In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No. 88

IN THE MATTER OF THE PUBLIC SERVICE SUPERANNUATION ACT 1981

BETWEEN:-

HIRAM EDWARDS

Plaintiff

-and-

THE MINISTER OF FINANCE

First Defendant

-and-

THE ATTORNEY GENERAL

Second Defendant

-and-

THE MINISTER OF ENVIRONMENT, PLANNING AND INFRASTRUCTURE STRATEGY

Third Defendant

JUDGMENT

(In Court)

Date of hearing: 25th February 2013, 1st March 2013
Date of judgment: 5th April 2013

Mr Kenrick L James, James & Associates, for the Plaintiff
Ms Shakira J Dill, Attorney General's Chambers, for the First, Second and Third Defendants

Introduction

1. By an originating summons dated 7th March 2012, and amended on 26th June 2012, the Plaintiff, Hiram Edwards, seeks declaratory relief from the First through Third Defendants with respect to various issues, including pension payments which he claims are due to him under the Public Service Superannuation Act 1981 ("the 1981 Act").

2. The following issues arise:

   (1) Whether the Plaintiff was re-employed in the post of temporary Assistant Telecommunications Inspector on a full time or alternatively a part time basis.

   (2) Whether, if the Plaintiff was re-employed in that post on a full time basis, he nevertheless had a legitimate expectation that he would be treated as a part time employee for purposes of his pension rights.

   (3) Whether, subject to issue (4) below, the deductions made to the Plaintiff's pension while he was re-employed as a temporary Assistant Telecommunications Inspector were lawful.

   (4) Whether the amended version of section 25(1) of the 1981 Act applied to the Plaintiff.

   (5) Whether the compulsory retirement age contained in section 22(2) of the 1981 Act applied to the Plaintiff.

   (6) Whether the Plaintiff's appointment as Acting Director of Telecommunications was lawfully revoked.

3. The First Defendant is the Minister of Finance. Issues 1 through 4 concern decisions made by the Accountant General, who is answerable to the Minister.

4. The Second Defendant is the Attorney General. He defends issue 6 on behalf of the Cabinet Office.

5. The Third Defendant, the Minister of Environment, Planning and Infrastructure Strategy, is joined because the Ministry includes the Department of Telecommunications, in which the Plaintiff was re-employed. He defends issues 1, 2, and 4 through 6. At the time of the Plaintiff's re-employment, that Department was part of the former Ministry of Environment Planning and Infrastructure Strategy.

6. For ease of reference, in this judgment I shall simply refer to "the Defendants" when referring to more than one Defendant.

7. I have had the benefit of both affidavit and oral evidence from the Plaintiff, and from various senior civil servants on behalf of the Defendants. I have also been ably assisted by submissions from counsel, Mr James for the Plaintiff and Ms Dill for the Defendants, for which I am grateful.

Whether the Plaintiff was re-employed in the post of temporary Assistant Telecommunications Inspector on a full time or alternatively a part time basis

8. On 26th May 1996 the Plaintiff retired from the Bermuda Police Service, in which he held the rank of inspector. He had served in the police for more than 33 years. For more than 20 years he was assigned to the Police Radio and Telecommunications Department, where for a number of years he was officer in charge. Section 19(1)(a) of the 1981 Act provided that as he had contributed continuously to the Public Service Superannuation Fund ("the Fund") for more than 8 years, and had completed 25 years' service, he was entitled to a pension upon his retirement from public service. This was paid to him monthly.

9. On 1st July 1997 the Plaintiff was re-employed by the Government of Bermuda as an Assistant Telecommunications Inspector. This was a temporary relief appointment on a fixed term contract while the Department of Telecommunications sought a permanent employee. A temporary relief employee is an employee who is working for the Government in an established post that has not been filled on a permanent basis. The initial term of the contract was 3 months. But the appointment was renewed from time to time, with the result that the Plaintiff remained in the position for a number of years.

10. A crucial question is whether the Plaintiff's temporary employment was on a full time or alternatively a part time basis. This is because of the terms of section 25 of the 1981 Act. The section has since been amended. But the relevant part of the version that was in force while the Plaintiff was employed as an Assistant Telecommunications Inspector read as follows:

"*25 (1) If a pensioner is re-employed in the public service, his pension shall cease on his beginning to receive the salary of the office in which he is re-employed if such salary is equal to or greater than the salary of the office formerly held by him at the date of retirement from or ceasing to be employed in such former office; and if it is less than the salary of such former office, then no more of such pension shall be paid to him than that which, together with the salary of his new office, is equal to the salary of his former office.*

(2) Notwithstanding subsection (1) where a pensioner has been or is re-employed on a part time or casual basis because it is desirable in the public interest to have his service at the disposal of the Government or Government Board, payment of his pension shall not be suspended."

11. Section 2(2) of the 1981 Act provides that:

"*Reference to a person being re-employed on a part-time basis shall be construed as a reference to employment where the person gives personal service of at least twenty hours a week; and a reference to re-employment on*

a casual basis shall be construed as a reference to employment of an occasional nature."

12. The Plaintiff maintains that he was employed on a part time basis. His evidence was as follows. In the summer of 1997 he got a call from the Director of Telecommunications, Edward Pitman, who had worked with him previously, about a position. He came in and spoke to Mr Pitman about the prospect of being given a job on a part time basis. The issue of continued pension payments was discussed. Mr Pitman called him back and said that he could give him a job part time with his pension remaining. The Plaintiff understood this to mean that he would continue to receive his pension in full. The Plaintiff's evidence of this conversation was not directly challenged, although he accepted in cross-examination that the conversation was not documented.

13. The Plaintiff was not supplied with a written contract for his initial 3 month period of employment. But he was given a copy of an internal pro forma document headed "*Government of Bermuda Appointment/Change Form*" ("the Appointment Form"). The Appointment Form has been completed to show that the Plaintiff was to be paid weekly and employed on a part time basis. It is endorsed in manuscript with the remarks: "*Receives Government Pension / Do not deduct GEHI [Government Employee Health Insurance] / Pay wage 1/7 to 18/7.*" The Appointment Form, which was marked "*CC: AUDITOR*", was dated 18th July 1997 and signed by Mr Pitman. The Plaintiff relies on this document as further evidence that he was employed part time.

14. The Plaintiff continued to receive his pension in full until May 2000, 152 weeks after he took up his temporary appointment. He submits that this is consistent with his employment being part time.

15. The Defendants, on the other hand, maintain that while working as an Assistant Telecommunications Inspector the Plaintiff was at all material times employed on a full time, albeit temporary, basis. I heard evidence on this point from Gershon Gibbons. He is a Compensation and Benefits Manager in the Accountant General's Department and is responsible for the

proper administration of payroll for all Government employees. He stated that the Department's records show that throughout this period the Plaintiff worked full time hours, ie 35 hours a week, and was paid accordingly.

16. Mr Gibbons said that the statement in the Appointment Form that the Plaintiff was employed part time seemed therefore to be an error. He surmised that the error had come to light in May 2000 as the result of an annual internal audit, and that it had not come to light sooner because the auditors only audited a sample of payments made to employees each year.

17. The Plaintiff agreed that on average he worked a 35 hour week, but maintained that these hours were consistent with his position being treated as part time. This was because his terms and conditions were inferior to what they would have been if he had been employed on a permanent full time basis. Eg he was paid at a lower grade than that at which the permanent position had been advertised; he did not receive any annual increment in the value of his pension; he was not eligible to make further employee contributions, or receive further employer contributions, to his pension; and he lacked the job security which came with a permanent full time position.

18. As to the other entries on the Appointment Form, the Defendants submit that these take the matter no further. The Plaintiff was paid weekly because, as Mr Gibbons stated, he was a temporary relief employee, not because he was employed part time. The statement that he was in receipt of a pension was consistent with both full time and part time status: as a full time employee, he would have been entitled to continue to receive pension payments, but at a reduced level.

19. Although the Plaintiff's temporary appointment was renewed from time to time, I have only been referred to one written contract. This was dated 7th July 2000 and is expressed to cover the period 1st May 2000 to 31st October 2000. It is signed by a Personnel Manager, and endorsed in manuscript "*Originals / signed June 14th 2000 / by Hiram Edwards. / This copy to be / filed in Personnel file.*" The First Defendant has been unable to locate a copy signed by the Plaintiff. But in his affidavit the Plaintiff accepted that he received the contract. Indeed it is he who produced a copy to the court.

20. The contract states at paragraph 4, which is headed "*Hours of Work*": "*The normal hours of duty of full-time employees who work five (5) days per week Monday to Friday are thirty-five (35) hours …*" These are the hours that the Plaintiff had worked since he was re-employed in July 1997.

21. As the Plaintiff's normal hours of work throughout his re-employment as a temporary Assistant Telecommunications Inspector were 35 hours per week, and as 35 hours per week were the hours normally worked by full-time employees, I conclude that he was employed on a full time basis.

22. With effect from 1st October 2004, the Plaintiff was appointed Assistant Director – General Telecommunications Services. This was a full time position in which the Plaintiff's pay grade was higher than the pay grade on which he retired. He accepts that from that date, for the duration of his appointment, he was not entitled to any further pension payments. This is subject to his submissions about the amended section 25(1) of the 1981 Act.

Whether, if the Plaintiff was re-employed as a temporary Assistant Telecommunications Inspector on a full time basis, he nevertheless had a legitimate expectation that he would be treated as a part time employee for purposes of his pension rights

23. Further or alternatively, the Plaintiff submits that even if he was not in fact employed as a temporary Assistant Telecommunications Inspector on a part time basis, in the circumstances set out above he had a legitimate expectation that for purposes of his pension rights he would be treated as if he were.

24. Mr James, referred me to the decision of the Privy Council in Paponette v AG of Trinidad and Tobago [2012] 1 AC 1. The judgment was given by Sir John Dyson. The applicants were members of an association of taxi owners and operators. They had agreed to move from one taxi stand, which they controlled and managed, to another taxi stand – one that stood on land owned by a competitor. Their agreement followed receipt of certain assurances from the Government about the control and management of the

taxi stand to which they were moving. The Government later resiled from these assurances. The Privy Council held that the applicants had a substantive legitimate expectation that the assurances would be honoured.

25. I extract the following principles from the decision, which were in turn derived from earlier caselaw:

(1) Where a claim to a substantive legitimate expectation is based on a promise, that promise must be clear, unambiguous and devoid of relevant qualification. See Paponette at paragraphs 28 and 34.

(2) The promise must be lawful. See Paponette at paragraph 34. But see too the discussion below.

(3) The applicant need not have relied upon the promise to his detriment. But if he has relied upon it, that will be relevant when deciding whether the public authority should be permitted to resile from its promise. See Paponette at paragraph 28.

(4) Where the public authority seeks to resile from its promise, the test is whether to do so would be so unfair that it would be an abuse of power. See Paponette at paragraph 38.

(5) It is for the applicant to prove the legitimacy of his expectation and any reliance upon it to his detriment. See Paponette at paragraph 37.

(6) Once a legitimate expectation has been established, it is for the public authority to justify the frustration of the expectation. See Paponette at paragraph 37.

26. The requirement that the promise should be lawful was only touched upon in Paponette, as it was not an issue in that case. It received fuller consideration from the Court of Appeal of England and Wales in Rowland v Environment Agency [2005] Ch 1. The claimant owned land through which flowed a stretch of the River Thames. Her late husband had bought the land in the belief, derived in part from the behaviour of the defendant navigation authority responsible for the river, that the stretch of river was private.

Some years later, the navigation authority formed the view that in fact it was not. The claimant sought a declaration that the public did not have rights of navigation over the stretch of river and the defendant sought a declaration that the public did have such rights. The court at first instance granted the declarations sought by the defendant and the claimant appealed.

27. The Court of Appeal held that the words and actions of the defendant would have been sufficient to give rise to a legitimate expectation on the part of the claimant. But this was subject to the rule under English domestic law that a legitimate expectation can only arise on the basis of a lawful promise or practice whereas the defendant's words and actions had been ultra vires.

28. Lord Justice Peter Gibson at paragraph 67 cited with approval the following passage from the judgment of Mr Justice Lightman at first instance, from which neither of the other two Court of Appeal judges, Lord Justice May and Lord Justice Mance (as he then was), dissented:

"*... English domestic law imposes a constraint upon the applicability of the doctrine of legitimate expectation. For an expectation to be legitimate the party seeking to invoke it must show, amongst other things, 'that it lay within the powers of the ... authority both to make the representation and to fulfil it': per Schiemann LJ in R (Bibi) v Newham London Borough Council [2002] 1 WLR 237 , 249, para 46. A legitimate expectation can only arise on the basis of a lawful promise or practice: per Gibson LJ in R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115 , 1125. If the expectation relates to the exercise of a lawful discretion, e g to admit late claims, such an expectation may bind the public body to exercise its discretion in accordance with that expectation: see R v Inland Revenue Comrs, Ex p Unilever plc [1996] STC 681. But under English domestic law there can be no legitimate expectation that a public body will confer a substantive benefit or extinguish an obligation when it has no power to do so. This rule of law has been the subject of sustained academic criticism as conducive to injustice: see e g Craig, Administrative Law, 4th ed (1999), p 642 and Morgan & Hogan, Administrative Law in Ireland, 2nd ed (1991), p 863. But it remains the law.*"

29. The Court went on to consider the effect on the claim to a legitimate expectation of article 1 of Protocol 1 to the European Convention of Human Rights, which is headed "*Protection of property*":

"*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

30. The Court of Appeal, relying inter alia on the decision of the European Court of Human Rights in Stretch v United Kingdom (2003) 38 EHRR 196, found that the claimant's expectation was a "*possession*" within the meaning of article 1, notwithstanding that it arose from the defendant's ultra vires words and actions. Peaceful enjoyment of the expectation was therefore protected by article 1 unless the interference by the defendant with the expectation was justified and proportionate. The appeal was dismissed as the interference satisfied these criteria.

31. Article 1 is similar in scope to section 13 of Schedule 2 to the Bermuda Constitution Order 1968 ("the Constitution"), which is headed "*Protection from deprivation of property*":

"*(1) No 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 the following conditions [which are then set out] are satisfied, …*

(2) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section –

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right—

(i) in satisfaction of any tax, rate or due;

. . .

(iii) as an incident of a … contract; …"

32. By parity of reasoning with the caselaw on article 1, I would have thought that a legitimate expectation is "*property*" within the meaning of section 13 and therefore subject to the protection of that section. However the point was not argued before me and it is not necessary for me to decide it. Neither is it necessary for me to decide whether, in this particular case, the legitimate expectation that the Plaintiff asserts would be defeated by one of the provisos in section 13(2)(a)(i) or (iii) of the Constitution. This is because I am satisfied that he did not have a legitimate expectation.

33. On the Plaintiff's account, Mr Pitman told him that he would be employed part time and continue to receive his pension. The Appointment Form is consistent with this representation. There is therefore a discrepancy between what Mr Pitman is said to have told the Plaintiff, and the Appointment Form, on the one hand, and the Plaintiff's actual basis of employment, which was full time, on the other. This does not amount to a promise, still less one that was clear, unambiguous and devoid of relevant qualification, that the Plaintiff would be employed on a full time basis but be entitled to receive his pension as if he were employed part time.

34. I accept that the Plaintiff was paid his full pension for 152 weeks after he took up his temporary appointment. But this is not sufficient to give rise to a legitimate expectation that he was entitled to those payments, as the fact of the payments is consistent with the Defendants' case that they were made by mistake. It might have been otherwise if the Plaintiff had queried those payments with the Accountant General and they had continued nonetheless. But I have heard no evidence that he did.

Whether, subject to the Plaintiff's submissions with respect to the amended section 25(1) of the 1981 Act, the deductions made to the Plaintiff's pension while he was re-employed as a temporary Assistant Telecommunications Inspector were lawful

35. Mr Gibbons stated that in May 2000 the Accountant General decided to recover the alleged overpayments. From May 2000 until October 2004, when he was appointed to another position, the Plaintiff's pension was therefore subject to various deductions. From May 2000 until May 2001, there was a monthly deduction of $577.57, leaving $2,506.45. From June 2001 until June 2003 the payments were stopped altogether. From June 2003 until November 2003, there was a monthly deduction of $2,185.88, leaving $590.64. From December 2003 until October 2004 the pension was again stopped.

36. Mr Gibbons explained that the amount that should have been deducted from the pension fluctuated in accordance with increases in the current salary of the pay grade at which the Plaintiff retired and the Plaintiff's pension. Even so, it is not clear why the Accountant General's Department was not able to calculate what it considered an appropriate deduction, making allowance for these variables as and when they arose, and apply it consistently throughout this period.

37. On 19th May 2000 the Plaintiff contacted the Accountant General's Department about the pension deduction, and was told that it was in order to comply with the requirements of section 25 of the 1981 Act. On 7th June 2000 the Plaintiff wrote to the Accountant General's Department requesting the immediate reinstatement of the deducted amount. On 14th June 2000 the Accountant General's Department wrote back to say that they had acted on advice from the Attorney General's Chambers, but would request further clarification from them. On 27th June 2001 the Accountant General's Department again wrote to the Plaintiff. The letter stated that the Plaintiff had been overpaid by $91,655.58 and enclosed a copy of the calculation. It also stated:

"*Effective immediately, we will cease payment of your pension in an attempt to recover the overpaid funds. We will also have to work out an additional payment plan to ensure that the repayment period is equal to the period of time the funds were overpaid.*"

38. I was not referred to any statutory authority for the proposition that the repayment period must be equal to the period of time that the funds were overpaid.

39. In a memorandum to the Director of Telecommunications dated 19th September 2002, the Accountant General stated that a determination needed to be made by the Department of Telecommunications as to the Plaintiff's employment status, as this status would have various implications as to the pension payments that he would eventually receive. The options outlined in the memorandum were (i) to make no changes to the Plaintiff's employment status; (ii) change his employment status to part time, which was described as 20 hours a week or less, or casual; or (iii) hire him as a consultant. In the case of option (i) the Plaintiff's pension would be reduced in accordance with section 25(1) of the 1981 Act; in the case of options (ii) and (iii) it would not. Neither of the latter two options was pursued.

40. The Defendants submit that authority for making the pension deductions is to be found in section 12 of the Public Treasury (Administration and Payments) Act 1969 ("the 1969 Act"). This provides in material part:

"*(1) This section shall have effect with respect to the payment out of the Consolidated Fund of sums—*

. . .

(b) in respect of pension payable to any person under the Public Service Superannuation Act 1981 …

. . .

(4) Notwithstanding anything in the foregoing provisions of this section, where payment in respect of any of the matters specified in subsection (1) is made to any person in excess of the rate appropriate in the circumstances then (without prejudice to any other lawful remedy which may be taken by any person) the Accountant-General may withhold from the person to whom

the overpayment was made the payment in whole or in part of any sums falling to be paid to that person out of public funds until the amount of the payments withheld equals the amount originally overpaid to that person, …"

41. I agree that section 12 provided lawful authority for the Accountant General to make deductions from the Plaintiff's pension to recover the amount overpaid. But this did not absolve him from the public law duty of fairness. As Lord Mustill stated in R v Home Secretary, Ex p Doody [1994] 1 AC 531 at 560 E – F:

"*… where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. … Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.*"

42. The Accountant General was exercising an administrative power to interfere with the Plaintiff's statutory right to payment of a pension. Although the amount to be deducted was an arithmetical calculation, the decision whether to make a deduction and, if so, the amount to be repaid each month, was a matter for the Accountant General's discretion. The Accountant General should have given the Plaintiff an opportunity to make representations about these discretionary matters. His failure to do so meant that his decision to withhold pension payments which would otherwise have been due to the Plaintiff was made unlawfully.

Whether the amended version of section 25(1) of the 1981 Act applied to the Plaintiff

43. Section 25(1) of the 1981 Act was amended with effect from 14th September 2007 ("the amended section") to read as follows:

"*If a pensioner is re-employed in the public service, payment of his pension shall not be suspended when he is re-employed.*"

44. The Plaintiff submits that the amended section applies to any re-employed pensioner working in the public service on or after 14th September 2007, even if his re-employment commenced prior to that date, and provides that with effect from 14th September 2007 payment of his pension shall not be suspended. The Defendants submit that the amended section only applies to pensioners whose re-employment commenced on or after 14th September 2007.

45. Thus the Plaintiff submits that the amended section applies to him, and that, whatever the previous position, with effect from that date he was entitled to payment of his pension in full. The Defendants submit that the amended section does not apply to the Plaintiff.

46. The wording of the amended section is, at least at first sight, consistent with both interpretations.

47. The Defendants submit that the tense used in the section is what in Re Barretto [1994] 1 All ER 447 at 455, a decision of the Court of Appeal of England and Wales, Lord Justice Staughton described as the "*legislative present*":

"*Parliament does not say: a person shall be guilty of theft if he dishonestly appropriates property belonging to another with the intention permanently depriving the other of it. Parliament says a person is guilty of theft in those circumstances. Where the present tense is used it looks to the future.*"

Thus the Defendants submit that "*is re-employed*" means "*is in future re-employed*".

48. Alternatively, the Defendants submit that if the legislature had intended the section to have the meaning for which the Plaintiff contends, the section would simply have read:

"*If a pensioner is re-employed in the public service, payment of his pension shall not be suspended.*"

49. The Plaintiff, on the other hand, submits that if the words in the amended section are given their ordinary meaning, they are intended to convey the continuous present rather than the legislative present, ie that "*is re-employed*" means "*is presently re-employed*", and that the words "*when he is re-employed*" serve to emphasise this meaning. He further submits that, if the legislature had intended the section to have the meaning for which the Defendants contend, the section would have read something along the lines:

"*If a pensioner is re-employed in the public service, and his re-employment commences on or after the date on which this section comes into force, payment of his pension shall not be suspended*."

50. As to the meaning of "*when*", Ms Dill referred me to the definition in The Concise Oxford English Dictionary, Eleventh Edition, Revised. It can mean, among other things, "*at the time that*" or "*after which*", which would support the interpretation of the amended section for which the Defendants contend. But it can also mean "*during the time that*", which would support the interpretation of the amended section for which the Plaintiff contends. I conclude from the dictionary definition, which is in any case descriptive not prescriptive, that "*when*" can mean slightly different things in different contexts. That does not assist me in resolving its meaning in this particular case.

51. As the wording of the amended section is ambiguous, under the rule in Pepper v Hart [1993] AC 593, which was a decision of the House of Lords, I can properly have regard to Parliamentary material in order to construe the legislative intent. See the headnote at 594 C – D. But I was told that there is no record available of any relevant proceedings in the Legislative Assembly. I have not been referred to any Explanatory Memorandum for the 1981 Act and was told that although there is such a Memorandum it would not assist in the construction of the amended section.

52. Mr Gibbons gave evidence that he understood the purpose of the amended section was to make it attractive for Government employees who had retired at the age of 55 to come back and work in Government, thereby preventing the premature loss of their knowledge and experience. Or as Mr James colourfully put it: "*to stem the brain drain*". Although Mr Gibbons was not asked about the basis for his understanding, both counsel accepted that this was an accurate summary of at least part of the legislative intent, and I shall proceed on the assumption that it was.

53. However this does not assist me in construing the amended section, as such legislative intent would be consistent both with attracting new employees, which would favour the interpretation for which the Defendants contend, and retaining existing ones, which would favour the interpretation for which the Plaintiff contends.

54. The Defendants submit that the amended section should not be construed so as to have retrospective effect. I agree. See Bennion on Statutory Interpretation, Fifth Edition ("Bennion"), at page 315:

"*Unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation.*"

The amended section 25(1) would have retrospective operation if it applied to pension payments made prior to 14th September 2007. But the Plaintiff does not contend that it does. Thus the presumption against retrospective effect, while applicable, is of little assistance.

55. Perhaps the Court should look not only to the amended section but the amending Act. Section 25 of the 1981 Act was amended by section 8 of the Public Service Superannuation Act 2007 ("the 2007 Act"), which provided:

"*Section 25 of the principal Act is amended by repealing subsections (1) and (2) and substituting [the amended section]*."

56. There are no transitional provisions providing that the unamended section 25(1) should continue to apply to re-employed pensioners who were already in public service when the amended section 25(1) came into force. Does it

follow, then, that the unamended section simply ceased to have effect from the date of its repeal? If it does, then as of that date, the Accountant General ceased to have authority to make the deductions from the Plaintiff's pension that the unamended section had hitherto required.

57. The answer is not quite so straightforward. As Bennion states at page 314:

"*Where the Act fails to include [transitional] provisions expressly, the court is required to draw such inferences as to the intended transitional arrangements as, in the light of the interpretative criteria, it considers Parliament to have intended.*"

58. Nevertheless, in the present case the absence of transitional provisions tends to suggest that the legislature did not intend there to be any. There is no need, as the meaning of section 8 of the 2007 Act is clear on its face.

59. There are two further considerations which tend to support the Plaintiff's interpretation of the amended section 25(1). First, the principle against penalisation under a doubtful law. See Bennion at page 825:

"*It is a principle of legal policy that a person should not be penalised except under clear law … The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which penalises him or her in a way which was not made clear.*"

60. Applied to the facts of the instant case, the principle suggests that the ambiguity in the wording of the amended section 25(1) should be resolved so as not to penalise the Plaintiff by permitting his statutory pension rights to be interfered with in the way that they were interfered with by the unamended section 25(1).

61. The Plaintiff's case is further supported by the presumption that the legislature did not intend a construction that would produce an anomalous result, which is an example of the wider principle that the legislature intends

to act reasonably: the more anomalous, and hence unreasonable, the result, the less likely it is that the legislature would have intended it. See the speech of Lord Millet in the House of Lords in R v Central Valuation Officer [2003] 4 All ER 209 at paragraphs 116 and 117.

62. It would be anomalous if, from 14th September 2007, payment of the pension of a pensioner whose re-employment in the public service commenced on 13th September 2007 was subject to the deductions required by the unamended section 25(1), but payment of the pension of a pensioner whose re-employment in the public service commenced on 14th September 2007 was not subject to those deductions. The presumption against anomaly suggests that in the absence of a clear indication to the contrary, the legislature did not intend such an anomalous result.

63. I am satisfied in all the circumstances that from 14th September 2007 the amended section has applied to the Plaintiff at all material times during his re-employment in the public service. This is without prejudice to the Accountant General's powers under section 12 of the 1969 Act.

Whether the compulsory retirement age contained in section 22(2) of the 1981 Act applied to the Plaintiff

64. Section 22 of the 1981 Act is headed "*Age of compulsory retirement*". Section 22(2) provides:

"*(2) Any other contributor, except where expressly otherwise provided by any provision of law, shall retire from the public service on attaining the age of sixty-five years:*

Provided that having regard to the conditions of the public service, the usefulness of such contributor thereto, and all other circumstances of the case, it is desirable in the public interest that the service of any such contributor should be retained, he may be permitted by the Head of the Civil Service to continue in the public service until a later age, not exceeding the age of seventy years."

65. "*Any other contributor*" is a reference to section 22(1) of the 1981 Act, which provides a compulsory retirement age of 55 years for the lower ranks in the Police, Fire and Prison Services. It was by reason of this sub-section that the Plaintiff was required to retire from the Bermuda Police Service.

66. "*Contributor*" is defined at section 2(2) of the 1981 Act as meaning:

> "*a person over the age of 18 years or over who contributes or has contributed to the Fund pursuant to this Act*"

It was by reason of having made such contributions that the Plaintiff was entitled to receive a pension under the Act.

67. The Plaintiff reached the age of 65 years on 17th February 2010. He sought and was granted permission to remain in public service for a further year until 17th February 2011. A further extension of one year until 17th February 2012 was also sought and granted. However the Head of the Civil Service declined to grant a further extension until 17th February 2013.

68. The Plaintiff submits that as he contributed to the Fund in his capacity as a police officer, he is not covered by the term "*any other contributor*" in section 22(2). He submits that, as a re-employed pensioner in the public service other than the Police, Fire or Prison Services, he was not subject to any maximum retirement age. True it is that section 82(1) of the Constitution provides that power "*to remove or exercise disciplinary control over*" persons holding public office is vested in the Governor acting in accordance with the recommendation of the Public Service Commission. But the power of removal must be understood as meaning "*remove for reasonable cause*": see the opinion of the Privy Council, which was delivered by Lord Diplock, in Thomas v Attorney-General (1981) 32 WIR 375 at 384j. In the present case, no such reasonable cause, other than the Plaintiff having reached the age of 65 years, was shown or suggested.

69. The Defendants submit that the Plaintiff has misconstrued section 22(2). The Plaintiff was a contributor because he had previously contributed to the

Fund. Section 22(2) did not require that any of those contributions were made by the contributor in the post that he held when he reached the age of 65 years. The Plaintiff had to retire when he reached that age, subject to the proviso in the second paragraph of section 22(2), because he held a position in the public service.

70. I agree with the Defendants. It would be a surprising anomaly if a public servant who had spent his entire professional life working in the Department of Telecommunications was subject to a compulsory retirement age of 65 years, but the Plaintiff, a former police officer who had been subject to a compulsory retirement age of 55 years but was subsequently appointed to a position in the Department, was not. I am satisfied that that is not what the legislature intended.

71. The Plaintiff complains that in breach of natural justice he did not have the opportunity to make representations about whether he should be permitted a further extension until 17th February 2013. But he had that opportunity in the memorandum that he would have submitted when applying for a further extension. I am therefore satisfied that there is no substance to this complaint.

Whether the Permanent Secretary acted lawfully in revoking or purporting to revoke the Plaintiff's appointment as Acting Director of Telecommunications

72. The Plaintiff was appointed Acting Director of Telecommunications for the period 5th January 2011 to 31st March 2011. The appointment, which was gazetted on 1st December 2010, was made by the Secretary to the Cabinet on the recommendation of the Permanent Secretary, Dr Derek Binns.

73. Dr Binns gave evidence that he was assigned to the Ministry of Environment Planning and Infrastructure Strategy in November 2010. One of the first things he did was to request an overview of the current status of the Ministry Departments. From this overview, he ascertained that the post of Director of Telecommunications was vacant and that the Plaintiff had, prior to his (ie Dr

Binns') arrival, acted in that position. That is why he recommended the Plaintiff for the Acting Appointment.

74. The recommendation was made on a form headed "*Application for approval to make an acting/deputizing appointment*". Under the heading "*Period of time the acting/deputizing appointment is required for*", the form was completed to show the "*commencing on*" date, 5th January 2011, and the "*concluding on*" date, 31st March 2011. Dr Binns signed and dated the form 24th November 2010.

75. On 18th November 2010, Dr Binns received an email from the Plaintiff advising him that the Department had overspent its budget for the fiscal year 2010 – 11 by $276,213. On 30th November 2010 he met with the Plaintiff and the Ministry Comptroller to discuss the overspend.

76. Dr Binns asked the Plaintiff to put a fuller explanation in writing, which the Plaintiff did in a memorandum dated 1st December 2010. On 5th December 2010 he sent the Plaintiff an email thanking him for his email but stating that the explanation did not satisfy him that the matter had been well managed and requesting further information.

77. Dr Binns also met with the Plaintiff to discuss the Plaintiff's memorandum. He advised him that he was not satisfied with his explanation, as it suggested that as Acting Director he had failed to ensure the proper and necessary stewardship of the Department's funding. Dr Binns also stated that he considered this to be an extremely serious failure in performance and responsibility, which required an equally serious response.

78. On 12th January 2011 Dr Binns consulted the Director of Human Resources, Carlita O'Brien, who also gave evidence. He told her that he no longer had confidence in the Plaintiff's ability to serve as Acting Director. She advised him that no employee had a right to an acting appointment. She said that, in order to terminate the Plaintiff's acting appointment, Dr Binns had simply to amend the form in which he had requested the appointment by crossing out the "*concluding on*" date and inserting a new one. He did so, deleting 31st March 2011 and inserting 21st January 2011.

79. On or about 13th January 2011 Dr Binns met with the Plaintiff and told him of his decision to terminate his acting appointment due to the serious financial crisis that his actions had caused.

80. As Acting Director, the Plaintiff was paid an allowance on top of his salary as Assistant Director. The Accountant General did not receive notice of revocation of the Plaintiff's appointment as Acting Director, and continued to pay him the allowance until 31st March 2011, when the Acting Appointment was originally due to have come to an end. I understand that the overpayment was subsequently recovered by way of monthly deductions from the Plaintiff's salary, starting in July 2011.

81. The authority for recovering the allowance was section 12(4) of the 1969 Act, which is set out earlier in this judgment. By reason of section 12(1)(a), this applies to, among other things:

"*...special allowances ... payable ... to a person appointed to act temporarily in any established or non-established office.*"

82. The statutory background to the Acting Appointment was as follows.

83. Section 82(1) of the Constitution provides that:

"*power to make appointments to public offices, and to remove or exercise disciplinary control over persons holding or acting in such offices is vested in the Governor acting in accordance with the recommendation of the Public Service Commission.*"

84. Section 83(1) of the Constitution provides that:

"*The Governor ... may by regulations delegate ... the powers vested in him by section 82 of this Constitution ... to such public officers as may be so specified.*"

85. Regulation 3 of the Public Service (Delegation of Powers) Regulations 2001 ("the 2001 Regulations") read in conjunction with paragraph 8 of the Schedule thereto provides that the power to make acting appointments to any

office, which is vested in the Governor by reason of section 82 of the Constitution, is delegated to the Head of the Civil Service.

86. Paragraph 3.5 of the Government of Bermuda Conditions of Employment and Code of Conduct ("the Code") is headed "*Acting and Deputizing Appointments*". Paragraph 3.5.2 provides:

"*The following guidelines will be considered by Permanent Secretaries and Heads of Department when determining if an acting or deputizing appointment should be made:*

. . . . .

(g) Requests for acting or deputizing appointments must be forwarded to the Head of the Civil Service for consideration by a member of the Civil Service Executive at least one week in advance of the proposed acting or deputizing appointment."

87. Regulation 4A of the 2001 Regulations provides that:

"*The Head of the Civil Service may designate an Assistant Cabinet Secretary to perform any of his functions under these Regulations*".

88. In Junos v Minister of Tourism and Transport [2009] Bda LR 26 at paragraph 31, Mr Justice Kawaley (as he then was) stated:

> "*… the Code's provisions are as much subsidiary legislation as the [2001] Regulations themselves because (a) the Regulations state that the Code and the Regulations should, where permissible, be read as one, and (b) the Code itself is made by the Governor, who is empowered to make regulations under the Constitution.*"

89. The statutory scheme for the appointment of an acting Head of Department is thus that the Permanent Secretary or Head of Department forwards the request for such appointment to the Head of the Civil Service for consideration by a member of the Civil Service Executive. The appointment is made by the Head of the Civil Service, who may delegate the power of appointment to an Assistant Cabinet Secretary.

90. Section 22 of the Interpretation Act 1951 provides in material part:

"*Where by or under any Act any public authority is empowered to appoint a person to any public office then the public authority, unless the contrary intention appears, may remove or suspend any person so appointed, …*"

91. It follows that in delegating the power to make an Acting Appointment, the Governor was also delegating power to revoke one. He has not delegated a power to revoke an Acting Appointment to anyone else. Thus power to revoke an Acting Appointment is limited to those who have power to make one.

92. I have considered whether, as the Defendants submit, a Permanent Secretary nonetheless has an implied delegated authority to terminate an Acting Appointment. This would be on the basis that the Head of the Civil Service would be unlikely to have first hand knowledge of a candidate's suitability for an Acting Appointment. Thus, if the Head of the Civil Service was satisfied that an Acting Appointment should be made, he would be likely to rely on the Permanent Secretary's recommendation as to who should fill it, and, if the appointment didn't work out, as to whether the appointee should be replaced by someone else.

93. Once the Head of the Civil Service has decided to authorise an Acting Appointment, it is submitted, his approval of the identity of the appointee is therefore merely a formality. Thus the Governor must have intended that the termination of an Acting Appointment and the substitution of another Acting Appointee can be made by a Permanent Secretary.

94. I can see the good sense in such an arrangement. However the 2001 Regulations read in conjunction with the Code provide for the delegation by the Governor of the powers vested in him by section 82 of the Constitution in a way that is detailed and comprehensive. This statutory scheme leaves no room for any further, implied, delegation of the Governor's powers.

95. I therefore agree with the Plaintiff that Dr Binns had no authority to revoke the Plaintiff's Acting Appointment and was therefore acting ultra vires when

purporting to do so. The Plaintiff was therefore entitled to payment of an acting allowance for the full term of the Acting Appointment.

96. This finding implies no criticism of Dr Binns. Paragraph 3.5.3 of the Code provides that:

"*Questions or clarification on acting or deputizing appointments should be directed to the Department of Personnel Services.*"

Dr Binns acted in accordance with this provision: he sought the advice of the Director of Human Resources and acted on that advice. His conduct in this respect was irreproachable.

97. I would have thought that it would be open to the Head of the Civil Service to ratify the revocation of the Plaintiff's Acting Appointment and I have no reason to doubt that he would do so. This would have the result that the Plaintiff's entitlement to an acting allowance would have ceased with effect from 21st January 2011. However as I did not hear argument on this point I make no findings on it.

98. The Plaintiff further submits that Dr Binns did not give him a fair hearing with respect to the termination of the Acting Appointment. I disagree. In Ex parte Doody, Lord Mustill stated at 560 E:

"*The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.*"

The Plaintiff was given ample opportunity to explain the overspend and was told that Dr Binns regarded this as an extremely serious failure of performance which required an equally serious consequence. This was sufficient to satisfy the demands of fairness.

Summary

99. The issues that were identified at the start of this judgment are resolved thus.

(1) The Plaintiff was re-employed in the post of temporary Assistant Telecommunications Inspector on a full time basis.

(2) The Plaintiff did not have a legitimate expectation that he would be treated as a part time employee for purposes of his pension rights.

(3) Section 12 of the 1969 Act provided lawful authority for deductions to be made from the Plaintiff's pension to recover the amount of pension overpaid to him while he was re-employed as a temporary Assistant Telecommunications Inspector. However those deductions were made unlawfully in that the Plaintiff was not given an opportunity to make representations about whether and at what rate they should have been made.

(4) The amended version of section 25(1) of the 1981 Act did apply to the Plaintiff from 14th September 2007 until the termination of his employment in the public service. Any deductions to his pension made pursuant to the unamended version of section 25(1) of the 1981 Act on or after that date were therefore unlawful. This is without prejudice to the powers of the Accountant General under section 12 of the 1969 Act.

(5) The compulsory retirement age contained in section 22(2) of the 1981 Act did apply to the Plaintiff.

(6) The purported revocation of the Plaintiff's appointment as Acting Director of Telecommunications was ultra vires. The Plaintiff was therefore entitled to payment of an allowance in respect of that post until 31st March 2011, ie for the duration of the period for which his Acting Appointment was initially authorised.

Declaratory relief

100. Jurisdiction to grant declaratory relief is conferred by Order 15, rule 16 of the Rules of the Supreme Court 1985 ("RSC"), which provides:

"*the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.*"

101. The applicable principles were summarised by Lord Justice Aikens in the Court of Appeal of England and Wales in Rolls Royce v Unite the Union [2010] 1 WLR 318 at paragraph 120. They include:

(1) The power of the court to grant declaratory relief is discretionary.

(2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.

(3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.

(4) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue.

102. There is no requirement that an application for declaratory relief should only be granted if there are no other adequate means of redress available. The Defendants submitted that there was such a requirement, based on the decision of this Court in Logic Communications Ltd v Minister of Telecommunications and TeleBermuda International Ltd [2000] Bda LR 23. However that decision appeared to conflate the test for granting declaratory relief with the test for permission to bring judicial review proceedings, whereas the tests are not only separate and distinct but different. The case

went to the Court of Appeal, but that Court did not consider the test for declaratory relief.

103. When considering an application for declaratory relief, the Court must be astute to ensure that it is not used as a device to circumvent any relevant limitation periods. For instance, the Plaintiff has argued his application on a public law footing as in substance an application for judicial review. RSC Order 53, rule 4(1) provides:

"*An application for leave to apply for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.*"

I shall bear this in mind when exercising my discretion.

104. The Plaintiff has succeeded in whole or in part on issues 3, 4 and 6.

105. I decline to grant a declaration as to issue 3. There has been inordinate delay by the Plaintiff in bringing proceedings on this issue and the unlawfulness involved is personal to the Plaintiff and raises no question of general public importance.

106. I shall grant a declaration as to issue 4 in terms of paragraph 99(4) above. Although the Plaintiff has delayed for more than 5 years in bringing proceedings on this issue, the decision that the amended section 25(1) did not apply to him continued to affect him for the remainder of his re-employment in the public service. Moreover, the issue is one of general public importance. In any event, the Plaintiff could have argued his case on a contractual basis, and he did bring these proceedings within the 6 year limitation period for an action for breach of contract. In all the circumstances I am satisfied that a declaration is an appropriate form of relief.

107. I shall grant a declaration as to issue 6 in terms of paragraph 99(6) above. The Plaintiff brought an application promptly with respect to this issue and I

am satisfied that a declaration is an apt remedy. Given the prospect of ratification, such declaration may, however, prove a hollow victory.

108. I shall hear the parties as to costs.

Dated this 5th day of April, 2013 _____

Hellman J