 must be regarded as a matter of discipline. Once so regarded, then under the Constitution of Dominica the only authority vested with power to exercise disciplinary control is the Public Service Commission.

In fact I go so far as to say that when the Permanent Secretary deducted the Appellant=s pay for the days she was on strike, notwithstanding that he was purportedly acting under and by virtue of General Order 3.27, he was in fact exercising a disciplinary financial sanction which in my view the Permanent Secretary had no authority to exercise.

Having regard to the view which I have taken concerning the relationship between General Orders 3.27 and 3.4, I yield to the submission of learned Counsel, Mr. Sheppard that General Order 3.27 is inconsistent with the Constitution because it deals with similar situations in General Order 3.4 and the former predetermines the

penalties available for misconduct. Therefore General Order 3.27 should be modified from the date the 1978 Constitution comes into force. It should be read with modification to bring it in conformity with the Constitution

[See **Attorney-General for St. Christopher, Nevis and Anguilla v Reynolds** 198 Ac.657]

General Order 3.27 should therefore in its modified form read absence from duties because of participation in strike or any industrial action is a misconduct. Any punishment consequent upon misconduct under General Order 3.27 is not mandatory. The discretion of the Public Service Commission to choose another punishment described in regulation 34 of the Public Service Commission Regulation is not fettered.

I deal with both matters together i.e whether the appellant is the holder of an office and that her salary was a reward for that office and consequently whether the deduction of the appellant=s pay was a deprivation of property contrary to S.6 of the Dominica Constitution.

S.6 states inter alia as follows:

ANo property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where provision is made by a law applicable to that taking of possession or acquisition for the payment, within a reasonable time of adequate compensation@.

It is now beyond dispute that money is, for the purpose of this section, to be regarded as property, and that there is a proprietary right in salaries and wages.

[See **A.G. of Guyana v Alli** [1989] L.R.C Const. 474]

The contention of the appellant is that the deduction of pay amounted to a deprivation of property in that the appellant as holder of an office in the public service was entitled to receive emoluments attached to that office.

The short response of the Respondent to this contention is that the appellant by going on strike disentitled herself to receiving pay for that period. Therefore, she can have no right over or interest in that sum of money, which would but for the strike action have been her pay. Therefore, since no right to pay accrued during the days the appellant went on strike, she had no property during that period and therefore could not be deprived of property contrary to Section 6 of the Constitution, according to the argument of the Respondent.

In **Gladwyn King v Attorney-General of Barbados** [1994] 1 WLR 1560 the appellant was appointed in 1981 to the office of clerical officer in the Ministry of Education in Barbados, an appointment established under S.2 of Civil Establishment Act 1948 by the Civil Service Establishment [General] Order 1990 which fixed the remuneration for the post. In 1991 enactment of the Public Service Reduction of Emoluments Act 1991 resulted in her salary being reduced by 8 percent for the period 1st October, 1991 to 31st March, 1993. The appellant brought proceedings against the Attorney-General of Barbados for, inter alia, a declaration that the Act of 1991 in depriving her of her right to be paid not less than the emoluments attached to her office by the order of 1990 contravened Sections 11 and 16 of the Constitution of Barbados. The judge dismissed her claim and her appeal was dismissed by the Barbados Court of Appeal. On appeal to the Judicial Committee, it was held inter alia that the appellant's only right was to such emoluments as the Minister under the Civil Establishment Act 1948 or as Parliament in exercise of its legislative powers as attached to her office⁵⁵. and that since the appellant had no right to a minimum salary she had no property protected by Sections 11 and 16 of the Constitution.

I interpret the judgment to be saying that the appellant does have emoluments attached to her office but only those stipulated by

the Minister acting under the Authority of the Civil Establishment Act 1948 or by Parliament.

I also interpret the judgment to be saying that if the appellant was entitled a minimum salary then she had property protected.

The contention that the appellant is the holder of an office is supported by:-

In **Abeywickrema v Pathirana and others** 1987 LRC [Const.] 999

At para. 1012 Sharvananda C.J. said:

ΔEmployment generally is a contract between parties and therefore the general rule is that the contract cannot be unilaterally changed by any party to the contract. The position is different in government employment in which government derives its powers from the Constitution to make rules laying down the conditions of service. By virtue of such power the government can prescribe the conditions of service without any reference to employees. It is only the origin of government service, which is contractual. Once appointed, the public officer acquires a status; thereafter his relations are governed by status and not by contract.

ΔThe legal position of a government servant is one of status than of contract and his rights and obligations are no longer determined by consent of both parties, but by rule which are framed and altered unilaterally by the StateΥΥΥ.. The hallmark of the status is the attachment to the legal relationship of rights and duties imposed by public law and not by agreement of the parties@

[See also **Miles v Wakefield Metropolitan District Council** 1985 1 AER 905]

Roshenlal v Union of India 1967 S.C. 1889

Dinesha Chandra v State of Assam & ors. 1978 1 S.C.R. 608

In **Dinesha Chandra v State of Assam & ors.** 1978 S.C.R. 608

Where at page 612 Goswami J Said:-

ΔIt is well settled that except in the case of a person who has been appointed under a written contract employment under the Government is a matter of status and not of contract even

though it may be said to have started, initially, by a contract in the sense that the offer of appointment is accepted by the employer@.

In light of the authorities I have little hesitation in coming to the view that the Appellant is the holder of an office in the Public Service and is entitled to receive emoluments attached to that office. She can only be denied those emoluments, or any part of those emoluments, by the Public Service Commission when so lawfully sanctioned i.e. not unconstitutional, for a breach of discipline under the Public Service Commission Regulations. However, this is not the case here. The deduction of the appellant=s pay in the circumstances constituted a deprivation of property.

Having regard to the foregoing the appeal is allowed. The judgment of the learned trial judge is set aside.

It is hereby declared as follows:

- [1] That the decision of the Permanent Secretary, Ministry of Education, contained in a letter dated 30th October, 1996 that deductions would be made from the Appellant=s salary is unlawful, unconstitutional, null and void.
 - [2] That the deduction made from the Appellant=s salary consequent upon the letter of 30th October, 1996 is unconstitutional, unlawful, null and void and that the said amounts be refunded to the Appellant.
 - [3] General Order 3.27 in its present form is unconstitutional.
- Costs to the Appellant to be taxed if not agreed.

ALBERT J. REDHEAD

I Concur

SATROHAN SINGH
Justice of Appeal

MATTHEW J.A. [Ag.]

I have read the judgment of Redhead J.A. and I agree with the conclusion he reached. I wish only to state that in my judgment, of the Appellant=s four grounds of appeal the only one which I find favour with is the second, namely :

that the High Court erred in not finding that the Permanent Secretary in deducting the Appellant=s pay was exercising a disciplinary power.

The Appellant had approached the High Court by virtue of Section 103 of the Constitution of the Commonwealth of Dominica because she was alleging that a provision of the Constitution, other than a provision of Chapter 1 thereof, had been contravened and she had a relevant interest in the matter. Indeed the particular provision of the Constitution she was referring to was Section 85 and she was alleging that under that Section the power to exercise disciplinary control over her vested in the Public Service Commission and therefore the Permanent Secretary had no authority to deduct pay from her salary. Of course part of her contention is that the Permanent Secretary did exercise disciplinary power. The learned trial Judge addressed this matter when he posed the question:

Als this[the deduction of the pay for the remuneration due for the month of November] a disciplinary matter so as to involve Section 85 of the Constitution?@

Thereafter he referred to General Orders 3.27 and 3.4 and held that as the Permanent Secretary had invoked General Order 3.27 as opposed to General Order 3.4 the matter was an industrial and not a disciplinary matter.

Those paragraphs are as follows:

3.27 A Salaries and wages of officers and employees who go on strike will not be paid for any day or portion of a day during which they are on strike. Thus if an officer or employee merely reports for work on any day of a strike but does not work for the day, he will not receive pay in respect of that day; if he works only for part of any day of a strike he will not be paid for that period of the day during which his services were withheld.@

3.4 A An officer who absents himself from duty without permission, except in the case of illness or other unavoidable circumstances, shall render himself liable to disciplinary action.@

They both appear under Chapter III of the document which deals with A Conduct of Public Officers@ and seem to address similar behaviour.

In **Thomas v Attorney General of Trinidad and Tobago** 1982 AC113 Lord Diplock gave a definition of discipline. At page 127 letter H he said:

A Discipline in this context means the code of conduct which a public officer is under a duty to observe: what he is required to do and not to do, whether the particular requirement is imposed upon him by legislation, primary or subordinate, or by the express or implied terms of his contract of employment.@

And Section 11 of the Public Service Act states-

A A public officer who, without reasonable excuse, does an act which:

[a] amounts to failure to perform in a proper manner any duty imposed upon him;

- [b] contravenes any of the provisions of this Act or any Regulations made thereunder;
- [c] is prejudicial to the efficient conduct of the Public Service or tend to bring the Public Service into disrepute, is liable to disciplinary proceedings for misconduct in accordance with the provisions of the Public Service Commission regulation in respect of that misconduct.@

In **Miles v Wakefield Metropolitan District Council** 1987 1 AER 1089 H.L. a Superintendent Registrar of births deaths and marriages had his pay for Saturday mornings deducted by the Council because he absented himself from work. An action by him was dismissed by the Judge. The Court of Appeal allowed his appeal on the ground that he was a statutory office holder and not an employee of the Council. The Council appealed to the House of Lords who reversed the Court of Appeal holding inter alia that although there was no contract between the Registrar and the Council the nature of the Registrar=s remuneration and the terms of his tenure of office were so closely analogous to a contract of employment that his claim to salary was to be considered in the same way as a claim to salary or wages under a contract of employment.

What is of interest in the case is that in the Court of Appeal it was stated that the Council was not entitled to take what was in effect disciplinary financial action.

I regret not being able to agree with the learned trial Judge that the Permanent Secretary=s choice of the General Order under which to proceed determines the nature of the action.

In my judgment the Permanent Secretary exercised a disciplinary financial power over the Appellant and the Constitution forbids him to do so, leaving discipline to be exercised by the Public Service Commission unless it chooses to delegate its power as authorised by subsection [2] of Section 85 of the Constitution.

It may be pertinent here to mention the rationale for the Public Service Commission. In **Thomas v Attorney General for Trinidad and Tobago** referred to above, Lord Diplock giving the opinion of the Privy Council on this matter at page 124 said:

ΔThe whole purpose of Chapter VIII of the Constitution which bears the rubric ΔThe Public Service@ is to insulate members of the civil service, the teaching service and the police service 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 or 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.@

For these reasons I would allow the appeal with costs to the Appellant to be agreed or taxed.

A.N.J. MATTHEW
Justice of Appeal [Ag.]