

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

In the matter of an application in terms
of Article 14 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

General Engineering & Business Services
(Pvt) Ltd.

No.171, Nawala Road,

Narahenpita, Colombo 5.

PETITIONER

CA (Writ) Application No.539/2010

M.C. Colombo Case No. 5143/05/10

Vs.

1. W.J.L.U. Wijayaweera,
Commissioner General of Labour,
Department of Labour,
Colombo 5.
2. A.P. Jothiratne,
195/5, Sirisumana Mawatha,
Kelanimulla, Angoda.
3. The Hon. Attorney-General,
Attorney-General's Department,
Colombo 12.

RESPONDENTS

BEFORE : S. SRISKANDARAJAH, J, P/CA

COUNSEL : Lakshman Keerthisinghe,
for the Petitioner,
Yresha Fernando SC,
for the 1st and 3rd Respondent
Thushani Machodo,
for the 2nd Respondent

Argued on : 29.11.2011

Written Submission : 31.01.2012 (Petitioners), 24.02.2011(2nd Respondent),
09.04.2011(1st and 3rd Respondents)

Decided on_ : 13.09.2012

S.Sriskandarajah.J.

The Petitioner is a limited liability company registered under the Companies Act of Sri Lanka. The position of the Petitioner company in relation to the 2nd Respondent is that the 2nd Respondent was employed as a Stores Assistant in Penta Ocean Wakachiku, a joint venture company, the contractor attached to the Port of Colombo Extension Project. The 2nd Respondent served the said company from 9th March 1992 up to the 31st December 1996. While the 2nd Respondent was working in the said company, he was injured in an accident. At the request of the said Joint Venture Company, the Petitioner Company employed the 2nd Respondent with effect from 4th January 1997, under their labour supplies contract, as Stores Assistant. The 2nd Respondent, on 7th April 2008, made an application to the 1st Respondent alleging unlawful termination of his services by the Petitioner Company on 8/02/2005, and has sought compensation.

The 1st Respondent inquired into that matter and the inquiry continued for several days and the 1st Respondent made his award on 2/04/2009. In the said award, the 1st Respondent observed that the 2nd Respondent has been consistently in the employment of the Petitioner Company for a period of 11 years with a good record of service, that the 2nd Respondent was outsourced by the Petitioner Company to serve as a Stores Assistant at Penta Ocean Wakachiku Joint Venture Project, the contractor of Port of Colombo Extension Project, and the Petitioner Company has failed to take any steps in respect of engaging the services of the 2nd Respondent after he was released from the said project on 8/02/2008. This act of the Petitioner Company has caused effective cessation of the services of the 2nd respondent from 8/02/2008. The Commissioner considering these facts and had come to the conclusion that the termination of the services of the 2nd Respondent is in violation of the provisions of Termination of Employment of Workmen (Special Provisions) Act and has awarded compensation to the 2nd Respondent in a sum of Rs.149,450/-.

The Petitioner in this application challenges the aforesaid order by way of Writ of Certiorari on the basis that the Commissioner's award is unlawful in the given circumstances and if the Commissioner, after inquiry, has come to the conclusion that the termination of the 2nd Respondent was in violation of the provisions of the Termination of Employment of Workmen (Special Provisions Act), he should have made order for reinstatement instead of awarding compensation. The Petitioner pleaded in his petition that the Petitioner Company is prepared to permit the 2nd Respondent to resume employment even at present.

The construction of Section 6, read with Section 5 of Termination of Employment of Workmen (Special Provisions) Act does not empower the Commissioner to terminate the services of the employee and to order for compensation. In *Eksath Kamkaru Samithiya v Commissioner of Labour* [2001] 2 Sri. L.R137 at 142 & 155 .De Z. Gunawardane]. observed:

“Section 5 renders any termination of employment in contravention of the relevant Act absolutely illegal. And Section 6 states that the Commissioner “may order the employer to continue to employ the workmen” in case the termination was in breach of the provisions of the Act. Although the word “may” taken in isolation express permission or liberty, yet that term “may” acquire a compulsory force in circumstances where, a duty devolves on the authority to exercise that power which that authority was permitted or enable by the statute to exercise”

U. De. Z. Gunawardane, J held:

“The Commissioner will bear in mind, as noted above, that the duty to reinstate the workmen, as are the other duties i.e. to pay “wages and other benefits”, imposed upon him under section 6 of the Act, is mandatory and compulsory and that here is no option in the matter”

However, there is no provision in the Act to deal with a situation where the employee has become incapable of assuming duties due to various circumstances at the time of the determination of the Commissioner that the employer had terminated the services of the employee in contravention of the Act. The Courts have interpreted the word “may order” in Section 6 in these circumstances empowering the Commissioner to order compensation instead of ordering the employer to continue to employ the workman. In *Blanka Diamonds (Pvt) Ltd. v Coeme* [1996], 1 Sri.L.R 200 at 2005 Senanayake J observed:

“The Commissioner in terms of Section 6 of the T.E. Act has a discretion in view of the word used in Section 6. The words used are ‘may order’ and not ‘shall order’. The Legislature in its wisdom had given the Commissioner a discretionary power as each case has to depend on various

factors and circumstances. The word 'may order' was considered in an unreported case the Ceylon Mercantile Union v. Messrs Vinitha Limited and the Commissioner of Labour, decided on 29th March, 1976 Tennekoon, C.J. observed "the words in the section are 'may order' and not 'shall order' the legislature obviously did not contemplate that in every case of Termination of Employment without the permission of the commissioner of Labour, it would be mandatory on the Commissioner to order reinstatement or continuance of employment upon a complaint being made to him under section 6. "I am bound by the interpretation given by the Bench of three Judges of the Supreme Court. **In the instant case the 1st Respondent was an expatriate and his visa was granted for a specific period.** Therefore, it is my view the circumstances and facts of each case have to be considered on its own merits and the Commissioner in those circumstances considering section 6 exercised his discretion without making an order for continuance of service. Therefore I am of the view that the submission of the learned Counsel for the Petitioner giving a restrictive interpretation to section 6 of the T.E. Act has no merit." (Emphasis added).

In Lanka Multi Moulds (Pvt) Ltd v. Wimalasena, Commissioner of Labour and others [2003] 1 Sri L.R 143 the 2nd Respondent (the workman) a British national was employed by the appellant company (the employer) on 1.9.1992 on contract for a period of 3 years. The employer terminated the employment of the workman with effect from 30.7.1994. On 22.11.95, the Commissioner ordered re-instatement of the workman with effect from 15.1.96 with back wages for 17 ½ months from 30.7.94 to 15.1.96 a sum of Rs.3,533,750/-. The Court of Appeal affirmed the order that the termination of employment is illegal for want of prior consent of the workmen under section 2(1)(a) of the Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971. The court quashed the order for re-instatement and reduced back wages to 13 months (The balance period of the contract of three years).

Fernando J held in the above case held:

“I hold that “may” in section 6 confers a discretion on the commissioner; that “and” must be interpreted disjunctively; and that **the Commissioner had the power to order payment of wages and benefits for the balance period of the 2nd Respondents contract without making an order for reinstatement.** The Court of Appeal was therefore entitled to order such payments when setting aside the order for reinstatement.” (Emphasis added)

In the instant case, the commissioner has no reason to order for compensation in lieu of ordering the employer to continue to employ the workman. As the workman is not incapacitated in any way that deprives the Commissioner to order for continuous employment, the Commissioner should have ordered for continuous employment with wages and other benefits which the workman would have otherwise received if their services had not been so terminated.”

For the aforesaid reason this Court issues a Writ of Certiorari to quash the award dated 2/04/2009 made by the 1st Respondent and direct the Commissioner to make an appropriate order for reinstatement of the workman with wages and other benefits which the workman would have received if his services had not been terminated.

This order will not preclude the Commissioner to consider the present situation and if there is sufficient ground to satisfy the Commissioner that there is any impediment depriving the Commissioner to order for reinstatement, after stating the reasons, he may order for compensation. Application for a writ of certiorari is allowed without costs.

President of the Court of Appeal