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

In the matter of an application for the issue of mandates in the nature of Writs of Writs of Certiorari and Mandamus.

Commercial and Industrial Workers' Union
17, Barracks Lane,
Colombo 2.

PETITIONER

CA Writ Application No: 548/2010
Arbitration Case No: A3182

Vs.

1. **Unilever Ceylon Ltd.,**
   No.258, M. Vincent Perera Mawatha,
   Colombo 14.
2. **V.I. Jayasuriya**
   No.50/20, Sumudu Uyana,
   Pubudu Mawatha,
   Mattegoda,
   Polgassovita.
3. **Gamini Lokuge,**
   Minister of Labour Relations and
   Productivity Promotion

Labour Secretariat,

Narahenpita,

Colombo 5.

4. **W.J.L.U. Wijayaweera,**
Commissioner of Labour,

Labour Secretariat,

Narahenpita,

Colombo 5.

RESPONDENTS

BEFORE : **S. SRISKANDARAJAH, J (P/CA)**

COUNSEL : S.Sinnathamby with R. Sasikumar,

for the Petitioner,

S.L.Gunasekera with Chamantha Weerakoon Unamboowa,

for the Respondents.

Argued on : 10.01.2012

Decided on : 30.01.2013

S.Sriskandarajah, J,

The Petitioner is a Trade Union called Commercial and Industrial Workers' Union, which has sought a Writ of Certiorari to quash the award of 8/06/2010, made by the 2nd Respondent, who was appointed as an Arbitrator under the Industrial Disputes Act, to hear the dispute between the Petitioner and the 1st Respondent. The dispute referred for arbitration was: "whether the decision of 1% from the annual salary increments of 802 employees of Unilever Ceylon Limited, whose names are referred to

in the attached schedule and withholding of their service increments and reduction of their annual leave by the company, having considered that the period from 1998 May2000 (excluding week-ends) during which the said employees had joined the strike as the members of the Commercial and Industrial Workers' Union as No-Pay Absentees is justified and, if not, to what relief the said employees are entitled."

The said dispute was first referred to Mr. A.N.D. Balasuriya for arbitration by the Minister of Labour under Section 4(1) of the Industrial Disputes Act, as amended. While the inquiry was pending, the Arbitrator, Mr. A.N.D. Balasuriya, died. The same dispute was thereafter referred for arbitration to the 2nd Respondent by the Minister of Labour. The Petitioner's position in the said arbitration was that the workers had been on strike from 1998 May 5th to 1998 May 20th and, after a settlement on 1998 May 20th, they had reported for work, but the 1st Respondent had considered the period on strike as no-pay leave, and had deprived the 802 workers their annual salary increments of 1% and their service increment and reduced the annual leave, and they prayed for the restoration of the increment and the annual leave before the Arbitrator. The 1st Respondent raised a preliminary objection stating that the Arbitrator has no jurisdiction as the said dispute arose from a Memorandum of Settlement. The 2nd Respondent-Arbitrator dismissed the preliminary objection and decided to inquire into the dispute. It revealed in the said inquiry, that the 1st Respondent introduced a new system and on 1998 May 4, the workers in the Toothpaste Department of the 1st Respondent, were forced to work according to the new system, and they refused to do so and stopped work. The workers struck work on 1998 May 5, and a complaint was made to the Commissioner of Labour, after a discussion on 1998 May 20, a settlement was arrived at and it was embodied in a Memorandum of Settlement under Section 12(1) of the Industrial Disputes Act and thereafter the workers reported for work. The settlement included the following:-

1) Clause 2 of the settlement provided that the 1st Respondent agreed that the suspension of the 22 workers be removed with immediate effect and that they be reinstated without conditions;
2) Clause 9 provided that the 1st Respondent agreed not to change the work shift method;
3) Clause 16 provided that the period from 1998 May 5 to 1998 May 20, be considered without pay; and
4) Clause 17 provided that the 1st Respondent will not do injustice or take revenge.

The Petitioners submitted, when the salary sheet for January 1999 was issued to the employees, it was found that 1% of the annual salary increment had been reduced. The service increments had also been reduced by 1%, and the annual leave entitlements had been reduced, considering the strike period as non-working days. In relation to the annual salary increments, the service increments and annual leave, provisions are laid down in the collective agreements between the 1st Petitioner and the 1st Respondent. Clause 8 of the collective agreement provides: "Employees whose work and conduct are satisfactory, will be entitled to an annual increment of 4% of their consolidated wage with effect from 1st January 1998. Those employees who have been absent without due authority with the consequence of being placed on no-pay absence in the preceding year, will be entitled to an annual increment of 3% of the consolidated wage with effect from 1st January 1998.

Clause 9 of the collective agreement provides that employees who have not registered an unauthorized absence in the preceding year, will not normally be entitled to an additional increment of 4% of the consolidated wage and employees who have registered no-pay absence for the past 3 years will be entitled to 3% of the consolidated wage with effect from 1st January 1998 on reaching 10, 15 and 25 years of service respectively.

According to Clause 8 of the collective agreement, those who have been absent without due authority and on being placed on no-pay absence in the preceding year, will only be entitled to an annual increment of 3% as against the normal annual increment of 4% from January 1998. The question before the Arbitrator was, whether the period on which the employees struck work could be considered as the period of leave authorized by the management. The position of the Petitioner is that the Union is legally entitled to strike, and the employees on strike do not require permission of the employer to strike and, therefore, the period of the strike does not require authorization by the management; the period on strike is a legitimate period of absence. The Petitioner contended that the 2nd Respondent erred in failing to consider that Clause 8 entitles the 1st Respondent to reduce the annual increment to 3% only if the employees have been absent without due authority with the consequence of being placed on no-pay absence. In other words, the employees should have been absent without authority and then, as a consequence of that, they are placed on no-pay absence and, in this case, these employees were on strike, and their absence was legitimate, and did not require authority from the 1st Respondent. The Petitioner contended that in the event the workers are legally entitled the right to strike which involves absence from work and, therefore, the absence during strike is authorized by law; therefore, the employees cannot be placed on no-pay absence. The Petitioner submitted, in the above circumstances, the Petitioner is entitled to a Writ of Certiorari to quash the award dated 8th June 2010 on the 2nd Respondent.

When workmen are on strike, there is no question of obtaining approval or permission, but in this instance, the Petitioners were on strike and the complaint was made to the Commissioner of Labour and, after a discussion on 20/05/1998, a settlement was arrived at and it was embodied in a Memorandum of Settlement under Section 12(1) of the Industrial Disputes Act, and the workmen reported for work on the basis of that settlement, and suspension of the 22 workmen was removed, and they were reinstated with immediate effect without any condition on

the basis that the workmen who were on strike from 5/05/1998 to 20/05/1998 be considered without pay. When parties agree that a particular period would be considered as without pay, that they conceded that their absence is without due authority, and that is why they were placed on no-pay leave, and that as this period, viz., 5/05/1998 to 20/05/1998 is considered as a period on which the workmen were on no-pay leave, the Arbitrator has quite correctly arrived at the finding that Clause 8 of the Agreement signed between Unilever and the Commercial and Industrial Workers' Union on 2/01/1998 refers to person's absence without due authority and on being placed on no-pay absence in the preceding year, will only be entitled to an annual increment of 3% as against the normal annual increment of 4% from 1st January 1998 and, as this period of no-pay could be considered as the period they were absent without authority, these employees are only entitled to 3% annual increment. The Arbitrator also observed that not all the 802 employees listed in the reference had participated in the said strike as in terms of the agreement, the employees' Union, when any reduction has occurred, to treat that period on strike as no-pay leave makes it clear that the Union is not claiming the period on which they struck work is on the basis of strike and that they are entitled for the salary during that period. In those circumstances the Arbitrator is justified in coming to the finding that:-

1) Unilever, the 1st Respondent is entitled to the reduction of 1% from the annual salary increment of the striking worker;
2) Unilever is within its rights to withhold their service increments; and
3) Unilever is entitled to the reduction of the annual leave of the workers who participated in the strike between 5/05/1998 and 20/05/1998.

In the above circumstances this Court dismisses this Application without cost.

President of the Court of Appeal