

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. M63 OF 1979

ORIGINATING SUMMONS

IN THE MATTER of the Judiciary Act.

A N D

IN THE MATTER of the Retiring Benefits
of MR. JUSTICE WILLIAM H. SWABY
(Retired).

BETWEEN	MR. JUSTICE WILLIAM H. SWABY (Retired)	PLAINTIFF
AND	THE PERMANENT SECRETARY MINISTRY OF THE PUBLIC SERVICE	FIRST DEFENDANT
AND	THE ATTORNEY GENERAL FOR JAMAICA	SECOND DEFENDANT

Dr. L. Barnett and Dr. Adolph Edwards for the Plaintiff.

R. G. Langrin and P. A. Sobers for the Defendants.

Heard on: June 15, 16 and 19, 1981.

JUDGMENT

CAMPBELL J.

The plaintiff is a retired judge of the Court of Appeal for Jamaica. He was appointed a judge of the said Court on November 19, 1973, after having acted for a short time in that office immediately preceding his substantive appointment. At the time of his appointment to act, he had been on retirement for some seven years, from the public service. He had been holding the office of Director of Public Prosecutions at the date of his retirement in August, 1966. He had been granted a commuted pension gratuity and a reduced pension under the Pensions Act in respect of his public service from which he had retired in 1966.

The plaintiff served in the office of judge as defined in the Judiciary Act until his retirement at the age of 67 on July 16, 1977. He thus retired in pensionable circumstances under Section 5(3) of the Judiciary Act.

Section 5 of the Act other than Subsection 3 in so far as the section is relevant to these proceedings reads as follows:

- " Section 5(1) where a person retires in pensionable circumstances from an office to which this Act applies he shall subject to Subsection (2) be paid a pension and gratuity in accordance with this Act in lieu of any pension, allowance or gratuity for which he may have been eligible, or which he may have been granted, pursuant to the Pensions Act.
- (2) If the pension and gratuity to which a person is entitled pursuant to this Act is less than the pension and gratuity for which he would have been eligible or which he was granted pursuant to the Pensions Act, that person may elect to retain his entitlement under the Pensions Act and forego his entitlement under this Act".

Section 6 of the Act in so far as the same is relevant is as hereunder:

- " 6 -(1) The rate of pension payable pursuant to Subsection (1) of Section 5 shall, in the circumstances set out in the first column of the First Schedule, be the annual rate prescribed in relation thereto in the second column of the Schedule.
- (2) For the purposes of Subsection (1) and the First Schedule -
- (a)
- (b)
- (c) Where a period of public service by any person is not continuous with his service as a judge the Governor-General may, in such cases as he thinks fit, determine that that person shall be deemed to have had public service which together with his service as a judge constitutes continuous service".

Without the exercise of the discretion vested in the Governor-General in favour of the plaintiff under Section 6(2)(c) above, the rate of pension under the First Schedule applicable to him would be the rate applicable to a person who had no previous public service immediately prior to and continuous with his office as a judge under the Act. He would however be entitled as of right to a pension under the Act. Whether in the special circumstances of the plaintiff, he is entitled to the enjoyment of this right in addition to and not "in lieu of any pension allowance or gratuity which he may have been granted under the Pensions Act" is a fundamental issue which calls for determination by me.

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The plaintiff by letter dated April 14, 1977 requested the exercise in his favour, by the Governor-General, of the latter's discretion under Section 6(2)(c) of the Act to the intent that his previous public service as Director of Public Prosecutions may be deemed continuous with his service as a judge.

This request was to enable the plaintiff to enjoy pension under the Judiciary Act at a higher annual rate than that to which he would otherwise be entitled. The Governor-General duly exercised the discretion vested in him in favour of the plaintiff so that his previous public service was deemed continuous with his service as a judge for purposes of Section 6(1) of the Act, that is to say for the purpose of determining the annual rate of pension appropriate to him.

The defendants in their memorandum dated February 28, 1978, recommending to the Governor-General the exercise by him of his discretion in favour of the plaintiff wrote, in so far as the same is relevant, as follows:

" 4. The Law Officers who have been consulted on the matter have advised that there is no legal objection to the Governor-General exercising his discretion in Mr. Swaby's favour on the understanding that Mr. Swaby refunds the benefits he has already received under the Pensions Act in respect of his previous service. This would be necessary in order to meet the provisions of Section 5 of the Judiciary Act which provides that any pension granted under that Act shall be in lieu of any pension for which the recipient may have been eligible or may have been granted under the Pensions Act.

5. On the question whether Mr. Swaby's case is a proper one in which the Governor-General should exercise a discretion in his favour, having regard to the lapse of time between his retirement in 1966 and the date he was appointed a judge in 1973, the Law Officers have advised as follows:

' This is for the Governor-General to decide and there are no legal objections to the Governor-General exercising his discretion in Mr. Swaby's favour'.

6. The Ministry of the Public Service considers that since Mr. Swaby's application can be legally entertained His Excellency should be asked to exercise his discretion in the applicant's favour. However it will be necessary to develop certain general criteria for dealing with future cases of this nature".

In response to the defendants' memorandum the Governor-General wrote thereon on March 13, 1978, insofar as is relevant, the following:

" The important point is whether, I should exercise my discretion in Mr. Swaby's favour taking into consideration that he was first retired in 1966 and then re-appointed as judge in 1973. There is no criteria, no precedence on which to base my discretion. This should be looked at because future cases of a similar nature may arise. I exercise my discretion in favour of Mr. Swaby in accordance with paragraph 4 of minute of February 28, 1978".

Subsequent to this, on October 6, 1978, the first defendant wrote to the Accountant General instructing him to arrange for payment to the plaintiff of his retiring benefits under the Judiciary Act namely a commuted pension gratuity and a reduced pension at the appropriate annual rate resulting from the exercise in his favour by the Governor-General of the latter's discretion. The Accountant General was however directed to recover from such retiring benefits the commuted pension gratuity and the total reduced pension which the plaintiff had received from August 20, 1966, under the Pensions Act.

It is as a result of this directive to the Accountant General by the first defendant based on the legal advice given to him by the second defendant that the herein Originating Summons was taken out seeking the determination of the following questions namely:

- (1) Is a person who had previously retired from the Public Service and had received a pension (not as a judge) under the Pensions Act, and who subsequently to the commencement of the Judiciary Act retires as a judge entitled to the retiring benefits provided under the Judiciary Act.
- (2) Where the Governor General exercises his discretion under Section 6(2)(c) of the Judiciary Act so as to deem the prior service of a person as a member of a Public Service as continuous service with the service of that person as a judge, can conditions requiring him to forfeit his pension or retiring benefits as a Public Officer under the Pensions Act be legally or validly imposed.

- (3) Do Section 5 - 7 of the Judiciary Act or any provisions thereof require a person who had been awarded a pension under the Pensions Act (not as a judge) on retirement from the Public Service, to refund or bring into account the whole or any part of that pension on his becoming eligible for or being granted a pension under Section 5 and Section 6(2)(c) of the Judiciary Act and item 2 of the First Schedule thereto.

The plaintiff anticipating a determination of the above questions in his favour seeks an order declaring that he is entitled to receive the retiring benefits under Sections 5 and 6(2)(c) of the Judiciary Act and item 2 of the First Schedule thereto without having to:

- (a) Refund any amounts previously received under the Pensions Act; or
- (b) to have his eligibility or retiring benefits under the Pensions Act forfeited or rescinded.

The first question posed in the Originating Summons has already been answered by me in the affirmative.

Section 5 of the Judiciary Act expressly provides that a person retiring as a judge in any of the circumstances mentioned in Subsection 3 is entitled to a pension at the appropriate annual rate prescribed by Section 6(1) and the First Schedule to the Act. The Section is not limited to persons who were never in the enjoyment of retiring benefit under the Pensions Act derived from previous public service.

The third question posed is pertinent to the first because it raises the issue whether the person in relation to whom the affirmative answer is given on the first question, takes his undoubted entitlement under Section 5 free of any conditions so to speak.

The question is put thus by Mr. Langrin namely "whether a person who retires from the public service, having received pension and gratuity and after such retirement, is appointed a Supreme Court Judge or a Judge of the Court of Appeal and whose period of service as a public officer is linked to the period of his service as a judge is entitled to retain all retiring benefits under the Pensions Act and to receive in

addition, retiring benefits under the Judiciary Act".

I do not think the question is felicitously framed because, as framed, it comprehends the question as one which arises only where previous public service is deemed continuous with service in the office of judge. This is certainly not the case. In fact the question arises quite independently of any linking of service under Section 6(2)(c) of the Act.

The question in my view is simply this:

" Does Section 5 of the Judiciary Act in conferring entitlement to a pension under that Act to a person in lieu of any other pension which may have been granted to that person under the Pensions Act, by its construction, require that person to give up instalments of pension received prior to the date when he became by retirement under the Judiciary Act in pensionable circumstances, entitled to receive a pension under that Act?".

I have omitted the word "gratuity" because when a person has exercised his option under Regulation 31 of the Pensions Regulation or under Section 7 of the Judiciary Act to receive a lump sum payment and a reduced pension, he is not really getting a gratuity in addition to his pension. What he is getting is still his pension. It is really the present discounted value of or the accelerated payment of the $\frac{1}{4}$ th pension which the person foregoes for all future years. This is why it is described as a "commuted pension gratuity" to distinguish it from gratuity properly so called.

Section 5(1) of the Judiciary Act says in effect that any person who becomes a judge as defined in the Judiciary Act and who retires in pensionable circumstances as therein defined is entitled to a pension under that Act and to no other pension unless he is a person who in the circumstance prescribed in Section 5(2) elects to forego his pension right under the Act. It is plain language which admits of no ambiguity. In my view it applies to persons who had retired from the public service at a time prior to the commencement of the

Judiciary Act, it applies to persons who retired from the public service during the currency of the Act, it applies as well to persons who never had any public service whatsoever. The only factors necessary for a person to be brought within the ambit of the Act are that he immediately prior to his retirement held the office of a judge under the Act and that he retired from that office in pensionable circumstances as in the Act defined.

Such a person is not entitled while receiving a pension under the Judiciary Act to receive a pension under any other Act because Section 5 expressly states that the pension under the Act is in lieu of any pension to which the person may be eligible or may have been granted.

It follows that the prohibition against the continued enjoyment of any other pension, while a person is entitled to a pension under the Judiciary Act, applies irrespective of the annual rate of pension to which the person is entitled. It applies alike to a person entitled to a pension calculated under item 2 of the First Schedule as to a person whose pension entitlement is calculated under item 5 of the said Schedule.

Dr. Barnett's submission, as I understood him, is that Section 5 in so far as it uses the words "in lieu of any pension, allowance or gratuity for which he may have been eligible, or which he may have been granted pursuant to the Pensions Act" refers only to those persons whose eligibility for pension under the Pensions Act arose subsequent to the date of enactment of the Judiciary Act, or to persons who may have been granted a pension under the Pensions Act subsequent to the aforesaid date of enactment of the Judiciary Act. Concisely put, it refers only to existing judges who could exercise an election under Section 2(1) and Section 5(2) of the Act. This view would not in any case help the plaintiff's case as he was an "existing judge" under the Act. He was appointed on November 19, 1973, and is thus an existing judge by the definition contained in Section 3. He was a person who could have elected under Section 2(1)(a) and therefore

was a person within the ambit of Section 5(2).

The arguments advanced by Dr. Barnett in support of his interpretation are ingenious and intriguing. Such an interpretation would undoubtedly avoid the situation where a person in receipt of a pension flowing from retirement from the public service prior to the enactment of the Judiciary Act would have to forego this for a pension under the Judiciary Act even though the latter pension is calculated without regard to the very previous public service in respect of which the person had been receiving a pension under the Pensions Act. On the other hand to uphold this interpretation would unwarrantedly exclude certain persons from the obligation to forego pension rights currently being enjoyed as a condition of enjoying pension rights acquired under the Judiciary Act even though the plain import of Section 5 of the Act is against the enjoyment at one and the same time of two pension rights. I must reject this interpretation.

Does Section 5 in discountenancing the enjoyment of two pension rights on a proper construction, necessitate the bringing into account and or refunding of pension instalments received prior to the commencement of that person's entitlement to a pension under the Judiciary Act?

This consequence arises only if Section 5 is plainly retrospective. Learned Attorney for the defendants while conceding that there is a presumption against construing statutes retrospectively reminded me that like all presumptions it must give way to a clearly expressed intention that the statute should have retrospective effect. Learned Attorney for defendants relied on the words used in Section 5(1) namely "in lieu of any pension which he may have been granted" and the words "or which he was granted" under Section 5(2) as clearly indicative that the Section is to be construed retrospectively.

In Re Athlumney Ex Parte Wilson (1898) All E.R. (reprint) (1895 - 1899) page 329 there was a motion by the assignee of a creditor of a debtor for a declaration that he was entitled to payment of all dividends already declared or thereafter to be declared on the full amount of his assignor's proof for £10,153.1s.8d, a part of which was

for interest at a higher rate than £5 percent annum. The creditor had proved for a debt which carried interest at a rate exceeding 5 percent. Afterwards on August 18, of the same year the Bankruptcy Act, 1890 was passed.

Section 23 of the Bankruptcy Act 1890 was to the following effect:

" Where a debt has been proved upon a debtor's estate under the Principal Act (Bankruptcy Act 1883) and such a debt includes interest such interest shall for the purposes of dividends, be calculated at a rate not exceeding five percentum per annum".

The question was therefore whether the enactment i.e. Section 23 of the Bankruptcy Act, 1890 governed the distribution of dividend under a contract made under a scheme which had taken effect before the Act was passed or came into operation.

Wright J. in dealing with the question said at page 331:

" Perhaps no rule of construction is more deeply established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or an obligation otherwise than as regards matters, of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is capable of either interpretation, it ought to be construed as prospective only".

Further on he said:

" In the present case the enactment does not merely affect procedure. If the Section is construed retrospectively it will postpone the creditor's right to dividend beyond 5 percent, and will protanto deprive him of the vested right of action which he possessed at the commencement of the Act and when the bankruptcy occurred".

Yet further on he said:

" Then is the Section so expressed as to be plainly retrospective? No doubt the words 'where the debt has been proved under the Principal Act' are capable of such a meaning. But this form of words is often used to refer, not to a past which preceded the enactment, but to a time which is made past by anticipation, a time which will have become a past time only when the event occurs on which the statute is to operate.

" In former times draftsmen would have used the words 'where a debt shall have been proved' but in modern Acts the past tense is frequently used where no retrospective operation can be intended. In Moon v. Durdan (1848) 2 Exch. 22 even the phrase last mentioned was held not retrospective. It seems to me that the case for the trustee cannot be put higher than this - that either construction is possible; but if so, the authorities to which I have referred show that retrospective force ought not to be given to the section".

The last excerpt from the judgment of Wright J. is very appropriate to the question here being considered and I respectfully adopt the same. From this, the answer to the question whether Section 5 speaks retrospectively by using the words "may have been granted" is that it does not, because the language used is at best capable of either a retrospective or prospective interpretation and accordingly should be given a prospective interpretation.

Section 2(3) of the Judiciary Act in my view lends support to a prospective interpretation of Section 5.

It clearly shows that a former Chief Justice as defined in Subsection (4) in electing to have the Act apply in relation to him, does not have to refund any pension paid to him in respect of a period for which he was not in receipt of a pension under the Judiciary Act. He is by virtue of Section 2(3) entitled to a pension under the Act from and after 1st April, 1973, and to preserve the principle of one pension only, he is required to refund by way of deduction any pension from 1st April, 1973, pursuant to the Pensions Act but no more.

In conclusion the answer to the question raised in the third question in the Originating Summons is that Section 5 of the Act applies to a person like the plaintiff who served as a judge under the Judiciary Act after having previously retired from the public service before the Judiciary Act was passed. However, such a person is required under Section 5 to bring into account only such pension as may have been granted to him under the Pensions Act on and after July 17, 1977 being the date on and from which he became entitled to a pension under the

Judiciary Act. He is not on an interpretation of Section 5 as having prospective effect only, required to refund any commuted pension gratuity or reduced pension paid to him for the period ending July 16, 1977. Until his retirement on July 16, 1977 the plaintiff was not a person entitled to a pension under the Judiciary Act. It is the fact of retirement from the office of a judge in pensionable circumstances that eo instanti confers entitlement to a pension under the Judiciary Act. It is equally the happening of this event which is the sine qua non for the cessation of the pension which was granted under the Pensions Act.

Neither is Section 6 nor Section 7 of the Act relevant to the determination of the existence or non-existence of an entitlement to pension under the Act.

Section 6 starts on the premise that there is pension entitlement under Section 5, on this premise it provides the criteria for determining the annual rate appropriate to the person so entitled.

Section 7 equally starts on the premise that the person is entitled to a pension under the Act. If he is so entitled he is given the option to take a commuted pension gratuity and a reduced annual pension instead of a pension at the full annual rate which would have been appropriate to him under the Act but for the exercise by him of the option.

The last question in the Originating Summons for which the plaintiff seeks a determination is whether the Governor-General in exercising his discretion under Section 6(2)(c) so as to deem prior service in the public service as being continuous with service of that person as a judge may legally and validly impose conditions for the forfeiture by that person of his pension or retiring benefits as a public officer under the Pensions Act.

This question is really hypothetical because the plaintiff in paragraph 11 of his affidavit in support of his Originating Summons, specifically disclaims any contention that the Governor-General had imposed any terms for compliance by him in exercising in his favour the

discretion under Section 6(2)(c) of the Act.

Equally the main thrust of Dr. Barnett's submission in relation to this question is that the Governor-General had properly exercised his discretion. He had plainly exercised his discretion not on the basis of the plaintiff making any refund of benefits he had already received under the Pensions Act in respect of his previous service, but primarily by considering whether having regard to the time lapse between his first retirement and his re-appointment as a judge it was a case which was fit for the exercise by him of his discretion.

In my opinion the statement by the Governor-General that "I exercise my discretion in favour of Mr. Swaby in accordance with paragraph 4 of minute of February 28, 1978" only meant that the exercise by the Governor-General of the discretion was based on the premise that as stated in paragraph 4 of the minute there was no legal objection to the exercise by him of his discretion and that there would be compliance with Section 5 of the Act.

It is totally unnecessary to import into this reference to paragraph 4 of the minute by the Governor-General, that he was himself postulating what had to be done to effect compliance with Section 5, and was himself imposing any condition that the plaintiff would have to refund pension benefits already received under the Pensions Act.

I agree with Dr. Barnett that the Governor-General's discretion was properly exercised, the validity of the exercise has not been challenged, there is nothing to indicate clearly and unambiguously that in exercising his discretion the Governor-General was guided by extraneous matters, or that he imposed any condition for the forfeiture of the pension or retiring benefits of the plaintiff as a public officer under the Pensions Act to the exercise of his discretion in favour of the plaintiff.

Accordingly it is unnecessary to answer specifically the second question raised in the Originating Summons, except to say that the exercise of a statutory discretion must always be in good

faith, must be reasonable and must be exercised according to the rules of reason and justice. Prima facie a condition annexed to the exercise of a discretion that a person should forfeit rights vested in him would not appear to be in harmony with these principles and would accordingly be a legally invalid exercise of the discretion.

In summary the questions in the Originating Summons are determined thus:

- (1) A person in the position of the plaintiff who is contemplated in question 1 is entitled to the retiring benefits provided under the Judiciary Act;
- (2) Prima facie conditions imposed such as those mentioned in the question would be legally invalid and would vitiate the exercise of the discretion. No such situation however arises on the facts before me;
- (3) Section 5 of the Judiciary Act require a person as contemplated in the question to refund all other pensions received by him under any other Act from the time when he became first entitled to receive a pension under the Act. Such a person is not required to refund pensions received under the Pensions Act prior to the date of first entitlement under the Judiciary Act.

Accordingly the plaintiff will have an order declaring that he is entitled to receive the pension under Section 6(2)(c) of the Judiciary Act and item 2 of the First Schedule thereto subject to:

- (a) Refund of only such pension as he may have received under the Pensions Act on and after July 17, 1977;
- (b) Termination of all pension rights under the Pensions Act as from July 17, 1977.

Costs of proceedings for the plaintiff, the same to be agreed or taxed. Certificate for Counsel granted.

U. V. Campbell.