Privy Council Appeal No. 38 of 1994

J. Subramanien and Others *Appellants*

v.

The Government of Mauritius and Others *Respondents*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 11th December 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Browne-Wilkinson
Lord Slynn of Hadley
Lord Nicholls of Birkenhead
Mr. Justice Hardie Boys

*[Delivered by **Mr. Justice Hardie Boys**]*

This appeal concerns the status and entitlements of teachers in aided primary schools in Mauritius.

Background

The appellants had for many years been teachers in Roman Catholic primary schools. These are aided schools, as defined in the Education Ordinance 1957, for they are in receipt of grants-in-aid from Government funds. The appellants brought these proceedings against the respondents because of an agreement entered into on 12th April 1990 between the Minister of Education on the one part and Cardinal Margeot on behalf of the Roman Catholic Education Authority (the RCEA) of the other part. The RCEA was joined in the proceedings as a co-respondent. The agreement provided, among other things, that the RCEA would not be entitled to "benefits to which Government teachers are entitled by law in virtue of their public

offices"; that "all teachers of the RCEA will remain within the RCEA establishment"; and that "as teachers and other staff of the RCEA are not public officers, they will not be eligible for promotion to any public office".

The effect of these provisions, or rather of their implementation by the Government, was to deny to teachers in Roman Catholic aided primary schools a number of benefits and opportunities they had previously enjoyed. Whereas they had customarily been eligible for transfer to, and promotion within, the State school system and the public service generally, to earn additional remuneration as election officers and in supervising examinations, to accrue and use overseas passage benefits and to take advantage of related travel tax exemptions, these were all now to be denied to them. They could move only within the RCEA establishment, although presumably they could, like anyone else, apply to join the public service.

The agreement was the result of negotiations between the Government and the Roman Catholic authorities following the promulgation of the Education (Amendment) Regulations 1989 by which it became a condition of a primary school's continuing eligibility to a grant-in-aid that "it shall not, in recruiting its staff, or otherwise, make any discrimination on the grounds of race or religion". Although the educational authorities of other religious persuasions were able to live with this change, the RCEA was not. The outcome of the negotiations was that the Government agreed to exclude the RCEA's schools from the application of the new requirements, but only on the terms that were subsequently contained in the agreement of 12th April 1990.

The appellants say that they were not consulted about the agreement. It is accepted that they were not parties to it and are not bound by it. Nonetheless its terms have been implemented, except in one relatively minor respect; hence these proceedings. Rather than attempt a paraphrase, their Lordships set out in full the paragraphs that formulate the appellants' claim before the Supreme Court:-

"7. Plaintiffs aver:-
(a) that they are public officers
(b) and/or have always been treated by the Defendants as public officers and have over the years enjoyed the same rights and privileges and been subject to the same rules and regulations as other primary School Teachers who are public officers and had legitimate expectations to continue to be treated as such.

(c) the effect of the Agreement is to deprive them of their acquired rights to property and to the protection of the law in breach of Section 3 and 8 of the Constitution of Mauritius.

8. Plaintiffs aver that to the best of their knowledge and belief they have no other redress available under any other law.

9. Plaintiffs therefore pray for (a) declaration under Section 17 of the Constitution of Mauritius that they are and have always been public officers (b) alternatively that they have acquired the same rights and privileges as Primary School Teachers who are public officers and can legitimately expect to continue to enjoy the same status as public officers, (c) that the agreement is accordingly void in so far as they are affected thereby.

10. Plaintiffs further pray for an order directing the Defendants:

(a) to reinstate them in their rights as Public Officers;

or

(b) should it be held that they are not Public Officers to restrain the Defendants from depriving them of the status, rights and privileges which they had always been enjoying ever since they joined the service and which they can legitimately expect to continue to enjoy.

(c) for such other relief as the Court may deem fit and proper."

Section 17 of the Constitution confers on the Supreme Court original jurisdiction to redress contraventions of any of sections 3 to 16 thereof. The appellants claimed contraventions of section 3(a) (the right to protection of the law) and 3(c) (the right to protection from deprivation of property without compensation) and section 8, which prohibits the compulsory taking possession of, or the compulsory acquisition of, property unless certain requirements are met. Insofar as the claim is based on the appellants being public officers, a declaration that that is what they are doubtless could, if it were necessary, be made under section 17, thus laying the basis for any further relief to be granted by reason of that status. However, it seems that the case for the declaration was not put in this way in the Supreme Court. Rather, it was argued, as it was before their Lordships, with reference to section 89 of the Constitution. This section declares that the power to appoint persons to, and to remove persons from, office in the public service is vested in the Public Service Commission.

If the appellants did indeed hold office in the public service, the agreement of 12th April 1990 could not have affected that fact. But relief for contravention of section 89 is provided by section 83 of the Constitution, not section 17. It is therefore understandable for the Supreme Court, seized with section 17 proceedings, to hold as it did that it could not make the declaration even had the appellants made out their claim.

Are the teachers public officers?

The issue of the true status of the teachers is fundamental to all aspects of the case, and their Lordships now turn to it. The term "public officer" is defined by section 111 of the Constitution as the holder of a public office, including a person appointed to act in a public office. "Public office" is in turn defined, with an exception not presently relevant, as an office of emolument in the public service. "Public service" is defined as "the service of the State in a civil capacity in respect of the Government of Mauritius". Thus the issue in this case is whether teachers in aided primary schools are in "the service of the State...in respect of the Government of Mauritius" or whether they are in the service of the RCEA.

The Supreme Court had considered this issue on an earlier occasion in what is known as the GTU case, *Government Teachers Union and Another v. Roman Catholic Education Authority and Another* (1987) M.R. 88, and had concluded that a teacher in an RCEA primary school was not a public officer and was therefore subject to the disciplinary jurisdiction of the RCEA, not that of the Public Service Commission. Its reasons were that under section 89 of the Constitution it is only the Public Service Commission that is able to appoint public officers; and the particular teacher's appointment had in fact been made by the RCEA. Further, to be a public officer the person must hold a post created by an establishment order under the Civil Establishment Act 1954 and section 74 of the Constitution; and this teacher did not.

This last reason was disapproved by their Lordships' Board in an appeal on a very different topic: see *Fakeemeeah Cehl Mohammad and Another v. Essouf Amanoullah Ahmad and Another* [1994] 1 W.L.R. 697. Judgment in that appeal had not been delivered when the present case was heard in the Supreme Court, but Mr. Ollivry, who had appeared for the teacher in the earlier case also, endeavoured to persuade the Supreme Court that evidence he adduced, which had not been before it on the earlier occasion, should lead it to a different conclusion on this occasion.

The Supreme Court was not persuaded. It acknowledged that the evidence showed that in a number of respects teachers in aided schools had been all but equated with Government school teachers (indeed, there was a belief in some official quarters that they were public officers), but considered that the statutory scheme showed a clear legislative intention that teachers such as the plaintiffs are not servants of the State. For the reasons which follow, their Lordships agree with this conclusion.

The applicable legislation is the Education Ordinance 1957 and the Education Regulations 1957. The Ordinance recognises several kinds of school, in some respects treating them all alike, in others in differing ways. Thus the Minister of Education has control of the education system as a whole, with particular responsibility for "the effective direction, development and co-ordination of all educational activities"; for the recruitment and training of teachers; and for the provision of adequate educational facilities and opportunities: section 3.

Specific provision is made for aided primary schools. It is a requirement that there be Education Authorities, responsible to the Minister "for the good administration of the aided primary schools under their control": section 6. (This provision refers back to the earlier Ordinance of 1944, under section 13(3) of which the RCEA was declared to be the appropriate Educational Authority for Roman Catholic aided primary schools.) By far the greatest part of the Ordinance, Part III, headed "Control and Inspection of Schools", does not apply to schools entirely maintained and controlled by the Government, and so enacts a separate regime for schools such as the aided primary schools.

Under this Part, each school must have a registered manager, who is responsible for the general administration of the school. The Minister is given control over such matters as building standards, teacher qualifications and experience and the suitability of managers. Teachers must be registered, and the Minister may refuse or cancel registration on grounds of unfitness or misconduct; but cancellation of the registration of a teacher in an aided primary school may occur only after consultation with the appropriate Education Authority. There are rights of appeal to an Appeals Tribunal.

As distinct from the registration of teachers, there are provisions for the employment of teachers, which show that it is the manager, doubtless as agent of the Education Authority, who is the employer. Consistently with the extent of Ministerial control, it is provided that no teacher may be employed unless he or she is either a qualified teacher or is authorised to teach by

the Minister. But application for authority to employ is made by the manager; and it is to the manager that authority to employ is granted, that authority specifying the particular school in which the teacher may be employed.

The Regulations do not have a separate Part dealing with non-Government schools, but they too recognise and maintain a distinction between Government and aided primary schools.

The Minister's obligation under the Ordinance for the recruitment and training of all teachers is fleshed out by a prescribed minimum qualification for permanent appointment in both Government and aided primary schools: regulation 3; and the Minister makes the first appointment of newly trained teachers to both Government and aided primary schools, but in the case of the latter he must take into account the wishes of the appropriate Education Authority, and may not appoint a teacher who is unacceptable to it: regulation 4(2)(a). Once appointed to an aided primary school, a teacher's promotion is in the hands of the Education Authority, subject to the Minister's approval: regulation 4(2)(b). Also of relevance is regulation 9, which gives the Minister power, in consultation with the appropriate Education Authority, to second or transfer a teacher from a Government to an aided primary school and vice versa, and "from the service of one Education Authority to another".

Apart from this provision, the Regulations did not at first deal with the appointment of teachers other than on their first appointment, that presumably being a matter for the Education Authorities themselves. But in 1989 a new regulation was added, controlling the right of an aided primary school to recruit staff: the position must be advertised, applicants must pass a qualifying examination set by the Ministry and selection is by a panel equally representative of the Ministry and of the school. This is a quite different procedure from that for the appointment of teachers in State schools.

In addition to the disciplinary measure of cancellation of registration, the 1957 Regulations contain in regulation 6 a further provision applicable only to teachers in aided primary schools. It declares that these teachers are subject to the same disciplinary regulations as teachers in Government schools. But then in regulation 7 different disciplinary procedures are provided for: for Government teachers, the procedure is that in the Public Service Commission Regulations 1967, while for teachers in aided primary schools it is such as is determined by the Minister in consultation with the Education Authority concerned. It was this very distinction that lay at the heart of the GTU case, for the issue

there was whether the teacher was subject to the disciplinary procedures of the RCEA or of the Public Service Commission.

Another relevant provision is regulation 31, which authorises grants of aid. The grants may cover capital and maintenance items, and "the salaries of teachers and school servants, and such allowances [as may be approved] at the same rates and subject to the same conditions as in the Government primary schools". It is clear that the grants are payable to the Education Authority; while under regulation 50(1) a manager's administrative responsibilities include the regular payment of salaries to the staff. It seems that at one time teachers' salaries were paid direct by the Ministry, but that was simply a matter of administrative convenience and could not affect the status of the teachers.

Their Lordships have no difficulty in concluding that the scheme and effect of the Education Ordinance and the Regulations is to provide a separate regime for aided primary schools, which have their own administrative structures and their own particular responsibilities. They own and administer their own schools, and employ their own teaching and other staff. The State provides funding and insists on the maintenance of proper standards, in particular in regard to the qualification of teachers, which is uniform throughout the profession. The power of first appointment may properly be seen as an aspect of the State's insistence on maintaining standards. It does not affect the fact that it is the Education Authorities that employ the teachers.

Brief reference to other statutory provisions confirms this conclusion. First, section 2 of the Industrial Relations Act 1974 declares that in that Act "public officer" includes an aided primary school teacher. Although Mr. Ollivry submitted that the definition was intended simply to make clear what was already the position, their Lordships see the more likely explanation to be that it was thought that without an expanded meaning such teachers would not be included at all.

Secondly, there is the history of the Pension Fund Ordinances. The Widows' and Orphans' Pension Fund was established in 1886 for the benefit of the widows and orphans of public officers, the latter being defined in an amending and consolidating Ordinance of 1928 as in general persons "permanently appointed to an office on the fixed establishment of the Colony". In an amending Ordinance of 1955 the definition of public officer was extended so as to include "a teacher as defined in section 2 of the Aided School Teachers' Pensions Ordinance 1952". The latter Ordinance was the second

relevant to the topic to be passed in 1952. The first, the Pensions Ordinance 1952, empowered the granting of pensions to "officers who have been in the service of Mauritius", the pensions being payable on their retirement from the public service, a term defined in very similar words to the definition later to appear in section 111 of the Constitution. Manifestly, this Ordinance was not intended to provide for teachers in aided schools, for three months later the Legislature enacted the Aided School Teachers' Pensions Ordinance 1952, which was made retrospective to 1st January 1943, when, their Lordships were informed, the RCEA was first established.

The clarity with which the status of teachers in aided schools was thus differentiated from that of public officers subsequently became clouded. In 1981 the second of the 1952 Pensions Ordinances was repealed and nothing was put in its place. The reason, the Supreme Court explained, was that the 1981 Ordinance was an enactment "pour faire la toilette juridique" at the time of the publication of the Revised Edition of the Laws of Mauritius by the Attorney-General's office; and it was then believed in that office, erroneously in the Supreme Court's view, "that primary aided teachers had somehow been 'converted' into public officers, with the result that a separate enactment to provide for their pensions had become unnecessary".

Their Lordships were informed from the Bar that this same belief explains another change. The dependants' pension scheme was re-enacted by the Widows' and Children's Pension Scheme Act 1969, which repeated the definition introduced with the earlier Ordinance, by which aided school teachers were expressly included in the definition of "public officer". But that particular part of the definition was omitted, apparently without statutory authority, in the publication of the Revised Edition of the Laws of Mauritius in 1982.

These more recent changes, whether made with legislative authority or not, do not alter the distinction drawn in the earlier legislation. There has certainly been no legislative provision expressly conferring any changed status on teachers in aided primary schools. Their Lordships must agree with the Supreme Court that the belief held in the Attorney-General's office was erroneous. Indeed the Solicitor-General of Mauritius acknowledged as much before their Lordships' Bar.

Perhaps by reason of this erroneous belief, perhaps because until recently teachers in aided schools have been accorded the same benefits as their Government counterparts, appointment procedures have been inappropriate and have further contributed

to the teachers' misunderstanding of their position. It was evidence on this topic that Mr. Ollivry submitted to the Supreme Court in his bid to have it not follow its earlier decision in the GTU case.

The evidence consists of documents provided to and signed by would-be teachers on their application and acceptance for training; and by these people on completion of their training and at their initial appointment. It is unnecessary to describe them in detail. Generally, they are consistent with the dual educational system and a choice as to the kind of school in which the applicant wishes to teach. Quite inconsistent, however, is a requirement for a declaration under the Official Secrets Act 1972, headed "To be signed by Public Officers on appointment", and referring in its text to employment in the Public Service. Further, while letters of appointment are under the hand of the Secretary of the RCEA, they state that the appointment is "subject to the regulations governing the Public Service of Mauritius and the Public Service Commission Regulations". The recipient is told that his or her whole time will be "at the disposal of Government".

This material is certainly confusing and contradictory, but it cannot affect the proper construction of the Constitution. For the reasons given, their Lordships are satisfied that the Supreme Court was right in its conclusion that teachers in aided primary schools are not and have not been public officers. The appellants therefore were not entitled to the declaration they sought in that regard.

Other remedies

As the Supreme Court recognised, this conclusion does not necessarily mean that the appellants have no remedy. It does, however, mean that the Government's implementation of the agreement of 12th April 1990 did not result in a deprivation of property within the meaning of either section 3 or section 8 of the Constitution. This is because as they were not public officers, the appellants had no right to any of the benefits they had previously enjoyed. Even had they been public officers, some of the benefits, such as assisting in elections or with the supervision of examinations, were no more than opportunities which may or may not have been open to them at particular times. But the appellants are not public officers, and so all the advantages they enjoyed and no longer have must for the future be seen as no more than lost opportunities or expectations. They are not existing property or property rights.

The Supreme Court thought that passage benefits and their corollary, the foreign travel tax exemption, might be in a different category. In appropriate circumstances, a claim in respect of matters such as these, if substantiated, could be dealt with under section 17(2) of the Constitution, which enables the Court to make such orders, issue such writs, and give such directions as it considers appropriate to enforce any of sections 3 to 16. The Court declined to act under those powers, instead relying on the proviso to subsection (2), which is that the Court "shall not exercise its powers...if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law". As their Lordships understand the judgment, the Court's point was that the appellants had not established their right to the two particular benefits in the present proceedings, but it was open to them to do so in other proceedings.

Before their Lordships' Board, Mr. Ollivry, in this respect supported by Mr. d'Unienville, counsel for the RCEA, who had in other respects supported the respondents, submitted that the Supreme Court ought to have dealt with all these matters in the present proceedings; and further that it ought to have addressed the administrative law issue, founded on legitimate expectations, raised in the alternative prayer in the pleadings. The Supreme Court did not expressly address that issue at all.

Their Lordships' conclusion that the appellants are not public officers means that if the appellants have a remedy - and as to that their Lordships express no view - it is not a constitutional remedy. Any remedy would lie in contract or in tort, or in judicial review. A constitutional action is not an appropriate vehicle for a contractual or tortious claim, nor indeed for judicial review, which has procedural requirements of its own. No doubt, had judicial review, or relief in contract or in tort, been sought in a separate action or separate actions, the Supreme Court could have ordered all issues to be tried together or in sequence. But such a course was not embarked upon, and their Lordships can therefore see no reason to hold that the Supreme Court erred in its decision to dismiss the present claim.

Conclusion

Their Lordships accordingly dismiss the appeal. The appellants must pay the costs of the respondents but the co-respondent should pay its own costs.