Van Gorkom v Attorney General [1977] 1 NZLR 535 (New Zealand Supreme Court)

Van Gorkom v Attorney-General and Another

Supreme Court Wellington
29, 30 November 1976; 10 February 1977
Cooke J

Education – Teachers – Transfers – Minister authorised to lay down conditions in respect of removal expenses by regulations not a delegation of legislative function but no authority to discriminate between male married teachers and female married teachers – Education (Salaries and Staffing) Regulations 1957, reg 16 (9) (SR 1973/29).

Administrative law – Regulations – Validity – Laying down conditions in respect of transfer expenses is an ancillary power and as such cannot extend the scope or general operation of the statute.

The question was whether, having regard to the provisions of reg 16 (2) of the Education (Salaries and Staffing) Regulations 1957 which enables a teacher on promotion from one permanent position to another to claim removal expenses, the minister, pursuant to reg 16 (9), in laying down conditions governing payment of removal expenses could differentiate between married male and married female teachers. As regards a married male teacher the conditions included the cost of removal of household articles and of the conveyance of the teacher and his family and the cost of accommodation. As regards a married female teacher (except in the case of her husband being an invalid and dependent upon her) the conditions included only the costs of her own travelling and removal of her own personal possessions but not of any household possessions (whether owned in common or not).

Held, that the minister in laying down conditions as to payment for removal expenses could not validly discriminate between married male teachers and married female teachers:

1 Regulation 16 (9) is valid since it does not delegate the legislative function itself or the precise matter entrusted by the statute to the Governor-General in Council or fix the basis on which rights to removal expenses arise. It is concerned with incidental details or administrative machinery (see p 540 line 2).

Hawke's Bay Raw Milk Producers Co-operative Co Ltd v New Zealand Milk Board [1961] NZLR 218 and *Godkin v Newman* [1928] NZLR 593, distinguished.

2 The minister in laying down conditions under reg 16 (9) could not validly discriminate between the sexes as there is nothing in the Act or the regulations to authorise such discrimination and s 150 of the Education Act 1964 contains some indication against such discrimination (see p 541 line 36).

3 The power to lay down conditions pursuant to reg 16 (9) is an ancillary power and as such does not enable the scope or general operation of the statute to be extended but is strictly ancillary and is confined to authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself (see p 542 line 20).

Apart from a reference in reg 16 (9) that is the only reference to a 'family' in the whole regulation; and both are directed to the cost of conveyance of the teacher and his family, not to the cost of removing household articles. Yet, as already mentioned, in the case of a married man it has been accepted in practice that '. . . the actual and reasonable expenses of his removal . . .' within the meaning of reg 16 (6) usually cover the expenses of moving the household, notwithstanding the absence from reg 16 (6) of any express reference to a family. Considering the regulation as a whole, I think that reg 16 (6) justifies the practice. '[T]he actual and reasonable expenses of his removal' appears to be intended as a compendious expression covering various kinds of removal expenses if actually and reasonably incurred by the teacher. For instance, it would extend to the removal of household articles and the conveyance and accommodation of persons. Whether the expenses claimed have been actually incurred by the teacher and whether they are reasonable are questions of fact for determination in any given case.

"On that view it would be wrong to treat the financial dependency or otherwise of a spouse as a criterion. On a teacher's first permanent appointment to a position in a school approved for country service, he or she is entitled to be paid the actual and reasonable expenses of his or her removal to that position. If he or she actually incurs reasonable expenses in moving his or her spouse or other family, those expenses are recoverable from the employing authority. Whether the teacher is a man or a woman is not of itself important for this purpose. The simple question is whether he or she has actually incurred reasonable expenses of his or her removal. If the family has to move because of the teacher's new appointment, he or she may well incur reasonable expenses and these may well include the cost of conveying both household articles and household members. If so, they are expenses of his or her removal, within the meaning of the regulation, and they have been necessitated solely by that removal. Whether the teacher's spouse is earning or can earn an income or has independent means is beside the point".

Accordingly, in that case a declaration was made that on her appointment the plaintiff was entitled to be paid the actual and reasonable expenses of her removal; and that these would include the expenses of moving her household articles and her family, if actually incurred by her and reasonable. The following passage occurs towards the end of the judgment:

"It may be as well to add the following. Regulation 16 (9) requires the minister to lay down the general conditions governing the matters there listed. No question has been raised in this case about the validity of reg 16 (9) or about the validity of reg 16 as a whole; and s 2 of the Statutes Amendment Act 1945, which is to be read together with and deemed part of the Acts Interpretation Act 1924, provides that no regulation shall be deemed to be invalid on the ground that it delegates to or confers on the Governor-General or on any Minister of the Crown or on any other person or body any discretionary authority. The old Education (Salaries and Staffing) Regulations 1948, part XVII, provided for removal expenses in a more detailed way than the present regulations and contained no provision corresponding to reg 16 (9). The terms of ss 165 and 203 of the Education Act 1964 would also require close consideration before reg 16 (9) was acted on. Assuming the full validity of reg 16, a question might arise as to whether the minister has power in general conditions under reg 16 (9) to discriminate on the basis of sex. That question has not been argued in this case. So I would be going beyond my province if I expressed any opinion on it".

Added as a precautionary postscript, that has turned out to be a prologue. From the papers now filed it appears that for some months after the decision in Mrs Elson-White's case the department paid removal expenses without distinguishing between married male and married female teachers, but that this practice ceased after 2 April 1976 when by approving a departmental recommendation the minister formally directed that the provisions contained in what was then chapter 26 of the manual should be the conditions for removal expenses of teachers. When the manual was rewritten the chapter was renumbered as 28, and a further formal approval was given by the minister on 7 September 1976. No affidavit was filed for the defendants in the present proceedings, but by consent copies of the two departmental recommendations approved by the minister were put in. The court has also had the benefit of a full argument by counsel for the defendants. It does not appear from the papers to what extent the questions mentioned in what I have called the postscript to the *Elson-White* judgment were considered or drawn to the minister's attention before he approved the chapter. What does emerge, however, from the April document – and it was also emphasised in the argument of counsel for the defendants – is a wish to retain the discrimination pending the outcome of negotiations between the State Services Co-ordinating Committee and the Combined State Service Organisations. In his argument Mr Mathieson emphasised that a reason for seeking to retain the discrimination in the meantime has been a suggested link with the broader question of fairness or equity between different parts of the state services.

Question 1

"Did the Governor-General have power under the Education Act 1964 to make reg 16 (9) of the Education (Salaries and Staffing) Regulations 1957, and is the regulation therefore valid?"

On this question I have been persuaded by the substance of Mr Mathieson's argument, although what I am about to say under this head may not be in every respect in accordance with his detailed submissions. Section 165 (1) of the Education Act 1964 provides:

"Subject to the provisions of this Act, the Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

". . .

"(g) Prescribing rates of allowances that may be paid towards the cost of, or incidental to, the removal of teachers on transfer from one school to another:

". . .

"(j) Prescribing such other matters relating to the conditions of employment of teachers as may be necessary to give definition to the administration of this Part of this Act".

Section 203 empowers the Governor-General from time to time, by Order in Council, to make regulations:

". . . for all or any of the following purposes:

". . .

"(g) Providing for such matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for the due administration thereof".

Counsel on both sides were agreed that s 165 (1)(g) is wide enough to authorise regulations giving teachers rights to actual and reasonable removal expenses. I accept that view. The scheme of the present reg 16 is to give such rights in circumstances specified in subcls (1), (2), (3), (5), (6), (7) and (8).

Subclause (4) gives more limited rights in certain cases of first appointments. Subclause (8) imposes a monetary limit in some rather special cases. Such being the pattern, it is plain that, unlike the regulations considered in the leading New Zealand cases of *Hawke's Bay Raw Milk Producers Co-operative Co Ltd v New Zealand Milk Board* [1961] NZLR 218 and *Godkin v Newman* [1928] NZLR 593, the present regulation does not purport to delegate either the legislative function itself or the precise matter entrusted by the statute to the Governor-General in Council or the power of fixing the basis on which rights to removal expenses arise. Subclause (9) requires the minister to lay down from time to time the general conditions governing payment of removal expenses; among other things it mentions specifically the cost of the conveyance of the teacher and his family. As there is no inconsistent context, nor any words to exclude or restrict the meaning, *his* family must include *her* family. In the context of the regulation as a whole, subcl (9) seems to me to contemplate incidental matters of detail or administrative machinery. It provides for such ancillary matters to be specified by the minister, without requiring them to be set out at length in the regulation itself as was done under part XVII of the Education (Salaries and Staffing) Regulations 1948. For instance, it would cover rules about the kind of household articles for which removal costs are to be payable, fares or mileage allowances, and the type of accommodation for which expenses would be allowed. The procedure for making claims is another example. Provision for the minister to lay down general conditions governing such matters is fairly to be regarded, I think, either as incidental to or consequential upon what the legislature has authorised by s 165 (1)(g) – that is to say, on the principle applied by the Privy Council in *City of Winnipeg v Canadian Pacific Railway Co* [1953] AC 618, 629-630; [1953] 2 All ER 988, 993 – or as authorised by s 165 (1)(j) or s 203 (g). Whatever the precise scope of s 2 (2) of the Statutes Amendment Act 1945, it is clear that the mere fact that the regulation delegates discretionary authority is not in objection to its validity. I do not read subcl (9) of reg 16 as purporting to authorise the taking away or cutting down of the rights to actual and reasonable expenses given by earlier subclauses; but its wording shows, in my view, that it does give the minister authority to settle the kinds of expenses to be treated as reasonable – an authority which is naturally subject to the limited judicial review applicable to statutory discretions in general. The scope of that authority arises for further consideration under question 2. For these reasons, however, question 1 will be answered "Yes".

Question 2(a)

"Are the 'general conditions' laid down by the Minister of Education pursuant to reg 16 (9) of the Education (Salaries and Staffing) Regulations 1957 valid in so far as they: (a) Discriminate between teachers on the basis of sex?"

The general conditions embody the policy summarised in the department's letter of 12 November 1976 previously quoted. I do not think there can be any doubt that they do discriminate between teachers on the basis of sex. In present social conditions it is doubtless more likely that a married man will have a dependent wife than that a married women will have a dependent husband. But, if a married male teacher qualifies for actual and reasonable removal expenses, the general conditions enable him to recover the actual and reasonable expenses of moving all his family, including his wife, even if she is not financially dependent on him at all. Paragraph C 28.3.5 states without qualification:

"A married man living with his wife is entitled to all of the expense items listed in this chapter according to the category of his appointment – first country service appointment, promotion, etc".

The expense items are elaborately detailed in paras C 28.20 to C 28.26 and cannot conveniently be summarised. As an illustration it is sufficient to mention that they include travelling expenses for the teacher's spouse, children, and other members of his household; whereas under para C 28.3.3 and 4 a married woman living with her husband cannot recover travelling expenses for these household members unless her husband is fully dependent on her – in which case ". . . payment of removal expenses as for a married man will be considered. Each case should be submitted to the Department for consideration, together with appropriate supporting evidence". This means that, if the husband is not fully dependent on her, although the entire household has to move because of her promotion and although they may travel by public transport and she may actually and reasonably incur all the travelling expenses, under the general conditions she is not entitled to recover the expenses for her family other than herself. Various other illustrations, such as household articles, can readily be given, but they throw no further light on the principle.

The regulations are delegated legislation made by the Governor-General by Order in Council under powers given by Parliament. Regulation 16 confers directly certain rights to actual and reasonable removal expenses. And in turn it subdelegates to the minister discretionary authority in the limited area of laying down general conditions governing payment of removal expenses. I have already held that this subdelegation is valid. Question 2(a) is directed to whether in introducing a sex discrimination the general conditions are within the scope of the subdelegated authority. Of course, if the subdelegated authority is on a fair construction wide enough to permit such a discrimination, whether it is advisable to discriminate in this way is not a question for the court: it is a question of policy for the minister. The court is only concerned with whether the discrimination is within what are sometimes called the four corners of the subdelegated authority. All this is fairly elementary.

In my judgment this discrimination, based as it is purely on sex, is not within the four corners of the subdelegated authority. Several reasons lead me to this conclusion. First, there is no hint in the Act or the regulations of any intention to authorise a discrimination on the ground of sex alone. Indeed, as Mr Reed pointed out, the Act itself contains some indication that Parliament is not in favour of such discrimination in the teaching field. Section 150 of the Act, which had its genesis in a section enacted as long ago as 1938, provides:

"Neither an Education Board nor the governing body of any secondary school or technical institute or community college, nor the Director-General in a case where the appointment is made by the Director-General, shall refuse to appoint a married woman as a teacher in any school on the ground only that she is a married woman, and no married woman shall be dismissed from a position as a teacher in any school on the ground that she is a married woman".

In modern times discrimination on the ground of sex alone is so controversial, and so widely regarded as wrong, that I would not be prepared to infer authority to introduce it from such general language as is found in reg 16 (9), especially in the light of s 150.

Secondly, it seems unlikely that the Governor-General in Council had any intention when reg 16 (9) was promulgated of authorising this kind of

discrimination. In dealing with removal expenses the 1948 regulations did not distinguish between male and female teachers. As Mr Mathieson suggested, in those days there may have been relatively fewer married women teachers in the service. Be that as it may, those regulations gave certain rights to actual and reasonable removal expenses and specified some of the allowable items, including the actual cost of conveyance of the teacher and his family (if any) and the cost of conveyance of the teacher's household furniture and effects: see regs 136, 137 and 138. The minister had power under reg 140 (4) to approve expenses not specifically referred to in the regulations, but there was no provision corresponding to the present reg 16 (9). Regulation 16 (9) was introduced in 1957, and repeated in 1973, with the evident purpose of ridding the regulations themselves of details as to allowable expense items and so forth, but the basic rights to actual and reasonable expenses were still directly conferred by the regulations. It is improbable that the subclause was meant to enable the apparent rights of married women teachers to be severely cut down. One would be loath to attribute any such intention to those responsible for the regulations.

Thirdly, in the context of reg 16 as a whole the power to lay down the general conditions governing the payment of removal expenses is an ancillary power and I have held that it is valid as such. As to what may be done under such a power, in *Utah Construction & Engineering Pty Ltd v Pataky* [1966] AC 629, 640; [1965] 3 All ER 650, 653, the Privy Council approved a statement in the judgment of the High Court of Australia in *Shanahan v Scott* (1957) 96 CLR 245:

> "The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends" (96 CLR 245, 250).

Relating that statement to the delegated legislation now in question, the regulation as a whole, including subcl (9), shows an intention to give certain rights to actual and reasonable removal expenses and indicates that this means that allowances will be available for such items as the cost of moving the teacher's family and some kinds of household articles, the details to be laid down in the general conditions. I think a sex discrimination would be not incidental to this scheme, but a departure from it.

Fourthly, reference to certain international documents, though not essential, is not out of place. The Universal Declaration of Human Rights, adopted and promulgated in 1948 by the General Assembly of the United Nations as a common standard of achievement, includes in articles 2 and 23 (2) statements that everyone is entitled to all the rights set forth in the declaration, without distinction of any kind, such as (among other things) sex, and that everyone, without any discrimination, has the right to equal pay for equal work. The Declaration on Elimination of Discrimination against Women, adopted by the General Assembly in 1967, states in article 10.1:

> "All appropriate measures shall be taken to ensure to women, married or unmarried, equal rights with men in the field of economic and social life, and in particular . . . (b) The right to equal remuneration with men and to equality of treatment in respect of work of equal value".

Paragraph (a) speaks of the right to professional and vocational advancement.

Obviously these very general statements are not directed specifically to such narrow questions as removal expenses. Nor are they part of our domestic law. They represent goals towards which members of the United Nations are expected to work. But, in relation to certain social rights enunciated in the United Nations Universal Declaration of Human Rights, the opinion is expressed in *8 Halsbury's Laws of England* (4th ed) para 844:

> "They may be regarded however as representing a legislative policy which might influence the courts in the interpretation of statute law".

Adopting that approach, I think that the discrimination against married women in the general conditions does not accord with the spirit of the United Nations declarations, and that it would be unsafe to infer from reg 16 (9) that general conditions with that tendency were authorised in 1957 or 1973. It is not to be overlooked that New Zealand has not ratified the Equal Remuneration Convention 1951 (No 100) of the International Labour Organisation, for reasons touched on in the *Report of the Commission of Inquiry on Equal Pay in New Zealand* (1971) paras 1.9 and 1.10. But that does not affect the present point, which is that a comparatively new subdelegated power, expressed in somewhat general terms and on its face of an ancillary and innocuous kind, should not without compelling reason be taken to allow the introduction of a policy conflicting with the spirit of international standards proclaimed by the United Nations documents. Whether a regulation under s 165 or s 203 could validly authorise such a policy is not now the question, but as a matter of construction of the Act I doubt it.

For the foregoing reasons question 2 (a) will be answered as follows: the general conditions are not valid in so far as in respect of removal expenses they discriminate against married women teachers on the basis of sex only.

Question 2(b)

> "Are the 'general conditions' laid down by the Minister of Education pursuant to reg 16(9) of the Education (Salaries and Staffing) Regulations 1957 valid in so far as they:
>
> "...
>
> "(b) Determine the class or description of teacher who is eligible for the payment of expenses pursuant to reg 16 aforesaid?"

Section 165 (1)(g) gives power to make regulations for a purpose: namely, prescribing rates of allowances that may be paid towards the cost of, or incidental to, the removal of teachers on transfer from one school to another. I can find nothing express or implied in that provision or elsewhere in the Act supporting the view that, if the power is exercised, the regulations must provide for the payment of allowances to all teachers who move from one school to another, whatever the reason for the transfer. Nor can I accept a suggestion made by counsel for the plaintiff that s 165 (1)(g) presupposes that, even if the power thereunder is not exercised, teachers on transfer are entitled to removal expenses. Rights to such expenses must depend directly or indirectly on the regulations. I will assume that if categories of teachers are selected as eligible for removal expenses, the basis of selection must be reasonable in the sense in which that term is used in public law: see, for instance, the speech of Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1976] 3 WLR 641, 681; [1976] 3 All ER 665, 695. But prima facie there is nothing to indicate that any unreasonable basis has in fact been adopted. Indeed, given that selection is permissible, I did not understand counsel for the plaintiff to be seeking to show unreasonableness in the selection of the categories of teachers entitled