

GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.5 OF 2001

BETWEEN:

JOSEPH CHARTER

Appellant

and

ALEXIS SIMON

Respondent

[1]

MICHAEL PIERRE

[2]

ATTORNEY GENERAL OF GRENADA

Appellants

and

ALEXIS SIMON

Respondent

Before:

His Lordship, The Hon. Sir Dennis Byron
His Lordship, The Hon. Mr. Satrohan Singh
His Lordship, the Hon. Mr. Albert Redhead

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Roald Henriques, QC; Mr. Hugh Wildman with him for the Appellants
Mr. Carol Bristol, QC for the Respondent

2001: November 22;
2002: July 17.

JUDGMENT

[1] **BYRON, C.J.:** Alexis Simon worked with the Government of Grenada from 15th July 1985 until 31st July 2000 when his employment as a gateman was terminated by a letter from Michael Pierre, acting Permanent Secretary in the Ministry of Works, Communications and

Public Utilities. At that time he was already locked into a battle with the Government because he had issued litigation against Joseph Charter substantive Permanent Secretary in the same Ministry, who had assigned him to the position of gateman from the position in which he was serving as a PBX operator. He issued additional proceedings against Mr. Pierre. The Hon Attorney General was joined as a defendant, as the representative of the State. Both matters were heard together.

- [2] Mr. Simon did not sue for wrongful dismissal. He brought constitutional motions under section 84 of the Constitution. He sought declarations that it was the Public Service Commission and not the Permanent Secretaries who had the authority to appoint him or to terminate his employment, and that he was entitled to pension and retiring benefits having been required to retire in those circumstances. During the trial he abandoned the applications he had initiated on the grounds of discrimination in his remuneration.

Section 84 of the Constitution

- [3] I think it would be of interest to recite the parts of section 84 of the Constitution that are relevant to this dispute. In effect there are three subsections that impact, namely 84(1), 84(2) and 84(8):

"84(1) Subject to the provisions of section 91 of the Constitution, the power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office, and the power to grant leave, shall vest in the Public Service Commission.

(2) The Public Service Commission may, by directions in writing and subject to such conditions as it thinks fit, delegate any of its powers under subsection (1) of this section to any one or more members of the Commission or, with the consent of the Prime Minister, to any public officer.

(8) Every officer who is required to retire on abolition of his office or for the purpose of reorganization of his Ministry or Department shall be entitled to pension and retiring benefits as if he had attained the compulsory retiring age."

The Background Facts

[4] Mr. Simon testified as follows:

"I am a public officer holding an office of emolument in the public service of the Crown in a civil capacity in respect of the Government of Grenada since the 15th day of July 1985."

He also testified that he was a member of the Public Workers Union.

Although both Charter and Pierre admitted that Simon was a public officer as he alleged, Michael Pierre testified:

"The terms of Mr. Simon's contract was made subject to a written Agreement between the Government of Grenada, the Ministry of Works and the Technical and Allied Workers Union, signed on the 4th July, 1985, covering the employment of all daily-paid unestablished employees in the said Ministry."

Mr. Simon's records were exhibited showing that he was a daily paid worker. This evidence was not challenged. Mr. Simon was originally engaged as a storekeeper in 1985. From January 1993 he held the post of PBX operator pursuant to a letter signed by Mr. Charter as Permanent Secretary in the Ministry of Works. In 1998 he complained by letter that he was being paid a lower salary than other persons in the post. Mr. Charter responded that Mr. Simon was assigned and not appointed to the position and as such he was entitled only to the salary of his substantive post. Mr. Simon was not placated. In December 1998 Mr. Charter wrote Mr. Simon assigning him to the position of gateman at the Ministry of Works. Mr. Simon's union wrote challenging the authority to assign him and eventually legal proceedings were initiated. In July 2000 Mr. Pierre, acting Permanent Secretary in the Ministry wrote Mr. Simon terminating his employment and indicating that he would be paid one month's wages in lieu of notice, 56 days vacation he had earned and severance benefits in accordance with the collective agreement made between the Government and the Grenada Technical and Allied Workers Union. Mr. Simon collected \$10,000.00 on account of severance benefits under the collective agreement.

[5] The trial was conducted on the basis of affidavits sworn by Mr. Simon and the two Permanent Secretaries and a number of documents exhibited with those affidavits. The learned trial Judge concluded and declared that the Permanent Secretaries did not have

the authority to appoint or to terminate Mr. Simon and consequently the purported appointment to the office of gateman and the purported termination of the appointment were ultra vires, void and of no effect. He also declared that Mr. Simon was entitled to full pension and retirement benefits as he had been required to retire for the purpose of the reorganization of the Ministry of Works, Communications and Public Utilities.

The Appeal

- [6] The grounds of appeal raised the following issues:
- [i] whether the delegation by the Public Service Commission remained valid pursuant to the transitional provisions of the Constitution;
 - [ii] whether the Public Service Commission can delegate its powers to a public office or must such delegation be to a named person;
 - [iii] whether Mr. Simon was entitled to benefits set out in section 84(8) of the Constitution.

Logic of the Judgment

- [7] Counsel for the Appellant challenged the logic of the Judgment. He argued that the decision that Mr. Simon was entitled to the constitutional protection of section 84(8) of the Constitution depended on a finding that he had been required to retire. But the declaration that the Permanent Secretaries who terminated his employment were not authorized to act on behalf on the Public Service Commission and that their purported actions were consequently null and void meant that Mr. Simon's employment was never properly terminated. It is therefore clear that these conclusions are inconsistent with each other. This logical problem had the result that the employment status of Mr. Simon was not clarified. If the Permanent Secretaries terminated his employment without lawful authority then Mr. Simon was wrongfully dismissed and no constitutional issue would arise. He would be entitled to damages for wrongful dismissal under basic substantive rules of law and this appeal would have to be allowed. However, the Appellant has reopened that

issue by appealing against the ruling that the Permanent Secretaries were not authorized to take the action they did.

Whether the Respondent was a Public Officer

- [8] The Appellant challenged the learned trial Judge's finding that Mr. Simon was a public officer, arguing that there were two categories of persons who perform services for the Government. One category was public officers appointed by the Public Service Commission who have tenure granted by the Constitution and the other was contract officers who could be terminated by notice. It was his contention that Mr. Simon was a contract employee and could be terminated by notice. In the Grenada Constitution section 84(1) clearly prescribes that the power to appoint persons to the public service is vested in the Public Service Commission. In this case no direct evidence was adduced that Mr. Simon was appointed by the Public Service Commission. On the contrary there was the uncontradicted evidence that he was employed as a non established worker in accordance with terms agreed with the relevant trade union, an agreement which made special provisions for redundancy. The terms under which Mr. Simon was employed made no provision for a compulsory retirement age or for the payment of any pensionable emoluments. I agree with Counsel that this employment did not provide tenure protected by the Constitution.

Whether the Delegation by Public Service Commission remained valid

- [9] In determining that the Permanent Secretaries had acted ultra vires section 84(2) of the Constitution the learned trial judge had relied on an inference drawn from the historical context. In 1967 Grenada became an Associated State with a Constitution. Under that Constitution the power of appointment to and removal from the public service was vested in the Public Service Commission and there was a provision that authorized the Public Service Commission to delegate any of its powers to any public officer with the consent of the Premier (see sections 84(1) and (2) above). In 1971 pursuant to that power the Public Service Commission with the consent of the Premier delegated the power to appoint minor salaried positions including those held by Mr. Simon to Permanent Secretaries and Heads

of Departments. In 1974 Grenada became independent with a new Independence Constitution, which contained the same provisions relating to the delegation of powers by the Public Service Commission. The Public Service Commission did not make a new delegation after the independence constitution came into force.

- [10] The learned trial Judge ruled that notwithstanding the transitional provisions in the Constitution, it must be deemed that, in the absence of evidence to the contrary, the delegation of authority expired when Grenada became independent. That conclusion is clearly inconsistent with the express provisions of the transitional provisions contained in the Constitution, which were intended to ensure continuity, and I would reverse that finding.

Whether the Delegation must name the Delegate

- [11] The learned trial Judge ruled that the power to delegate could only be effectively exercised by naming a specific person as the delegate and therefore a delegation to Permanent Secretaries was ineffectual and could not be exercised by either Charter or Pierre. In my view this finding is inconsistent with the plain language of section 84(2) of the Constitution [quoted above] which authorized the delegation to “any public officer”. A simple demonstration of the plain language test would be the contrast in meaning if the section had prescribed “any person holding a public office”. This may have required delegation to a person. In my judgment, therefore, a delegation to the public office of Permanent Secretary falls within the section. In addition there is the case of **R v Law Society ex parte Curtin** (1993) TLR 3rd December which provides judicial precedent for this conclusion.

Application of section 84(8) of the Constitution

- [12] This Court has previously considered section 84(8) of the Constitution [quoted above] on a number of occasions.

- [13] In the case of **Donovan v the Attorney General of Grenada** (1993) 2LRC 145 there was no doubt that the Appellant had been required to retire from the public service to facilitate reorganization of his Ministry or Department pursuant to an Act of Parliament which did not incorporate the provisions for retiring benefits conferred by section 84(8) of the Constitution. The dispute concerned the validity of the statutory provisions which provided for the retirement of public officers for that purpose. The Court ruled that the provisions of that Act of Parliament could not reduce the benefits conferred by the Constitution and declared the offending sections void to the extent that they deprived the retiree of his rights to pension and retiring benefits under the Constitution.
- [14] In the case of **Duncan v the Attorney General Grenada Civil Appeal No. 13 of 1997**, the Public Service Commission had required the appellant to go on the 43 days vacation leave to which it ruled he was entitled and thereafter to remain on leave for the purpose of improving the operations of the Ministry of Finance. After some time his salary payments were discontinued. The Court concluded that the effect of the conduct under consideration was that the appellant had been retired from the public service for the purpose of reorganization of the Ministry of Finance. The factual issue of the compulsory retirement for the reorganization of the Ministry was addressed on the evidence and proven to the satisfaction of the Court.
- [15] In the case of **McQueen v the Public Service Commission Grenada Civil Appeal No.17 of 1997**, the Public Service Commission approved McQueen's retirement from the public service on the ground that the office held was abolished. The dispute in that case revolved around the contention that the retirement benefits to which the Appellant was entitled did not include pension because when he joined the service an Act of Parliament was in force (The Pensions (Disqualification) Act of 1983) which provided that persons joining the service after its appointed date were not entitled to pension, gratuity and other benefits under the scheduled Acts which included the Pensions Act. The Court declared that the Pensions (Disqualification) Act was void to the extent that it is inconsistent with the benefits created by section 84(8) of the Constitution and ruled that the Pensions Act must

be employed and be read in conformity with section 84(8) of the Constitution. In this case Mr. McQueen established a statutory entitlement to pension.

[16] In each of these cases the factual basis of the applicability of the section was established by clear demonstration that the public servant had a statutory right to pension and had been required to retire either on the abolition of his office or to facilitate reorganization of his Ministry or Department.

[17] These cases therefore demonstrate certain conditions precedent which must be established before the constitutional right that section 84(8) confers can be claimed.

[18] In my view the learned trial judge did not consider whether the conditions precedent were established for the applicability of section 84(8). The section does not provide compensation for cases of termination of employment whether wrongful or otherwise. It only deals with compulsory retirement and then only certain types of such retirement. For example it does not make any provision for persons retired in the public interest. It makes provision only where the compulsory retirement occurs:

- [i] because an office has been abolished; or
- [ii] where the retirement is required for the purposes of reorganization of a Government Ministry or Department.

[19] The learned trial Judge did not make any findings of fact with regard to the compulsory retirement of Mr. Simon, nor did he make any findings of fact that the Ministry of Works, Communications and Public Utilities was reorganized or even that there were plans for its reorganization. It is not surprising that no findings were made because the only reason given for the termination was that the government had decided to contract out the work of the maintenance division of the Ministry. Both the Ministry and the Union regarded this as a redundancy situation requiring the provisions regarding payment of severance pay under the terms of the collective agreement be implemented. The concept of redundancy seems to me to be inconsistent with the idea of a public officer with tenure protected under the Constitution. In that context the factual situation which would otherwise be a redundancy

situation could create the rationale for the abolition of offices or the reorganization of a Ministry or Department. In any event I would think that the question whether there has been an abolition of office or a reorganization of a Ministry or Department is an issue on which there is an evidentiary threshold which an applicant must pass.

[20] The learned trial Judge did not analyze these issues in this case. He did not consider whether the termination of Mr. Simon's employment was a "compulsory retirement" or some other form of dismissal, and neither did he consider whether it was for the purpose of reorganization of the Ministry or a Department. These were matters requiring proof by the applicant. In my view there was no evidence which would require the relevant findings of fact to be found in favour of Mr. Simon.

[21] In my view there was no rational or evidential basis for concluding that Mr. Simon was a public officer protected by section 84[8] of the Constitution who was required to retire on abolition of his office or for the purpose of reorganization of his Ministry or Department.

[22] I would therefore allow the appeal and set aside the declarations and other orders made by the learned trial Judge.

[23] I would make no order as to the costs of this appeal.

Sir Dennis Byron
Chief Justice

I Concur.

Satrohan Singh
Justice of Appeal

I Concur.

[sgd.] **Albert Redhead**
Justice of Appeal