RAM NARAYAN CHETA

v.

THE ATTORNEY GENERAL

[HIGH COURT, 1989 (Palmer J) 29 September]

Civil Jurisdiction

Public Service- pensions- length of pensionable service- relevance of conscription for war service- Pensions Act (1958) Cap 59 (1967 Edn.)

The Plaintiff sought a declaration as to the length of his pensionable service with the Fiji Government. The High Court examined the relevant provisions of the legislation and regulations and, dismissing the Plaintiff's claims, HELD: that the length of his pensionable service had been properly computed.

Case cited:

McKenzie v. British Linen Company (1881) 6 App. Cas 82

V. Parmanandam for the Plaintiff

N. Nand and *Mrs. C. Manuel* for the Defendant

Palmer J:

The Plaintiff is a retired civil servant. In this action he is seeking a review of his pension entitlement which was determined in 1976. By originating summons he is seeking the following declarations: "That the Plaintiff has been an employee of the Fiji Government since the 1st day of January 1936 and is entitled to a pension based on such said date, or alternatively, that the Plaintiff has been an employee of the Fiji government since 18th June 1937 without a break." The significance of those two dates will become apparent.

The Plaintiff was originally employed in the Public Works Department but subsequently obtained qualification as a Teacher and the bulk of his Government service was in that capacity. There is no dispute between the parties that he was a teacher and in pensionable service in accordance with the Pensions Act from 1st June 1943 to the 23rd May, 1976 when he retired. His pension and gratuity entitlement was calculated on the basis that he commenced pensionable Government service on the 1st June 1943.

As to the Plaintiff's employment history the evidence shows that from the beginning of 1934 until the 31st May 1937 he was employed in various capacities including plumber and fitter in the Public Works Department. He himself in submissions to the Government described that service as "unestablished" and there is no contest as to that. I have not been referred to any interpretation of that term but in the context, and in its usual civil service context, I take it to describe service that is not permanent or pensionable. It seems to have been so accepted

by the parties. Therefore this part of his employment with the Government does not come into any pension computation and the Plaintiff is not claiming it.

Having qualified as a teacher in January, 1936 the Plaintiff was appointed to an Indian School on 18th June 1937 and subsequently served as a teacher in various Indian Schools - 6 in all - until the end of 1942. There was then a break in his service as a teacher from the 1st February to 31st May 1943, which will be referred to later on, and on the 1st June 1943 he was appointed to Samabula Government Indian Boys School. He then, as already stated, served in various Government Schools until his retirement and there is no contest that that service constituted pensionable service. His first claim in the action, to have service as from the 1st January 1936 recognized as pensionable service rests upon the fact that on that date there was issued to him a Teacher's Certificate by the Education Department, which evidenced that he "has been classified and registered by the Board of Education as a teacher." That issue can be disposed of briefly. On his own evidence he did not commence teaching anywhere until the 18th June 1937. Hence his alternative claim. It is not contended that he served as a teacher in Government Service before then. The mere fact of having been recognized and registered as being qualified as a teacher does not constitute Government service or give rise to any pension entitlement. The case in respect of that date rests upon a supposed estoppel. There has been put in evidence a copy of the Civil List. The cover of it is missing but I am informed and am prepared to accept that it is the Civil List for 1972. This contains the names and service details of established civil servants. On page 190 under Education Department appears the entry relating to the Plaintiff and under the heading 'Appointed to Service' appears the date 1.1.36. The Plaintiff relies on this as constituting an acknowledgment by the Civil Service that he has been a civil servant since that date and he claims that the Defendant is now estopped from asserting otherwise. In my view this contention is quite untenable. In the first place it is a well established rule both by authority and our own High Court Rules that estoppel must be pleaded and in this case it has not been pleaded. Furthermore, it is a well established rule that in the case of estoppel by conduct, which is what is alleged here, that "where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time" and the person is deemed to act wilfully "if he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it." See *Phipson on Evidence 12th Edition*, paragraph 2141. Although an estoppel by conduct may arise even from an untrue representation of fact made mistakenly it is an essential element that there must have been an intention, or conduct raising a reasonable presumption thereof, that the injured party was meant to act upon the representation as true, and the party relying on the representation must have acted on it to his own detriment. See for example McKenzie v. British Linen Company [1881] 6 App. Cas 82. At the hearing, in answer to me, Counsel for the Plaintiff informed me that it is not claimed that the Plaintiff changed his position as a result of the

publication in the Civil List.

A The entry in the Civil List is quite obviously an error, and the date of the Plaintiff's qualification as a teacher seems to have found its way into it as the date of his appointment into the service. However, this proposition completely flies in the face of the evidence which is quite clearly, on the Plaintiff's own showing, that he was not employed as a Teacher in the Government service at that date. The status of the Civil List has not been made clear and apart from the other considerations already mentioned I must make my findings of fact on the actual B facts as presented in evidence before me. The first prayer in the action therefore must fail.

Turning now to the alternative plea, which is for recognition as pensionable service of the Plaintiff's service as a teacher commencing on the 18th June, 1937. It seems on the face of it that the Plaintiff's service as a teacher in six C different Indian Schools between 18th June 1937 and 31.12.42 was in private and not Government Schools. The Plaintiff on the 26th May 1976 completed a Questionnaire for the Department in support of his application for pension, and on the 27th February 1978 wrote a letter to the Ministry of Finance, apparently in support of his present claim. In both these documents he lists the six Schools just referred to by the name of the school, e.g. "Tavua Indian School ," "Navua D Indian School" etc. his position in it and the dates of his service. When he comes to Samabula School he lists the same as "Samabula Government Indian Boys School. The Plaintiff has adduced no evidence that his service in the six Indian Schools was pensionable government service. He has not discharged the onus of proof resting upon him on that issue and accordingly I find that such service was not pensionable government service, subject however, to consideration of the E legislation, to which I am now turning. There is no question here that the Plaintiff has what the Pensions legislation refers to as qualifying service i.e. more than 10 years service. What is in question is the length of his *pensionable* service which is defined in the Pensions (1958) Regulations (Cap 59 - 1967 Edn.) as "service which may be taken into account in computing pension under these Regulations." The real crux of this part of the Plaintiff's case is that the Regulations operate so F as to make his service in private schools count towards his pension. The key Regulation for the present purposes is 19(1)(b) which reads as follows:-

> "19 - (1) Only service in a pensionable office shall be taken into account as pensionable service provided that:-
> (b) service in Fiji as a teacher in a non-Government school prior to G the first day of January, 1948, shall, whatever his date of retirement was or is, be taken into account as pensionable but not as qualifying service in the case of a teacher who joined or joins the service of the Government of Fiji as a teacher until the date of his retirement to the same extent and in such proportion as if such service had been service under the Government of Fiji in an equivalent office specified in the First or Second Schedules, as may be appropriate. In the case of a teacher in a non-Government school who first joined or

> joins the service of the Government of Fiji as a teacher and who was or is subsequently and immediately following his service as a Government Teacher required, solely in the interests of the Government and not of his own choice or at his own request nor arising out of or in consequence of any act, neglect or misconduct on his part, to transfer to a post in the public service other than as a teacher, his service in any other such post and in any further subsequent posts in the public service shall for the purposes of this paragraph be deemed to be service as a Government Teacher."

A

B

On the face of the first sentence in Regulation 19(1)(b) the Plaintiff's service in the non-government schools, all of which occurred prior to the lst of January 1948, counts as pensionable service and he would therefore be entitled to have his pension calculated on the basis that his teaching service as a pensionable service commenced on the l8th June, 1937 as he claims. However, the Defendant points to Regulation 15 (1) which provides that "except as otherwise provided in these Regulations only continuous service shall be taken into account as qualifying service or as pensionable service." It will be seen that the second sentence in Regulation 19-1(b) has "provided otherwise" in certain circumstances there set out. In the light of this it is now necessary to refer to other facts appearing in the evidence.

C

D

It is not in dispute that between the 1st February 1943 and the 31st May 1943 the Plaintiff worked for the Rewa Water Supply as timekeeper and water fitter, apparently because of the war time conditions and his qualifications and experience in that field. That service was unestablished service. In support of his contention that that service should be counted or the break in teaching disregarded, the Plaintiff refers to the Defence Regulations 1939 in Section 2 whereof "essential services" is interpreted as meaning "such service as may for the time being be declared by order of the Governor to be of public utility or to be essential for the prosecution of the war or essential to the life of the community," and there is in evidence a copy of a Gazette containing an order made by the Governor under those Defence Regulations dated the 4th November 1940 in which the Governor declares water supply services to be essential services for the purpose of those Regulations. The Plaintiff claims that he joined the water supply service in the Public Works Department for that 4 months period as a public service in the interests of the Government and as an essential war time service. There is no clear evidence as to the nature of the Plaintiff's taking up the work in the Public Works Department for those months. I have not been referred to anything which ties the Defence Regulations in with the Pensions Act. The reference to essential services and the declaration by the Governor does not in my view show any intention or effect of conscripting anyone to do essential work. The reference to essential services in the Defence Regulations is with reference to such matters as sabotage of installations, control of industry etc. What must be shown for the purpose of Regulation 19-1(b) of the Pensions Regulations is that a person was *required* solely in the interest of the government and not of his own choice or at his own

E

F

G

request etc. *to transfer* to another post. In short, if he was conscripted for war work, then he is deemed to have remained a teacher for Pension purposes.

A I have carefully looked through the evidence for anything to support this claim of the Plaintiff.

There is a letter from him of 20/5/43 (this is during his period of work for the Water Supply) whereby he applies for appointment to the Government Indian Schools, and subsequent correspondence of offer and acceptance leading to his B commencing service as a government teacher on 1.6.43 as noted.

There is evidence from various superiors in the Water Supply as to his service there between February and May 1943. One of them states that he was "instrumental in securing the job" for him. Two others depose that the Plaintiff left that work of his own accord. There has been no other evidence at all as to C how the Plaintiff came to take up the war work post. Certainly no evidence that he was required by the government to transfer to such a post. From the evidence it seems clear that he left the teaching position at the last non-government Indian School in order to take up this work and subsequently applied to join the government service as a teacher in a government school which he commenced on lst June 1943. But be that as it may he carries the onus of satisfying me that he D was required to transfer to that post as per Regulation 19. He has failed and indeed has not even attempted to do that. It is simply not enough for the purpose of the Pensions Regulations that his work was war work or even that it was performed solely in the interest of the government and not of his own choice. He must bring himself within the exception to the continuous service rule of Regulation 15.

E But there is in any case a further difficulty about, applying Regulation 19-l(b) to the Plaintiff's benefit and it is this : the second sentence is made applicable to the case of a teacher in a non-government school *who first joins the service of the Government of Fiji as a teacher*. It is clear that in the present case the Plaintiff prior to joining the government as a teacher was in fact, employed by the F government in the Public Works Department commencing in 1934. It seems to me clear from the reading of Regulation 19-1(b) and the Act and Regulations as a whole that the term 'service of the Government of Fiji' has a more neutral and wide-ranging meaning then the more restricted term 'pensionable service.' In my view it applies to any service for the Government, pensionable or otherwise and therefore in the present case I find that the Plaintiff did not first join the service of the government in his capacity as a teacher. That being so, he cannot G derive any benefit from Regulation 19-1(b) second sentence. It clearly has no application to his case.

I have also given consideration to the following proviso in Regulation 15 (1): "Provided that any break in service caused by temporary suspension of employment not arising from misconduct or voluntary resignation shall be disregarded for the purposes of this paragraph." I have considered whether his

4 months in the Public Works Department can be regarded as a temporary suspension of employment. However, apart from the fact that there is no evidence as to whether he voluntarily resigned from his last non-government school to take up this appointment, I do not consider that the service with the Public Works Department can be regarded as a temporary suspension. That term involves the notion of leaving of a post for a period and then returning to the same or at least leaving the service and returning to the same. Regulation 19-1 (b) does not deem service in a non-government school to be service in a government school, it merely enables it to be taken into account in computing the pension. The Plaintiff left service in non-government schools to go to the Public Works Department and then took up service in a government school. In my view this does not qualify for the description "temporary suspension."

Finally, Counsel for the Plaintiff has referred to Regulation 19 (7). This provides as follows:-

"(7) (a) Where an officer has been transferred from a pensionable office in which he has been confirmed to a non-pensionable office and subsequently retires either from a pensionable office or a non-pensionable office, his service in the non-pensionable office may, with the approval of the Minister, be taken into account as though it were service in the pensionable office which he held immediately prior to such transfer."

Counsel submits that the Minister has a discretion and that publication of the entry in the Civil List already referred to constitutes the exercise of that discretion at the time of publication.

This is completely untenable. I would expect very much more evidence than the bare publication in the Civil List, which has already been shown to have been a mistake. Also it is highly unlikely that the Minister would approve - even if he had power to do so - the granting of a pension from 1.1.1936 when on his own evidence the Plaintiff did not start teaching until June 1937 and before that was in non-pensionable service. Moreover, there can be no question of a transfer here. I reject this submission. It is in any case a matter for the Minister's discretion. I do not know whether the Plaintiff has ever applied to the Minister. It has taken him 10 years since his pension was determined to commence this action.

For the above reasons 1 hold that the plaintiff's pensionable service commenced on the 1st June, 1943. It follows that the Government of Fiji has correctly determined his pension entitlement as far as the period of service is concerned.

In the circumstances I refuse to make either of the declarations sought by the Plaintiff in this action. Literally I could make the second declaration sought in the amended summons, but it would be an exercise in futility.

The Plaintiff must pay the Defendant's costs to be taxed or agreed.

(Judgment for the Defendant.)