

SAINT VINCENT

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 16 OF 1997

BETWEEN:

FELIX DA SILVA

Appellant

and

**ATTORNEY GENERAL OF
SAINT VINCENT & THE GRENADINES**

**The Chairman and Members of
The Public Service Commission**

**KENNETH JOHN
FRANK WILLIAMS
SYLVESTER TAYLOR
DAPHNE FREDERICK**

Respondents

Before:

The Hon. Mr. Dennis Byron
The Hon. Mr. Albert Redhead
The Hon. Mr. Albert Matthew

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Othneil Sylvester QC, Miss Nicole Sylvester with him for the
Appellant
Mr. Parnel R. Campbell for the First-Named Respondent
Mr. Andrew Cummings for the Second-Named Respondent

1998: December 9.

JUDGMENT

BYRON C.J. [A.G.]

This is an appeal against the decision of Joseph J. delivered on the 31st day of July 1997. Judgment had been given in favour of the appellant declaring that a letter from the Public Service Commission dated 18th

January 1989 purporting to retire him in the public interest was an assertion that he was still a public officer and that the suspension of his Salary was wrongful. Damages based on assessment of Salary for a three year period was awarded in the sum of \$70,411.00. No order for costs was made.

The dispute commenced when the appellant was transferred from his position as Superintendent of Airports to that of Assistant Secretary in the Ministry of Tourism, Aviation and Culture with effect from 24th May 1988. He protested his transfer, in various unsuccessful appeals, and did not take up his new appointment. He was retired from the public service in the public interest with effect from the 10th day of April 1989.

Both sides appealed the Judge's order. The appellant challenging the quantum of the relief awarded and the respondent asserting the legality of the decisions taken by the Public Service Commission.

During the argument the issues were considerably narrowed by the concessions of Counsel who agreed that the Judge had acted on a wrong principle by limiting the award to three [3] years Salary.

The issues in this Appeal became limited to the determination of the constitutional questions:

- [1] Whether the Appellant was lawfully removed from his position as Superintendent of Airports and lawfully appointed to the position of Assistant Secretary within the Ministry of Tourism, Aviation and Culture.
- [2] Whether the procedure for retirement from the Public Service in the public interest was properly followed.

The Transfer

A transfer is effected by the simultaneous removal from one post and

appointment to another. The appellant's removal from the position of Superintendent of Airports was afforded the protection of Section 79 [2] of the Constitution which provided that -

The power to appoint persons to hold or to act in offices to which this section applies [including the power to confirm appointments], and, subject to the provisions of section 87 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 Governor-General, acting in accordance with the advice of the Public Service Commission: @.

The effect of this section is that the appellant could only be removed from his post of Superintendent of Airport [which is deputy head of department] by the Governor General acting on the advice of the Public Service Commission. The uncontroverted evidence which made it clear that he was removed by the Governor-General acting on the advice of the Public Service Commission satisfied the constitutional provisions.

The appointment to Assistant Secretary also carried constitutional protection prescribed by Section 78 of the Constitution as follows:

78. [1] The 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 87 of this Constitution, the power to exercise 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. @

In this, case, too the uncontroverted evidence was that he was appointed by the Public Service Commission.

We were referred to the Civil Service Order 2.16 which prescribed that:

Officers are liable for transfer to any post of equivalent grade in the State. @

The uncontroverted evidence was that the both posts were of equivalent grade. Counsel for the appellant advanced the argument that as appointment to and removal from a post protected by Section 79 of the Constitution required the act of the Governor-General on the advice of the Public Service Commission, it was a demotion to be transferred to a post under Section 78 where appointment and removal was effected only by the decision of the Public Service Commission. We have rejected that contention. Both Sections provide safeguards against arbitrary and whimsical executive action and they both require the Public Service Commission to act judicially in the discharge of its duty. The test of equivalence of grade, which order 2.16 establishes, does not infringe the Constitution and in my view is the appropriate criteria for determining whether there has been a demotion. He also contended that the appellant was specially trained to be the Superintendent of Airports. However I did not consider that Training to be inconsistent with his new assignment as the Permanent Secretary in that Ministry is the head of department of which the Superintendent was deputy head.

In my view the transfer was effected in accordance with the legal and Constitutional provisions.

The Retirement

The Appellant made written and made oral representations that he did not intend to take up the new position. The Public Service commission decided to initiate proceedings on the grounds of the appellant=s neglect/refusal to take up the said position. The Appellant was invited to attend a Hearing, but he refused to attend on the ground that since he was challenging the transfer, the Public Service Commission should defer its process. The Public Service Commission embarked on the Hearing and

came to the conclusion on 10th January, 1989, that he should be retired in the public interest.

The decision was not challenged for any alleged breach of rules of natural justice. Counsel for the appellant contended that the procedural requirement of the Public Service Commission Regulation 37 was breached, by the failure to obtain and consider a report from the head of the appellant's department as a condition precedent to deciding to retire him in the public interest.

PUBLIC SERVICE COMMISSION REGULATIONS

37. Retirement in the public interest.

A[1] Where it is represented to the Commission, or the commission considers it desirable in the public interest, that an officer ought to be retired in the public interest-

[b] if the officer has held such pensionable office for ten years and over and his retirement is contemplated on the ground of his inability to discharge his duties efficiently,

the officer shall be informed of the grounds on which his retirement is contemplated and he shall be given an opportunity of being heard by the Commission.

[2] The Commission shall, in respect of any officer to whom subregulation [1] [b] applies, obtain a report on the work of the officer from his head of department, and it may also obtain a report from any other head of department, and it may also obtain a report from any head of department under whom the officer has served during the previous five years.

[3] If, after having regard to -

[a] the conditions of the public service;

[b] the usefulness of the officer in the public service; and

[c] all the circumstances of his case,

the Commission, after hearing the officer, is satisfied that it is desirable in the public interest to do so, it shall require the officer to retire. @

This rule distinguishes between the case where the ground for

retirement is inability to discharge ones duties efficiently and other grounds. Regulation 37 [1] and [2] deal only with the ground of inefficiency and, rather sensibly I would say, the report of the department head is required. In this case however, there was no allegation that the appellant was unable to discharge his duties efficiently.

He was being retired because he refused or neglected to discharge his duties. This was uncontroverted and his own representations brought him under Regulation 37 [3] [b], because his refusal to take up a position rendered him useless to the public service. That brought his case within Regulation 37 [3], where there is no requirement for consideration of any report from the head of department.

In the circumstances we do not consider that a procedural breach occurred. I would declare therefore that the Public Service Commission acted within the Constitutional and legal provisions in retiring the appellant in the public interest .

Both Counsel have agreed that all in the circumstances he is entitled to receive his salary up to the date of his retirement and pensionable emoluments thereafter as prescribed by Regulation 38 of the Public Service Commission Regulations. The computation should be automatic, but if there is difficulty, delay or disagreement application should be made to the Court for quantification.

The decision we have made accords with the position which the Public Service Commission initially took in 1989. This is a factor which could affect the order of costs. However, since that date, more than nine [9] years ago, no money has been paid to the appellant. In my view his consent was not necessary for the payment of his Salary and pension. The fact that he was protesting the legality of his retirement does not justify withholding his emoluments.

Order

I would therefore declare that-

- [1] The Public Service Commission did not act unlawfully in retiring the Appellant in the public interest.
- [2] The award of \$70,411.00 made in the Court below be set aside.
- [3] The Appellant is entitled to receive the arrears of his salary up to his retirement from the Public Service Commission and his pensionable emoluments from that date; liberty to apply.
- [4] The Appellant gets his costs in the Court below and in this Court.

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

I Concur

ALBERT REDHEAD
Justice of Appeal

I Concur

ALBERT MATTHEW
Justice of Appeal [Ag.]