COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 13 OF 2003

BETWEEN:

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA

Appellant

and

[1] MIRIAM WILLIAMS
[2] PHILBERT BERTRAND
[3] EDWARD ETINOFFE

Respondents

Before:

The Hon. Mr. Brian Alleyne S.C.	Justice of Appeal
The Hon Mr. Michael Gordon Q.C.	Justice of Appeal
The Hon. Mde. Suzie d'Auvergne	Justice of Appeal (Ag.)

Appearances:

Mr. Elliot Mottley Q.C. and Mr. Joffre …. for the Appellant
Mr. Alick Lawrence for the Respondent.

2004: November 26;
2005: February 18.

JUDGMENT

[1] ALLEYNE, J.A. : This appeal, arising from separate applications for judicial review before the High Court in Dominica by the first named respondent, and by the second and third named respondents, which applications were consolidated and heard and decided together at the High Court, was also heard as one in this court.

[2] All three respondents were members of the Commonwealth of Dominica Police Force for over 20 years. The respondent Williams became a member of the force

before 1st February 1976, and the other two respondents after that date. The importance of this distinction will become apparent in due course. The President of the Commonwealth of Dominica, acting on the advice of the Prime Minister, under the provisions of section 8 of the Police Pensions Act[1], compulsorily retired each of the respondents from the Police Force on the basis that they had served for more than 20 years. The respondents successfully challenged these decisions in the High Court on the ground that they are unconstitutional. The appellant has appealed against the decision of the High Court.

[3] Learned Queen's Counsel for the appellant argued two issues. The first issue argued was that the learned trial judge erred in law in not applying a purposive construction to the provisions of section 57(1) of the Social Security Act[2] and as a result held that the provisions of that section did not repeal the Police Pensions Act in its entirety.

[4] The first thing to be noted is that the learned trial judge was careful not to go beyond the bounds of what she considered necessary for the purposes of deciding the issues before her. She did not rule that section 57(1) of the Social Security Act repealed the Police Pensions Act or any part of it, only that section 8 of the latter Act does not apply to the respondents Bertrand and Ettinoffe. Nevertheless, in the circumstances we consider it appropriate to examine the question raised by learned Queen's Counsel and decide the point.

[5] Section 57(1) of the Social Security Act provides as follows:

> "The Pensions Act and the Police Pensions Act shall cease to have effect in respect of persons whose employment or appointment commenced on or after the appointed day."

[6] It is common ground that the appointed day for the purposes of this section is February 1st, 1976. For the reason that the respondent Miriam Williams became a member of the Police Force before that date, and the respondents Philbert

[1] CAP. 23:81 of the Revised Laws of Dominica 1990.
[2] CAP. 31:01.

Bertrand and Edward Ettinoffe after that date, the issue concerning section 57, while it could affect the appeals in respect of the second and third respondents, will have no impact on the issue concerning the first respondent Miriam Williams.

[7] Learned Queen's Counsel for the appellant points out that section 57(1) of the Social Security Act does not purport to repeal the Police Pensions Act, but only to render it ineffective in relation to persons whose employment or appointment commenced on or after the appointed day. The question in issue is whether the section has that effect on every section of the Police Pensions Act, or whether section 8 of the latter Act is excepted from the effect of the section.

[8] Learned Queen's counsel argued that it is necessary to adopt a purposive approach to the interpretation of section 57(1) of the Social Security Act. The said Act seeks to provide a scheme for pensions, which scheme is intended to apply to members of the Police and Public services of Dominica, and to replace the existing pension provisions for persons joining those services after the establishment of the scheme. He argued that the Parliament of Dominica in passing the Act did not intend or purport to affect the provisions regarding compulsory retirement of those officers, and to so interpret it is to apply a wrong approach to the construction of the Act. Learned counsel relied on DPP v Schildkamp[3]. Counsel pointed to the dictum of Lord Upjohn at page 1652:

> "The task of the court is to ascertain the intention of Parliament; one cannot look at a section, still less a subsection, in isolation, to ascertain that intention; one must look at all the admissible surrounding circumstances before starting to construe the Act."

Lord Upjohn sought support for that view in the words of Viscount Simonds in A.G. v. H.R.H. Prince Ernest Augustus of Hanover[4]:

> "For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already

[3] [1969] 3 All ER 1640.
[4] [1957] 1 All ER 49 at 53.

> indicated as including not only enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy."

[9] Lord Diplock's dictum in Wentworth Securities Ltd. v. Jones[5] is also very instructive. His Lordship said this:

> "I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words not expressly included in it. Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.[6] provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law."

[10] Although to interpret the Social Security Act in the way that learned counsel for the respondents suggests would not defeat the purposes of that Act, it would defeat the purposes of section 8 of the Police Pensions Act, a result which clearly could not have been the intention of Parliament in passing the Social Security Act. Such a result could only result unintentionally by inadvertence on the part of the draftsman and Parliament, and we see no reason why the principles laid down in the foregoing dicta should not equally apply. We agree with learned counsel for the appellant that a purposive approach should be taken to the interpretation of section 57(1) of the Social Security Act and that that Act should not be so interpreted as to defeat the provisions of section 8 of the Police Pensions Act in the cases where that section is intended to apply.

[5] [1980] A.C. 74 at 105.
[6] [1970] A.C. 850.

The Constitutional question:

[11] Learned Queen's Counsel for the appellant contended that the decision of the President to compulsorily retire the respondents from the police service is not unconstitutional, null and void on the ground that section 8 of the Police Pensions Act is in conflict with section 92(2) of the Constitution[7], and that the learned trial judge was wrong in so holding.

[12] It is convenient to quote both sections. Section 92(2) of the Constitution reads:

> "The power to appoint persons to hold or act in offices in the Police Force below the rank of Deputy Chief of Police [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 Police Service Commission."

Section 8 of the Police Pensions Act is in the following terms:

> "The President may require any member of the police service to retire after he has completed twenty years of service or has attained –
> (a) in the case of a subordinate officer of or above the rank of sergeant, fifty-five years;
> (b) in the case of any member below the rank of sergeant, fifty years."

[13] It is accepted by the appellant that the President, in compulsorily retiring the respondents, acted on the advice, not of the Police Service Commission, but of the Prime Minister[8]. However, learned counsel for the appellant argued strenuously that the decision of the President 'to require the respondents to compulsorily retire from the Police Force' was not synonymous with the removal of the respondents from the Police Force and was not a removal or dismissal within the meaning of the Constitution. Counsel submitted that the learned trial judge erred in law in holding that the power of compulsory retirement falls within the ambit of the power to remove and as such is vested in the Police Service Commission.

[7] Constitution of the Commonwealth of Dominica, Chapter 1:01, Laws of Dominica Revised Edition 1990.
[8] Section 63, Constitution of Dominica.

[14] Section 8 of the Police Pensions Act undoubtedly purports to empower the President to act as he did with respect to the respondents. Learned Queen's Counsel for the appellant submitted that it is necessary for the executive to have control of Police Officers in so far as requiring them to retire at a certain age and it is also necessary for the executive to have power to retire Police Officers in the public interest.

[15] Learned Queen's counsel stated the issue as 'whether the compulsory retirement of a member of the Police Service under section 8 of the Police Pensions Act is a removal within the terms of section 92(2) of the Constitution.' I agree.

[16] Counsel relied on the provisions of section 121(9) of the Constitution, which is in the following terms:

> "Any provision in this Constitution that vests in any person or authority the power to remove any public officer from his office shall be without prejudice to the power of any person or authority to abolish any office or to any law providing for the compulsory retirement of public officers generally or any class of public officer on attaining an age specified by or under that law."

[17] This section relates to any law providing for the compulsory retirement *of public officers generally* or any *class of public officer* on attaining the specified age. It does not, in my view, relate to a power to selectively retire individual public officers within the general class, or within a particular class. The section undoubtedly permits Parliament to enact laws empowering the executive to determine the compulsory retirement age for all public officers (*generally*), or for all public officers falling within a particular *class* of public officers, for example members of the Police Service. It clearly does not, in my view, permit the executive to select individual officers for what would probably be considered by the subject of that decision to be punitive action against him or her.

[18] It is precisely that situation that the seminal case of Thomas v. Attorney-General[9], relied on by the respondents, addresses. In the headnote to the report

[9] [1981] 32 WIR 375.

on that case the decision is summarised in the following words; 'The power of the Police Service Commission to remove from office in the Police Service under section 99(1) of the 1962 Constitution embraced every means by which a police officer's contract of employment (not being a contract for a specific period) could be terminated against his will.' Lord Diplock, delivering the opinion of the Privy Council, said[10] in relation to the question whether the appellant was a servant of the Crown dismissible at pleasure:

> "[It] is in their Lordships' view, the most important of the three questions, for it affects the *security of tenure* and *insulation from political patronage and pressure* not only of members of the police force itself but also of every member of the public service".

[19] Far be it from me to suggest that in the particular case of these respondents the actions of the executive were motivated by anything but the most proper motives. That is not the question before this court. What we are called upon to decide is whether the power vested in the executive to require *any member of the police service* to retire after he or she has completed 20 years of service or has attained a particular age under the provisions of section 8 of the Police Pensions Act is legally permissible in light of section 92(2) of the Constitution of the Commonwealth of Dominica. In this connection I think it helpful to quote extensively from the opinion of Lord Diplock in Thomas. At page 281 of the report the learned Law Lord had this to say:

> "To speak of the right of the Crown to dismiss its servants at pleasure is to use a lawyer's metaphor to cloak a political reality. "At pleasure" means that the Crown servant may lawfully be dismissed summarily without there being any need for the existence of some reasonable cause for doing so: in other words "at whim"; and "the Crown" in the context of the 1962 Constitution of Trinidad and Tobago meant that (*sic*) the Governor-General who, in this regard, was required by section 63 of the Constitution to act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. Under a party system of government such as exists in Trinidad and Tobago and was expected to exist after independence in other Commonwealth countries whose Constitutions followed the Westminster model, dismissal at pleasure would make it possible to operate what in the United States at one time became known as the "spoils" system upon a change of government, and

[10] *Ibid* at page 380 g.

> would even enable a government composed of the leaders of the political party that happened to be in power to dismiss all members of the public service who were not members of the ruling party and prepared to treat the proper performance of their public duties as subordinate to the furtherance of that party's political aims. In the case of an armed police force with the potentiality for harassment that such a force possesses, the power of summary dismissal opens up the prospect of converting it into what in effect might function as a private army of the political party that had obtained a majority of the seats in Parliament at the last election. Their Lordships do not suggest that there is any likelihood of any of these extreme consequences of the existence of *a legal right of summary dismissal without cause* occurring in Trinidad and Tobago; but what has actually happened in some other countries suggests that the possibility of their occurrence was not too far-fetched to justify the Constitution-makers in the 1960's making provision to eliminate any such risk in Constitutions which follow the Westminster model.
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> '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 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.
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> 'In respect of each of these autonomous Commissions the Constitution contains provisions to secure its independence from both the executive and the legislature."

[20] Their Lordships have left no doubt as to the scope and purpose of the provisions made in these Constitutions for controlling the exercise of disciplinary control over Public Servants, nor can there be any remaining doubt that the protection extends to cover summary dismissal without cause. Learned Queen's Counsel for the Attorney-General, the appellant, submitted that the power to 'require a member of the police service to retire' under section 8 of the Police Pensions Act does not amount to a power to 'remove' from office contemplated by section 92(2) of the Constitution. Counsel submitted that whereas under the Constitution of Trinidad and Tobago 'remove' is related to the exercise of disciplinary control, under the Constitution of Dominica, it is not. He contended that the respondents were entitled to obtain, and did obtain, all their pension rights, and therefore this legislative provision and the action of the executive under the section does not

amount to dismissal at pleasure, where there is no entitlement to any accrued benefit. Learned counsel sought to contrast the case of The State of Bombay v. Saubhagchand M. Doshi[11] with Thomas *supra.* It was held in Doshi that an order of retirement differs both from an order of dismissal and an order of removal, in that *"it is not a form of punishment prescribed by the rules, and involves no penal consequences, inasmuch as the person retired is entitled to pension proportionate to the period of service standing to his credit".*[12]

[21] Learned Queen's Counsel also cited in support of his contention the case of Baikuntha Nath Das v. Chief District Medical Officer[13]. This case, like Doshi, is a case under the Constitution of India and holds, among other things, that the power in the government to retire a government servant in the public interest after he completes a specified number of years of service or after attaining a qualifying age *"is in pari materia with the Fundamental Rule 56(j)"*[14]*.* The judgment of the court also states that the rule embodies one of the facets of the pleasure doctrine embodied in Article 310 of the Constitution and holds the balance between the rights of the individual government servant and the interest of the public, and that rules of natural justice are not attracted in such a case. If the appropriate authority forms the requisite opinion bona fide its opinion cannot be challenged before the courts though it is open to an aggrieved party to contend that the requisite opinion has not been formed or that it is based on collateral grounds or that it is an arbitrary decision[15]. It was decide that compulsory retirement is not a punishment, that the order has to be passed by the government on forming the opinion that it is in the public interest to retire the public servant compulsorily; the order is passed on the subjective satisfaction of the government. Principles of natural justice have no place in the context of an order of compulsory retirement, the court held[16].

[11] [1957] A.I.R.892.
[12] Page 895, para. 10.
[13] [1992] SOL Case No. 011.
[14] Paragraph 8.
[15] Paragraph 13.
[16] Paragraph 32.

[22] In I.K. Mishra v. Union of India[17] it was acknowledged that under the Indian Constitution the power to retire compulsorily a government servant in terms of the service rules is absolute provided the concerned authority forms an opinion *bona fide* that it is necessary to pass an order of compulsory retirement in the public interest[18]. Learned counsel cited other cases from India to similar effect.

[23] It is clear, however, that the Constitution of India, at least in respect of the issues before this court in this case, is fundamentally different from the Constitution of the Commonwealth of Dominica. In the case of Union of India v. Col. J.N. Sinha and Anr.[19] cited by learned Queen's Counsel for the appellant, the appeal court referred to Article 310 of the Constitution of India and said "A government servant serving under the Union of India holds his office at the pleasure of the President as provided in Article 310 of the Constitution." This Constitutional principle is in stark contrast to the Constitutional principle entrenched in the Constitution of Dominica and decisively applied in Thomas and all the subsequent cases from these Commonwealth Caribbean Jurisdictions which have followed it, and has until now remained unquestioned[20]. I cannot agree with learned counsel for the appellant that compulsory retirement under section 8 of the Police Pensions Act can be distinguished from removal from office under section 92(2) of the Constitution. I would therefore dismiss the appeal on the Constitutional point and affirm the declarations of the learned trial judge.

The Remedy

[24] Learned Queen's Counsel for the appellant contended, following the submissions of learned counsel for the respondents, that even if the appeal were not successful on the substantive issues, the declaration of the learned trial judge that the appellants are still members of the police force should not be upheld. Counsel submitted that the police force is a disciplined force among whose principal

[17] [1997] SOL Case No. 499.
[18] *Ibid* paragraph 3.
[19] [1971] 1 S.C.R. 791 at page 794.
[20] See also McQueen v. The Public Service Commission [1998] ECLR 298 at page 301D.

functions is ensuring the security of the State. On this basis, and to avoid the risk of undermining morale within the force, the court should avoid an order which would have the effect of reinstating these officers, and should instead make an order for compensation. In his oral submissions learned counsel for the respondents contended that to fail to sustain the learned trial judge's declaration in this respect would render the Constitutional protection virtually worthless, or at the least, would severely diminish the value of the protection given to public officers by the Constitution.

[25] In this case I can see no reason on the evidence in the record or otherwise to interfere with the declaration made by the learned trial judge, which cannot be impeached in point of law. I would decline to make the order sought by learned Queen's Counsel.

[26] On the matter of costs, I would affirm the learned trial judge's order, save that I would order costs on the basis of the prescribed costs rule here and below, taking the value of the claim to be $50,000.00. The respondents are therefore entitled to their costs in the sum of $14,000.00 below and $9,333.33 costs of the appeal.

Brian Alleyne, SC
Justice of Appeal

I concur.

Michael Gordon Q.C.
Justice of Appeal

I concur.

Suzie d'Auvergne
Justice of Appeal (Ag.)