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 Writs of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

J.P.Alensu,
Chandrasiri Hotel and Bakery,
No.372, Hospital Road,
Kalubowila, Dehiwala.

Petitioner

C.A. Writ Application No: 455/2006

Vs

1. Mahinda Madihahewa,
   Commissioner General of Labour,
   Department of Labour , Labour Secretariat, Colombo -05.
   And six (06) others.

Respondents.

BEFORE : **S. SRISKANDARAJAH, J.**

COUNSEL : J.Jayawickrema
for the Petitioner
Mrs. Maithri Amarasinghe Jayatilake SC
for the Respondents

Argued on : 06.12.2010

Decided on : 14.02.2011

S.Sriskandarajah J

The Petitioner was managing the hotel called Chandrasiri Hotel during the relevant period. On 17th September 2004 an employee of the said hotel named Bandula Bandara having enjoyed one week leave prior to 17.09.2004 made another leave application. The 4th ,5th ,6th Respondents with Bandula Bandara and 8 other employees have threatened the Petitioner stating that if the Petitioner does not grant leave to Bandula Bandara they will not turn up for duty and disrupt the work at Bakery and Hotel. The Petitioner submitted that 11 employees of the hotel and bakery including 4th, 5th,6th Respondents and Bandula Bandara did not report for duties and kept away without prior notice and /or approval of the Petitioner. The 4th ,5th and 6th Respondents made three separate applications to the Commissioner of Labour dated 03.12.2004 in terms of the Termination of Employment of workmen (Special Provisions) Act No 45 of 1971 as amended. The Petitioner in the inquiry before the Commissioner raised objection to the said applications on several grounds namely: that the Petitioner is not the employer, that the number of the workmen in the work place were less than 15 and that the 4th ,5th and 6th Respondents had admitted that they have vacated their post on their own. Hence the said applications cannot be considered under the said Act No.45 of 1971.

After an inquiry the 1st Respondent made an order on 22.12.2005 to pay compensation to the 4th ,5th and 6th Respondent. The Petitioner in this application has challenged the said order and had sought a writ of Certiorari to quash the said order on the grounds; that the inquiry was held by the 2nd and 3rd Respondents but the order was made by the 1st Respondent who has not heard the parties and thereby there is a breach of the principles of natural

justice and that the 1st Respondent has not given sufficient reasons for his decision.

The Respondents' position is that on many occasions at the inquiry it had come to light that the Petitioners had more than 15 employees at the relevant time. The employees who filed the said application before the Commissioner claimed that there were more than 25 employees at the relevant time. The Petitioner has failed to prove their own contention or contradict the Respondents position by producing evidence such as attendance registers or payrolls. It is also evident from the EPF contributions that the Petitioner is the employer of the said employees. In addition there is ample evidence to show that the Petitioner has overall supervision and control of the employees and the business. The term employer has been defined in the interpretation Section of the Act to include any person who on behalf of any other person employs any workman. In *Ibrahim v Edirisinghe 32 NLR 214* the court interpreted the term "Employer" to include a person who enters into any agreement expressly or impliedly with any labourer and the duly authorised agent or manager of such person. Therefore the Petitioner who claims that he is only managing the said hotel and hence he cannot be the employer of the 4th ,5th and 6th Respondent is untenable.

If the Commissioner after an inquiry found that an employment of an employee was terminated in contravention of the provisions of the Termination of Employment of workmen (Special Provisions) Act he could in the ordinary circumstances order reinstatement with back wages under Section 6 of the said Act on the basis that the services of the workmen had not been terminated. It is settle law that the Commissioner is empowered under Section 6 in special circumstances to award compensation in lieu of reinstatement.

In *K.D.C.Pradeep and 16 Others v Skyspan Asia (Pvt) Ltd and 4 Others C.A/WRIT/App/No.2045/2003 C. A Minutes 22/06//2005* the Court after considering the cases *Eksath Kamkaru Samithiya v Commissioner of Labour [2001] 2 Sri.L.R137 at 142 &155, Blanka Diamonds (Pvt) Ltd. v Coeme [1996], 1 Sri.L.R 200 at 205, Lanka Multi Moulds (Pvt) Ltd v Wimalasena, Commissioner of Labour and others [2003] 1 Sri.L.R 143*, held:

> "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. In these circumstances the Courts have interpreted the word "may order" in Section 6 empowering the Commissioner to order compensation instead of ordering the employer to continue to employ the workman".

Section 6A deals with the situation where the employment of any workman is terminated in contravention of the provisions of this Act in consequence of the closure by his employer of any trade industry or business, in these circumstances the Commissioner is empowered to award compensation to the employees whose services are terminated in contravention of the said Act as an alternative to reinstatement of such workman. But there is no provision in law to deal with a situation where the employer has become incapable of providing employment to its employees not due to closure but due to various circumstances that has arisen at the time of the determination of the Commissioner on an application of the employees in relation to the termination of their employment.

Appling the rationale of the above judgement if the circumstances are such that ordering reinstatement causes employer-employee unrest in the opinion

of the Commissioner he could order compensation instead of ordering the employer to continue to employ the workman. The Commissioner in his order has given his reasons for ordering compensation in lieu of reinstatement.

The compensation awarded to the workmen is in terms of the formula published in the Gazette No 1321/17 dated 31.12.2003 therefore the compensation awarded cannot be considered as unreasonable.

The Petitioner has also challenged the said order on the ground that the inquiry was held by the 2nd and 3rd Respondent but the order was made by the 1st Respondent and hence the rules of natural justice had not been followed.

In *Nagalingam v Lakshman de Mel , Commissioner of Labour 78 N.L.R* 231, Sharvananda J with Tennekoon, C.J and Gunasekara J agreeing held:

> "Mr.Jayawardena, appearing for the Petitioner, urged two grounds in support of his application.
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> One ground was that the inquiry in to the 3rd respondent's application under section 2 of the Act was conducted by the 2nd Respondent and that in the premises the 1st respondent had no jurisdiction to make the order complained of. Section 12 of the Act provides that the commissioner shall have power to hold such inquiries as he may consider necessary for the purposes of the Act. Section 11(2) authorises the commissioner to delegate to any officer of the Labour Department any power, function or duty conferred or imposed on him under the Act. Hence, it was lawful for the Commissioner to have delegated to his assistant, the 2nd Respondent, the function of holding the inquiry into the 3rd respondent's application. The ultimate order dated 28th March, 1974,(P12) , though it has gone under the hand of the 1st

respondent, was in fact, as a perusal of the original record disclosed, made on the recommendation of the 2nd Respondent. In the circumstances, there is no substance in this objection. In fact, the Counsel for the petitioner, when it was pointed out to him that the order only embodied the decision of the 2nd Respondent, did not press the matter further,"

In *Kundanmals Industries Ltd v Wimalasena Commissioner of Labour and Others [2001] 3 Sri.L.R 229* J.A.N.De Silva P/CA (as he then was) held:

"I see no serious objection to the Head of the Department taking a final decision having considered the evidence recorded and documents available to him on the question that has to be decided. In the circumstances I state that there is no merit in this submission. There is no material available to establish that the 1st respondent mechanically adopted the recommendations without giving his mind to the evidence and documents."

The power to delegate hearing under the Termination of Employment of Workman Act was considered and accepted in the above cases. In the absence of any material that the commissioner has not given his mind to the inquiry and the recommendation of his subordinate officers the order of the commissioner cannot be quashed. The burden is on the Petitioner to show that the Commissioner has not given his mind to the inquiry proceedings and the Recommendation of the inquirer as there is a presumption in the Evidence Ordinance that all official acts are done according to law.

For the above reasons the Petitioner is not entitled to any relief as prayed for in the Petition. The application of the Petitioner is dismissed without costs.

Judge of the Court of Appeal