

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA

In the matter of an application for a
mandate in the nature of Writ of
Certiorari under and in terms of Article
140 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

Onally Holding PLC, Unit No.603,
4th Floor,
No.2, Galle Road
Colombo 4.

Petitioner

Lab Dept. No.TEU/C/19/2008
C.A. (Writ) Application No.843/2010

Vs.

1. The Hon. Minister of Labour,
Labour Secretariat, No.575,
Colombo 04.

- 2(a) Mrs. Pearl Weerasinghe,
Commissioner General of Labour,
Labour Secretariat, 575,
Colombo 05.

3(a). Mrs. N.S. Athukorale,
Deputy Commissioner of Labour,
Labour Secretariat, 575,
Colombo 05
And another.

Respondents

BEFORE : S.SRISKANDARAJAH, J (P/ CA).
COUNSEL : Chandimal Mendis,
for the Petitioners.
Vikum de Abrew SSC
for the 1st to 3rd Respondents.
M.Y.M.Faiz with N.Fernando,
for the 4th Respondent
Written Submission on : 02.07.2012 (Petitioner & 4th Respondent)
30.08.2012 (1st to 3rd) Respondent
Argued on : 08.03.2012
Decided on : 27.09.2012

S.Sriskandarajah, J,

The Petitioner is a Public Leasing Company. The 4th Respondent, an employee of the said company made an application to the Commissioner General of Labour on the 2nd of April 2008, alleging that his employment was unjustly terminated by the Petitioner

company on 12th March 2008. On this complaint an inquiry was held by the Assistant Labour Commissioner (Termination) on 9/06/2009, 1/07/2008, 3/01/2008, 5/12/2008 and 4/03/2008 and thereafter written submissions were tendered by both parties. The Commissioner of Labour delivered his order on the 26th of October 2010, holding, inter alia, that the Petitioner be reinstated in employment with effect from the 15th November 2010, together with back wages for the period from 12/03/2008 to 14/11/2010. The Petitioner in this application is seeking a Writ of Certiorari to quash the said order.

The Petitioner submitted that the said order is bad in law, irrational, unfair, ultra vires and arbitrary for the reason:

- (a) The decision to immediately reinstate the Petitioner when the Petitioner is over 67 years of age is unreasonable, unjustified and irrational, for the reason that he will be unable to carry out his duties as Maintenance Manager;
- (b) The responsibility of Maintenance Manager includes long hours of work and work during the weekends.
- (c) The responsibilities warrant him to be of sound mind and memory and physically competent to manage several employees.
- (d) The 2nd Respondent, the Commissioner of Labour does not have the power to reinstate employees who have passed the age of retirement and as such the said order of the 2nd Respondent is ultra vires.

The position of the Petitioner is that the 4th Respondent employee joined the services of the Petitioner on a contract entered between the Petitioner and the employee, and the letter of appointment issued to the employee dated 19th of February 1997 for the post of Maintenance Manager in Clause 7 states as follows:-

“Should you resign the post, you are requested to give 3 clear months notice to the employer before resignation or pay 3 months salary in lieu of notice. The employer reserves the right to give you 3 calendar months notice or pay 3 months salary in lieu thereof and terminate your service.”

The position of the Petitioner is that the 4th Respondent was given 3 months salary together with gratuity, and his services were terminated in terms of the letter of appointment, as stipulated in Clause 7 of the said letter. The Termination of Schedule of Employment of any workman is covered by the Termination of Employment of Workmen (Special Provisions) Act. As such an employer cannot have special clauses in the letter of appointment that would violate the provisions of this Act. Even if there is a clause for termination in the said letter of appointment or the contract of employment, that cannot supersede the provisions of the said Act. Under Section 2 of the Termination of Employment of Workmen (Special Provisions) Act, no employer shall terminate the scheduled employment of workmen without -

- (a) prior consent in writing of the workman; or
- (b) prior written approval of the Commissioner.

In the present case, if the Petitioner wishes to terminate the services of the 4th Respondent, he should have obtained written consent from the 4th Respondent. The mere fact that the 4th Respondent was given 3 months salary and the gratuity and that he accepted that does not mean that he has given written consent for the termination of his services. In fact, that he has not given consent for the termination of service is borne out from the fact that he made a complaint to the Commissioner of Labour that his services were unlawfully terminated.

If the position of the Petitioner is that the Petitioner has reached the age of 67 and that he is unable to carry out his duties as Maintenance Manager, and if the responsibility warrants him to be of sound mind and memory and be physically competent to manage several employees, and that he cannot, at his age, unable to satisfactorily carry out these responsibilities, and that it will severely prejudice the Petitioner to continue to permit the 4th Respondent to serve with the Petitioner, the Petitioner would have presented these facts to the Commissioner and would have obtained prior written approval of the Commissioner to terminate his services. The fact that there is no retirement age mentioned in the letter of appointment does not mean that the services of the 4th Respondent cannot be terminated at a given time when he reaches an age where he cannot serve the Petitioner efficiently. As I have observed above, it is the duty of the Petitioner to comply with the provisions of the Termination of Employment of Workmen (Special Provisions) Act in terminating the services of an employee. In the given circumstances the Petitioner had not complied with the provisions of this law and terminated the services of the 4th Respondent, therefore, the 2nd Respondent had correctly ordered that the 4th Respondent be reinstated with back wages.

The above order of the Commissioner of Labour does not contain any error of law or it cannot be considered unreasonable. In the given circumstances this Court dismisses this application without costs.

President of the Court of Appeal