



2. On 26 May 1996, the appellant retired from the Bermuda Police Service as an inspector having served over 33 years. His service ended as Officer in Charge of the Police Radio and Telecommunications Department. He was entitled to a pension which was paid monthly under the Public Service Superannuation Act 1981 ("the 1981 Act"). On 1 July 1997 he was re-employed by the Government of Bermuda as an Assistant Telecommunications Inspector. This was a temporary appointment, initially for a period of 3 months but it was renewed from time to time and he remained in the position for a number of years. As a temporary relief employee he was working for the Government in an established post that had not been filled on a permanent basis. The judge found he was employed on a full time rather than a part time basis. The consequence under section 25(1) of the 1981 Act was that if his salary was equal to or greater than his salary from the police immediately before he retired, his pension ceased and if it was less than the salary in his former office his pension was restricted, so that together with his new salary he was pegged to the limit of the salary in his former office. Section 25(2) creates an exception for those employed on a part time basis and the appellant contended that he was employed on a part time basis. The appellant's next argument, on which he again failed before the judge, was that, if employed on a full time basis, he nevertheless had a legitimate expectation that he would be treated as a part time employee for the purposes of his pension rights and that Section 25(2) of the 1981 Act would be applied to him.
  
3. In the event the appellant was, in error, paid his full pension until May 2000, 152 weeks after he took up his full time, but temporary, appointment. With effect from 1 October 2004 he was appointed Assistant Director General Telecommunications Services which he did not dispute was a full time position. As his pay grade was higher than that on which he retired from the police, section 25(1) of the 1981 Act applied.

4. In May 2000 the Accountant-General decided to recover the overpayments that his department had mistakenly made. He relied on Section 12 of the Public Treasury (Administration and Payments) Act 1969 (“the 1969 Act”). The material parts of this Section provide:

“(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, .....

The Accountant-General did this by monthly deductions from the appellant’s pension as follows:

- From May 2000 – May 2001 \$557.57 per month.
- From June 2001 – June 2003 he was paid no pension at all.
- From June 2003 – November 2003 \$2185.88 per month.
- From December 2003 – October 2004 he was again paid no pension.

The judge stated it was unclear why the Accountant-General’s Department was unable to calculate an appropriate ongoing deduction taking account of salary increases etc.

5. There was correspondence between the appellant and the Accountant-General’s Department to which it is unnecessary to refer. The Judge accepted that Section 12 of the 1969 Act provided lawful authority for the Accountant-General to make deductions from the appellant’s pension to recover the

amount overpaid. But he held, following Lord Mustill in *R v The Home Secretary Ex parte Doody* [1994] 1 AC 531, 560 E-F that this did not absolve him from the duty of fairness.

6. The Accountant-General was exercising an administrative power to interfere with the appellant'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 appellant an opportunity to make representations against this discretionary decision. His failure to do so meant that his decision to withhold pension payments, which would otherwise have been due to the appellant, was made unlawfully. Against this decision there is no appeal by the Accountant-General. The appellant's first ground of appeal is that notwithstanding this conclusion, the judge refused to grant a declaration that the Accountant-General had acted unlawfully. In consequence he is unable to recover the unlawfully deducted sums.

7. Before considering the first ground of appeal it is necessary to continue with the chronological story. Section 25(1) of the 1981 Act was amended to read:

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

The amendment came into effect on 14 September 2007. The issue was whether the amendment applied to the appellant. It was one of statutory construction and the judge held that it did concluding:

"I am satisfied in all the circumstances that from September 2007 the amended section has applied to (the appellant) 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."

Again, this conclusion is not the subject of appeal.

8. On 17 February 2010 the appellant became 65. He sought and was granted permission to remain in public service for a further year until 17 February 2011 and then a further year until 17 February 2012. However, the Head of the Civil Service refused to grant a further extension until 17 February 2013. This decision, upheld by the judge, gives rise to the second ground of appeal. The respondents argued that the compulsory retirement age of 65 in Section 22(2) of the 1981 Act does not apply to him and that he has no compulsory retiring age. The outcome of this issue, which is one of statutory construction, turns on the true meaning of Section 22 of the 1981 Act. I shall return to this when I consider the two grounds of appeal.
  
9. The final issue before the judge, again not the subject of appeal, was whether the Permanent Secretary acted lawfully in revoking or purporting to revoke the appellant's appointment as Acting Director of Telecommunications. The appellant was appointed Acting Director of Telecommunications for the period 5 January 2011 to 31 March 2011. On 12 January 2011 Dr. Binns, the Permanent Secretary, purported to revoke the appointment as from 21 January 2011. The judge held, for reasons that I need not go into, that the Permanent Secretary had no power to revoke the appointment and therefore the appellant was entitled to an acting allowance for the full term of the acting appointment.

*Ground One – The Judge's Refusal to Grant a Declaration*

10. The judge found that Section 12 of the 1969 Act gave lawful authority for deductions to be made from the appellant's pension to recover the amount of pension overpaid to him while he was re-employed as a Temporary Assistant Telecommunications Inspector but that the deductions had been made unlawfully because the appellant was not given an opportunity to make representations whether, and if so, at what rate, they should have been made. It will be appreciated that Section 12 of 1969 Act gives a power to the Accountant-General to withhold payment; it does not impose a duty to do so. Having found that the Accountant-General had acted unlawfully the judge

refused, in the exercise of his discretion, to grant the appellant the declaratory relief sought. The relief sought is set out in the amended originating summons namely a declaration that:

“It was unlawful for the (Minister of Finance) to simultaneously stop the (Appellant’s) pension and by instalment withdrawals from his wages set about to take back from him the sum of \$91,655.58 as purported overpayment under (Section 25(1) of the 1981 Act) as opposed to the (appellant’s) affidavit in exhibit HE3.”

The terms of this declaration obviously require redrafting. In particular it is common ground that deductions were in all instances made against pension payments. Further, there is no agreement as to the sum of \$91,655.58.

11. The appellant proceeded initially by originating summons, claiming, inter alia, breach of constitutional rights. Following objection that it was inappropriate to bring proceedings for breach of constitutional rights when there was an alternative remedy, the appellant amended his originating summons deleting all reference to breach of constitutional rights. A defence was filed but nothing was said about delay or limitation.
12. The Judge correctly directed himself as to the power to grant declaratory relief and that he had to exercise his discretion. He then said this:

“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 (appellant) has argued his application on a public law footing as in substance an application for judicial review.”

He then referred to RSC Ord 53 Rule 4(1) which he said he would bear in mind when exercising his discretion. He concluded that there had been inordinate delay by the appellant in bringing proceedings on this issue and that the unlawfulness involved was personal to the appellant and raised no question of general public importance. Accordingly he would not grant a declaration.

13. In the first place the appellant had not made an application for judicial review. Had he done so he would have required leave and any time issues would have been considered at the leave stage. Secondly, the judge's decision that there had been inordinate delay came as a surprise to both sides. No issue of delay or limitation had been raised on the pleadings or in argument and the judge did not raise the subject so as to give the parties an opportunity to deal with it. Nor was any point taken that there was acquiescence or waiver on part of the appellant. Ms. Dill, for the respondents, relies on the judge's inherent jurisdiction, but I cannot accept that he was entitled to decide this point against the appellant when it was not pleaded, argued or raised with the parties. In these circumstances he should have not made a finding of inordinate delay on part of the appellant and he should have granted a declaration to give teeth to his finding that the Accountant-General had made unlawful deductions from the appellant's pension. In short neither delay nor limitation was an issue before the Judge. On this issue I would allow the appeal and grant a declaration that:

"The first respondent unlawfully deducted payments from the appellant's pension under Section 12 of the 1969 Act between May 2000 and May 2004 in a total sum to be agreed between the parties or in default of agreement to be determined by the trial judge."

#### *Ground Two – Retirement Age*

14. The second ground of appeal turns on the true construction of Section 22 of 1981 Act. The section is headed "Age of Compulsory Retirement."

Section 22(1) provides:

"A contributor being a police officer or a fire officer below the rank of Superintendent or Divisional Officer as the case may be, or a prison officer below the rank of Deputy Commissioner shall retire from the public service on attaining the age of fifty-five years or a contributor being a member of the Bermuda Regiment staff shall retire from the Regiment on attaining the age prescribed by the Bermuda Regiment Governor's Orders 1993."

Then there is a proviso allowing extensions to the age of 60 in certain circumstances.

Section 22(1A) concerns teachers.

Section 22(2) provides:

“Any other contributor, except where expressly otherwise provided by any provision of law, shall retire from the public service on obtaining the age of sixty-five years.”

Again there is a proviso allowing extensions, on this occasion up to age 70.

15. Mr. James, who has appeared for the appellant, argues that the appellant is covered by Section 22(1) as he was a police officer until he retired in 1996. As he is a contributor within the meaning of that subsection he cannot, he submits, be “any other contributor” under subsection (2) and therefore is not caught by the 65 year age provision for retirement of public servants in that subsection. The judge was unimpressed by this argument pointing out it would be a surprising anomaly if a public servant who had spent his entire professional life in the Department of Telecommunications was subject to a compulsory retirement age of 65 years but the appellant, 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, and he was satisfied it was not what the legislation intended.
16. In my judgment Mr. James’ construction is wrong. Section 22(1) applies to a “contributor being a police officer.” The words “being a police officer” qualify “contributor.” A person who has been, but no longer is a police officer such as the appellant is not among those contributors to whom the subsection applies. That seems to me to bring the appellant squarely in the definition of “any other contributor” in subsection 22(2). All those within that category have to retire from public service on obtaining the age of 65, subject to being permitted an extension up to age not exceeding 70.



17. A contributor is defined in Section 2(1) of the 1981 Act as :

“A person of the age of 18 years or over who contribute or who has contributed to the fund pursuant to this Act.”

Once a person receives a pension he cannot contribute to the fund again. The appellant falls within the definition of contributor because he contributed to the fund when he was a policeman.

18. If the appellant is correct he has no compulsory retirement age but it is interesting to look at what occurred. His contract provided for a minimum period of 3 months notice. Before he reached his 65<sup>th</sup> birthday on 17 February 2010 he sent a memorandum seeking a year's extension. He did so again in the following years and was granted a second but was refused a third extension. In making these applications he relied on the proviso to Section 22(2) and two of the extensions were indeed granted on this basis. Even if, which in my view is plainly not the case, the compulsory retirement age provision did not apply to the appellant there would be no obligation to continue to employ him. He was initially on 3 months' notice and was then granted two annual extensions. When the second extension came to an end his contract of employment ceased. I would dismiss the second ground of appeal.



Baker, JA

I agree

  
Zacca, P

I agree

  
Evans, JA