

DHANAPALA
v.
DISSANAYAKE, PROVINCIAL DIRECTOR
OF EDUCATION AND OTHERS

SUPREME COURT.
DR. AMERASINGHE, J.,
RAMANATHAN, J. AND
WIJETUNGA, J.
S.C. APPLICATION NO. 145/95.
FEBRUARY 7 AND MARCH 24, 1997.

Fundamental Rights – Article 12(1) of the Constitution – Legitimate expectation – Provincial Council public service – National Public Service – Powers of Public Service Commission – Position of persons in the National Service not seconded but serving in Provincial Council public service to assist or to support.

There are two kinds of officers who are subject to the power of transfer and disciplinary control of a Provincial Council.

(1) Those who belong to a National Service but serving a Provincial Council on secondment; and

(2) Those who belong to the provincial public service.

A distinction is made between those who belong to a National Service but serve a Provincial Council on secondment on the one hand and those who are members of the provincial public service. The former have a right of appeal to the Public Service Commission in respect of all matters connected with their employment, for, although for the time being they are subject to the powers of transfer and disciplinary control of the Provincial Council they serve, they are nevertheless members of a National Service coming therefore within the Public Service Commission. Those who belong to the provincial public service too have a right of appeal to the Public Service Commission but only against an order of dismissal.

There is a third group of officers like the class of officers to whom the petitioner belongs, who have not been seconded nor serve as members of the provincial public service. This third group belong to the National Service but their services have been made available to Provincial Councils to support or assist them but not upon the basis of secondment.

Persons in the third group would remain subject to the powers of transfer and disciplinary control of the Public Service Commission. Hence the transfer of the

petitioner by the Secretary of the Education Service Board of the Public Service Commission to the Ministry of Education and Higher Education from the post of Deputy Director of Education in charge of the Dimbulagala Division held on appointment by the North Central Provincial Director of Education and Secretary, Ministry of Education, Health etc. of the North Central Provincial Council, was valid and in no way frustrates his legitimate expectations.

APPLICATION for relief for infringement of fundamental rights.

L. C. Seneviratne, P.C. with Nigel Hatch for petitioner.

Kolitha Dharmawardene, D.S.G. for respondents.

Cur. adv. vult.

April 04, 1997.

DR. AMERASINGHE, J.

In 1967, the petitioner was appointed a Grade III Sinhala Teacher at the Aluthwewa Vidyalaya by the Chief Education Officer, Polonnaruwa. In 1981 he was promoted to the rank of Grade IV Principal. In 1982 he was promoted to the rank of Grade V Principal and appointed Education Officer Polonnaruwa. In 1985 he was appointed a Class III Officer of the Sri Lanka Education Administrative Service. In 1988 he was appointed Principal of Welikanda Maha Vidyalaya. All the appointments and promotions since 1981 were made by the Education Service Board of the Public Service Commission.

The petitioner served as Education Officer of the North Central Provincial Council from July to September 1989 and in the Dimbulagala Division Education Office from 1 September 1989 to March 1993. In 1992, while he was at Dimbulagala, he was promoted to Class II of the Sri Lanka Education Administrative Service by the Education Service Board of the Public Service Commission. In 1993, he was appointed from time to time to serve as Deputy Director of Education of the Lankapura Pradeshiya Education Office, the Elahera Pradeshiya Education Office, the Dimbulagala Pradeshiya Division Office, and at Mannampitiya. In 1994 he was appointed Deputy Director of Education in charge of the Dimbulagala Division. The appointments and transfers between 1989 and 1993 were made by

the Pradeshiya Education Director. The 1993 and 1994 appointments and transfers were made by the North Central Provincial Director of Education and the Secretary, Ministry of Education, Health etc of the North Central Provincial Council. By a letter dated 31 March 1995, the Secretary of the Education Service Board of the Public Service Commission transferred the petitioner to the Ministry of Education and Higher Education. The Fourth respondent was appointed by the Education Service Board of the Public Service Commission to fill the vacancy created by the transfer of the petitioner. The petitioner in his letter dated 18 April 1995 addressed to the Secretary, Education Service Board of the Public Service Commission appealed against the transfer, but received no response.

The petitioner alleged that his fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by his transfer to the Ministry of Education and Higher Education. The petitioner does not deny that he was and is a member of the Sri Lanka Administrative Service, but he maintains that he was "released from or about 1988 to the service of the [North Central] Provincial Council in terms of the applicable State Administrative Circular[s]," namely Public Administration Circulars No. 10/89 and No. 10/89 (1). He states that in terms of Public Administration Circular No. 25/91 dated 03 July 1991, officials released to a Provincial Council would serve that Council for a period of four years; at the end of that period, the officer was entitled at his request to have his service with the Council extended. Until such a request was made, he could not be transferred without the approval of the Head of the relevant Department of the Provincial Council. He had neither requested a transfer, nor had the transfer been made with the approval of the Head of his Department. On the other hand, the Additional Secretary (Education), on the directions of the Minister of Education of the Provincial Council, had objected to the transfer of the petitioner. The petitioner maintains that the Secretary of the Education Service Board had no power to transfer the petitioner and frustrate his legitimate expectation of serving the North Central Provincial Council.

While it is not in dispute that the petitioner did serve the North Central Provincial Council and was appointed to various posts by that

Council, there was no evidence placed before us to show that he had been released to serve the Provincial Council on secondment. All that he has been able to do is to say that "to the best of his knowledge and belief in October 1993 he signified for the first time his consent to be released to the Central Provincial Council (sic.) on a letter dated 19/10/1993 sent to the Deputy Director of Education Dimbulagala Education Office of the North Central Province on which the Deputy Director of Education Dimbulagala who was the head of the Department that the petitioner had served in had approved the said extension of the petitioner's service," and to submit a copy of the letter dated 19 October 1993. That document (P9) is a letter from the Dimbulagala Pradeshiya Education Office requesting the petitioner in terms of Circular Nos. 10/89 and 10/89 (1) to signify his agreement to serve that institution. That document is of little or no value, for it does not evidence the fact that the petitioner had been seconded for service in the North Central Provincial Council. Indeed, the petitioner, although he submitted the letter, states in paragraph 17 of his petition that the basis of the letter was flawed by "inadvertence or mistake".

If the petitioner had not been released on secondment in terms of the prescribed manner to serve in the Provincial Council of the North Central Province, then he would have been subject to the authority of the Education Service Board of the Public Service Commission and could legitimately have been transferred by that Board. If he had been released, he might perhaps have come under the authority of the Provincial Council until 23 April 1993. After that date, however, he would, it seems, have been subject to the control of the Education Service Board even if he had been released on secondment, for Public Administration Circular No. 56/89 (1) issued on 23 April 1993 states that to be the case. At the date of the letter intimating his transfer, namely 31 March 1995, the petitioner was subject to the authority of the Education Service Board of the Public Service Commission in terms of Circular No. 56/89 (1).

However, learned counsel for the petitioner submitted that if Circular No. 56/89 (1) did permit the Education Service Board "to transfer any officer in the all-island services during their period of release to the Provincial Public service unilaterally, then ... this

circular is contrary to the Constitution which by the 13th Amendment Provincial Council List has vested the transfer and disciplinary control of such officers in the Provincial Council. This circular can only be made operative if such transfers are made on the recommendation or approval of the Provincial Public Service or the relevant Provincial Ministry. Further, the question arises whether the consent of the officer should not be obtained if he is to be transferred out of the Province since his consent is obtained in respect of his transfer or appointment to the Provincial Public Service.”

The petitioner was neither transferred nor appointed to the provincial Public Service, and therefore the question of obtaining his consent before he was transferred does not arise. He did serve the North Central Provincial Council under some arrangement or on the basis of some tacit understanding, with regard to which the Court was not provided with any information. More importantly, there was no evidence placed before us to show that the petitioner was seconded in the manner prescribed by the relevant circulars to serve the Provincial Council, let alone being transferred to the provincial public service. The petitioner continued to be a member of the Sri Lanka Education Service and while he was serving in the Provincial Council was promoted to Class II of that Service by the Education Board of the Public Service Commission.

Education and Educational Services are indeed placed on List 1 (the provincial Council List) by the Thirteenth Amendment to the Constitution; but there is no unqualified devolution. List 1 states that the subject of education is devolved “to the extent set out in Appendix III”. Appendix III.3 states as follows: “The transfer and disciplinary control of all educational personnel, i.e. Teachers, Principals and Education Officers. Officers belonging to a National Service but serving the Provincial authority on secondment will have the right of appeal to the Public Service Commission. Officers belonging to the provincial public service will have a right of appeal to the Public Service Commission against dismissal.”

The first sight, the phrase “all educational personnel” would suggest that each and every person, without exception, engaged in

providing educational services, whether as a teacher, principal or education officer, would in terms of Appendix III.3 be subject to the powers of transfer and disciplinary control of the relevant Provincial Council.

However, the legal meaning of Appendix III.3 is that there are two kinds of officers who are subject to the power of transfer and disciplinary control of a Provincial Council: (1) those who belong to a National Service but serving a Provincial Council on secondment; and (2) those who belong to the provincial public service. A distinction is made between those who belong to a National Service and serve a Provincial body on secondment on the one hand, and those who are members of the provincial public service. The former have a right of appeal to the Public Service Commission in respect of all matters connected with their employment, for, although for the time being they are subject to the powers of transfer and disciplinary control of the Provincial Council they serve, they are nevertheless members of a National Service coming therefore within the Public Service Commission. Those who belong to the provincial public service too have a right of appeal to the Public Service Commission, but only against an order of dismissal.

The petitioner does not belong to either class of officers referred to in Appendix III.3; he has not been seconded nor is he a member of the provincial public service. He belongs, in my view, to a third group – those who belong to a National Service, but whose services have been made available to Provincial Councils to support or assist them but not upon the basis of secondment. Persons in the third group would remain subject to the powers of transfer and disciplinary control of the Public Service Commission.

In the circumstances, I am of the view that the transfer of the petitioner was valid and in no way frustrates his legitimate expectations. The Secretary of the Education Service Board of the Public Service Commission has adduced evidence to establish that other officers having the status of the petitioner have also been transferred and that there has been no invidious discrimination.

For the reasons set out above, I declare that the petitioner's fundamental rights under Article 12 (1) of the Constitution have not been violated and make order dismissing the petition; but, having regard to the important and debatable questions he has raised for consideration, without costs.

RAMANATHAN, J. – I agree.

WIJETUNGA, J. – I agree.

Application dismissed.
