

GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 11 of 2003

BETWEEN:

[1] GRENADA TECHNICAL AND ALLIED WORKERS' UNION
[2] PUBLIC WORKERS' UNION

Appellants

and

[1] PUBLIC SERVICE COMMISSION
[2] ATTORNEY GENERAL OF GRENADA
[3] GRENADA POSTAL CORPORATION

Respondents

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Adrian D. Saunders	Justice of Appeal
The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]

Appearances:

Mr. James Bristol for the Appellants
Mr. Darshan Ramdhanni for the First and Second Respondents
Mrs. Winnifred Phillip for the Third Respondent

2003: July 8;
2004: February 2.

JUDGMENT

[1] **SAUNDERS, J.A.:** Historically, postal services in Grenada used to be handled by the Grenada Government through public officers employed in the Ministry of Communications and Works. In 1996 however, the Grenada Postal Corporation Act ("the Act") was enacted by the Grenada Parliament. As a result, from January, 1997, the postal services were taken over by the Grenada Postal Corporation ("the Corporation") and the postal workers were seconded to the Corporation.

[2] The Grenada Technical and Allied Workers' Union ("TAWU") and the Public Workers' Union ("PWU") are trade unions that have been representing the postal workers in Grenada. The unions brought this action claiming a declaration that the provisions of the Act automatically abolished the public offices of the workers and that the workers are therefore all entitled to pensions in accordance with section 84(8) of the Grenada Constitution. The trial judge found against the unions and they have appealed. Later in the judgment I shall outline in full the provisions of section 84(8) but it is first necessary to outline the background to the litigation.

The Background

[3] Some time in or before 1996, the Government of Grenada proposed the idea of commercialising the postal services. Cabinet appointed a committee to examine and report on the venture. From the very outset, the workers, through their unions, were made an integral part of the process. Both unions were invited to participate and each to nominate a representative to be a part of the committee. The committee met several times and held wide-ranging discussions on various facets of the proposal. The committee also deliberated on the Bill that was intended to establish the new entity that would be responsible for postal services.

[4] The Act repealed the old Post Office Act and created the Corporation that was to be the exclusive provider of postal services throughout Grenada. The Act gave the Grenada Public Service Commission ("the PSC") the power to approve the secondment of public officers to the Corporation. Section 14(3) provided that public officers so seconded shall, in relation to pension, gratuity or other allowances, and in relation to other rights as a public officer, be treated as if in continued service in the public service of Grenada.

[5] The trial judge found that on the 10th February, 1997, pursuant to the Act, the PSC approved the secondment to the Corporation of workers then employed at the General Post Office for a period of two years with effect from 24th January, 1997. There is no basis for this court to disturb this finding.

[6] Apart from section 14, other sections of the Act also went to considerable lengths to try to preserve the status of public officers for the seconded postal workers. Section 15 provided that where an officer was seconded to the Corporation, the officer's post or an equivalent post shall be deemed to

be subsisting for the duration of the secondment. Section 16 preserved any pension rights accrued by a seconded officer from service in the Grenada public service. Section 17 declared that seconded officers were still to be regarded as being in the public service of Grenada until such time as the officer resigns, retires or otherwise leaves the public service.

[7] Consequent upon the extensive discussions that were held between the Government and the unions, those parties entered into a joint Labour Agreement ("the Agreement") on the 25th August, 1999. The Agreement was deemed to have taken effect from the date of the commencement of the secondment.

[8] Article 1 of the Agreement declared that all established workers of the Post Office, who wish and agree to be seconded to the Corporation, shall be so seconded upon indicating their agreement to this effect by signing the requisite instrument. Established workers who did not want to be so seconded were free to so indicate by signing another document. Article 2 stated that the period of secondment shall be two years in the first instance, renewable to a maximum of five years. Article 3 provided for a change of mind on the part of the worker. It stated that "any public officer who elects at any time not to be seconded or to continue to be seconded to the Corporation ... may apply for voluntary separation from the Public Service or apply to be reassigned within the Public Service". Any such application for voluntary separation shall be approved by the [...Government of Grenada...] with all entitlements and benefits to the workers in accordance with the collective Industrial Agreements and Laws of Grenada.

[9] Some uncertainty now surrounds the position of the seconded workers. The trial Judge described the situation in the following manner:

"Over the years the future of the seconded workers became a major issue. In 1999 there were applications from two workers requesting termination and voluntary separation. In 2000 the Corporation wished to return two workers to the public service. In the following year the union submitted requests from workers seeking payment of pension and gratuity under section 84(8) of the Constitution. Also, the Corporation indicated its wish to return 27 workers to the public service. Later that year the workers withdrew their request for retirement under section 84(8). It was ascertained that there were then 44 workers on secondment at the Corporation. It emerged that there were no vacancies for certain categories of workers in the public service and the PSC decided that the service would not be able to assimilate all workers on secondment. It appears that since early 2002 the fate of the seconded workers has been in abeyance..."

[10] Section 84(8) provides:

“Every Public 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 fundamental issues in this case are firstly, whether the seconded postal workers have been required to retire as public officers and if so, whether they are due the entitlements prescribed by section 84(8). In a fully reasoned judgment, the learned judge, Barrow, J., answered both questions in the negative.

[11] The judge noted that it was conceded by the Grenada Government and the PSC that there had been an abolition of the offices of the postal workers. The judge then held that, provided the postal workers agreed to be so seconded, the PSC had the power to second them to the Corporation; that the mere fact that their offices had been abolished did not automatically mean that their employment had been terminated; that sections 15 and 17 of the Act clearly indicated that the workers were still retained as employees in the public service; and that therefore the declarations sought by the unions should be refused.

[12] Counsel for the unions attacked these conclusions of the learned trial judge. It was submitted that the PSC had no power to transfer a public officer outside of the public service and that the true position of the postal workers was that they had effectively been retired because their posts within the public service had been abolished. Counsel relied on the provisions of section 84(1) of the Constitution and on three cases decided by this court, namely **Duncan v. The AG of Grenada**¹, **Donovan v. The AG of Grenada**² and **Irvin McQueen v. The Public Service Commission**³.

[13] Section 84(1) of the Constitution provides:

“Subject to the provisions of section 91 of this Constitution, the power to appoint persons to hold or to 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.”

¹ *Grenada Civil Appeal No. 13 of 1997*

² *[1993]2 LRC 145*

³ *Grenada Civil Appeal No. 17 of 1997*

[14] The trial Judge had reasoned in the following manner:

"It is beyond doubt that in the present case the PSC intended to retain the seconded workers as employees in the public service. To that end the government legislated the deeming and declaratory provisions in sections 15 and 17 of the Act. It is true that since the government could not appoint persons to the public service it could not deem persons to be officers in the public service: **Attorney General of Barbados v. Smith** (1984) 38 WIR 33. But while incapable of having that particular legal effect those provisions were significant as expressions by the government of an intention and a decision separately held by the PSC. That decision was that the workers would continue as public officers and appropriate provision would be made to provide a framework for them to fit into the structure of the public service. I am satisfied that when the offices were abolished, on which premise I proceed because the government and PSC so conceded, the workers continued to be public officers."

Were the seconded workers required to retire?

[15] Section 84(8) of the Constitution commences with the words "*Every Public Officer who is required to retire...*" The entitlements provided for in the section only arise where the public officer is *required* to retire. The mere fact that the office of the public officer has been abolished or that there has been a reorganization of the officer's Ministry or department does not by itself alone entitle the officer to the prescribed benefits. It must first be determined that the officer has been required to retire. In my judgment the learned trial judge correctly held that the workers were not required to retire. I also consider that the circumstances that existed in the cases cited by Counsel for the unions are all different from those that exist here.

[16] In **Duncan** for example, the appellant was asked to take indefinite leave after all his accumulated leave had been exhausted. He was given no answer to his inquiries as to why he was being placed on leave when he had no vacation leave left to utilise. He was never asked to resume his duties. It was held that the true nature and real effect of what was done to him was permanently to exclude him from the performance of his employment. In other words he had effectively been retired. In that case, as well as in the cases cited by the court therein, namely **Smith and others v. AG of Belize**⁴ and **Thomas v. The AG of Trinidad & Tobago**⁵, the affected public officers were complaining of

⁴ [1985] LRC (Const) 1128

⁵ (1981) 32 WIR 375

acts taken by the relevant authorities against their free will. That is not the situation here where the postal workers voluntarily agreed to be seconded to the Corporation.

[17] The cases of **Donovan** and **McQueen** are also to be distinguished. In each of them there was no issue as to whether the public officer had or had not retired. In **Donovan**, the public officer was informed by letter that he had to retire pursuant to the Public Service Re-organisation Act. The case had to do with whether parliament could pass legislation that purported to reduce the constitutional entitlement of a person who was retired in those circumstances. The case also held that parliament could not usurp the powers of the PSC to regulate PSC procedures. In this case before us, the postal workers had not been retired. They had been voluntarily seconded by the PSC to the Corporation. Further, the Act passed here did not usurp the functions of the PSC but rather, provided a statutory framework or cover for the acts of the PSC.

[18] Similarly, in **McQueen**, all parties had agreed that McQueen had been retired consequent upon the abolition of the office of Local Government Coordinator which he then held. The issue in the case was what should be his retiring benefits. He argued that his benefits should be those prescribed by section 84(8) of the Constitution. The State argued that the benefits should be as prescribed by an Act of Parliament passed subsequent to the coming into force of the Constitution. It was in this context that the learned Chief Justice declared that section 84(8) created constitutionally entrenched rights in favour of public servants. The Chief Justice did specify however that those rights were reserved for officers who were required to retire on abolition of office or for the purpose of re-organisation of their department or Ministry. The court also held that, as was the case in **Donovan**, parliament could not, without amending the Constitution, pass laws that in effect collided with section 84(8).

[19] Unlike the present case, the cited cases were all instances where public officers had either been required to retire or had, in light of the treatment meted out to them, effectively been retired. Here however, a critical condition precedent to the triggering of section 84(8) was never established. See in this regard: the observations of Byron, CJ in **Charter v. Simon**⁶. The postal workers here still retained the status of public officers after their offices had been abolished. They were never

⁶ *Grenada Civil Appeal No. 5 of 2001 at para. 17*

required to retire. Far from it. They agreed to be seconded to the Corporation upon terms that allowed their re-entry, at their option, into the public service. And some of them actually exercised that option. When they did, their re-entry was regarded as a lateral transfer. They were not re-employed as fresh recruits. It would be quite ironic for this court to hold that a group of persons had been required to retire from the public service when some of the group are currently still in unbroken employment with the government.

Could the PSC second outside of the public service?

[20] It was submitted that the PSC had no power to transfer or second public officers to posts outside of the public service because the provisions of section 84(1) of the Constitution did not give the PSC that power. I think the learned trial Judge effectively dealt with this point in the judgment when he stated at paragraph 11:

“I do not accept that because that power is not expressed it means that the power does not exist. The power to transfer, for example, is not expressed but no one can doubt that the PSC has the power to transfer persons within the service from one office to another. Such a transfer can be either on appointment or on temporary assignment. That latter type of transfer is in fact a secondment...Given that the PSC has the power to second within the service there is no reason why, subject to the proper safeguards, it should not be able to second outside the service. The difference with outside secondment is that it must be by agreement, it cannot be imposed upon the officer just as it cannot be imposed upon the receiving employer.....”

I would respectfully agree with those conclusions.

Contracting out of the Constitution

[21] Counsel also argued that the fact that the workers had agreed to be seconded to the Corporation could not disentitle them from their constitutionally prescribed benefits. Reference was made to **The AG of Grenada v. The Grenada Bar Association**⁷. In my view since the postal workers had never been required to retire this point does not arise for determination.

⁷ *Civil Appeal No. 8 of 1999*

[22] In all the circumstances I would dismiss this appeal and make no order as to costs.

Adrian Saunders
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal

I concur.

Ephraim Georges
Justice of Appeal [Ag.]