

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

The Sri Jayawardenapura General Hospital Board  
The Sri Jayawardenapura General Hospital,  
Thalapathpitiya, Nugegoda.

**PETITIONER**

C.A 1749/2006 (Writ)

Vs.

1. Hon. Athauda Seneviratne M.P.  
Minister of Labour Relations and Foreign  
Employment,  
2<sup>nd</sup> Floor, Labour Secretariat  
Narahenpita, Colombo 5.

**And 7 others**

**RESPONDENTS**

**BEFORE:** Anil Gooneratne J

**COUNSEL:** Sanjeewa Jayawardena P.C., with Senani Dayaratne for Petitioner  
Viveka Siriwardena S.S.C., for Substituted 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondnets  
T. Machado for the 6<sup>th</sup> Respondent

**ARGUED ON:** 16.11.2012 & 23.11.2012

**DECIDED ON:** 21.03.2013

**GOONERATNE J.**

Mandates in the nature of Writ of Certiorari and Mandamus are sought by the Petitioner namely The Sri Jayawardenapura General Hospital Board to quash an Arbitration award reflected in P7 & P7(a). The 5<sup>th</sup> Respondent was the arbitrator. A Writ of Mandamus is sought against the 1<sup>st</sup> Respondent to refer the matter for fresh arbitration. The 2<sup>nd</sup> paragraph of award P7 refer to the matter in dispute. It reads thus: (in verbatim)

The matter in dispute between the aforesaid parties is whether the not granting of permanency in service by Sri Jayawardanapura General Hospital Board to Miss A. A. S. Livera, Mrs. P. C. K. Pathiratne, and Mrs. R. A. D. L. Ranasinghe who are employed as Electro Cardiograph Recordists at the Sri Jayawardanapura General Hospital is justified and to what relief each of them is entitled.

6<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> Respondents were employed on a contract basis in the Petitioner Hospital as 'Electro Cardiograph Recordists'. The case argued before this court was only regarding the 6<sup>th</sup> Respondent, (though resigned from service on 26.10.2004) since the 7<sup>th</sup> & 8<sup>th</sup> Respondents had settled the case with the authorities concerned. The body of the petition filed in this application describe the onerous nature of the duties and functions/responsibilities reposed in the

above Respondents as Electro Cardiograph Recordists (paragraphs 8 – 12 of petition). Position of the Petitioner is that 6<sup>th</sup> Respondent was employed on a contract basis. It is also pleaded that persons holding the above post need to successfully complete a training course (paragraph 13 of the petition) and should possess a certificate of competence issued by the Department of Health Services. The 6<sup>th</sup> Respondent and 7<sup>th</sup> & 8<sup>th</sup> Respondents had not obtained a certificate of competence from the Department of Health Services. Petitioner had advertised the posts on or about April 1999 with certain terms including the requirement of having a certificate of competence, and due to the necessity of the Petitioner Hospital the 6<sup>th</sup> Respondent along with 7<sup>th</sup> & 8<sup>th</sup> Respondents were employed on a contract basis (document A40 and annexure also discussed below).

In the submission before this court the learned President's Counsel maintained that the 6<sup>th</sup> Respondent and the other two were not entitled to a permanent post since a certificate of competence had not been obtained by them, and the Arbitrator had erred to that extent by not considering that fact. I have noted the submissions made to this court by the learned President's Counsel and the matters contained in the pleadings of both parties.

It would be important to examine the order of the learned Arbitrator, to ascertain whether the order at P7 & P7(a) is a just and equitable order. The following salient points are noted.

- (a) Evidence of 3 witnesses considered. The order highlight the evidence of one Sarath Roberts who was an Administrative Assistant and emphasis is on
  - (i) Three other employee who did not possess the certificate of competence were granted permanency. One Miss D.K.S. Perera

recruited as a E.C.G. Recordist with lesser qualifications was made permanent (A30) even without a certificate of competence.

(ii) 6<sup>th</sup> Respondent and the other two Respondents had continuity of service though not possessed with the certificate of competence. As such in view of (i) above 6<sup>th</sup> Respondent and the other two Respondents treated differently. They were deprived of any form of training whilst some clerks recruited as ECG Recordists were sent on training.

(b) Some reference made to the marital status of the other two Respondents and the 6<sup>th</sup> Respondent remained unmarried, (paragraph 9 of award)

(c) The Commissioner of Labour inquired into a complaint made by the said employees regarding them being deprived of permanency. The Commissioner of Labour took the position that non granting of permanency was illegal (paragraph 10).

(d) Evidence of Dr. Neomalee Amarasena with reference to a particular document A97. Continuity of service of the 6<sup>th</sup> Respondent admitted and that the Trade Test as described was done by the witness. Witness was satisfied with operating of the ECG machine by the employees concerned who had obtained more marks than the others at a test.

(e) The Administrative Officer's evidence considered. 6<sup>th</sup> Respondent's resignation accepted from the hospital (X5).

(f) 6<sup>th</sup> Respondent was employee on a contractual basis but continuity of service established. No complaints as regard the work of 6<sup>th</sup> Respondent. The Petitioner hospital failed to release the 6<sup>th</sup> Respondent and the other

two Respondents from hospital work to enable them to obtain the certificate of competency.

The material placed before this court and the arbitrator no doubt indicate that the 6<sup>th</sup> Respondent had been in the employment of the Petitioner hospital for a period of about 7 ½ years. (contractual basis from 13.1.1997 to 26.10.2004). Evidence transpired in the Arbitration proceedings indicate that there was a continuity of service of the 6<sup>th</sup> Respondent but she could not obtain the certificate of competence issued by the Health Department. This was a point that the Petitioner relied upon to fault the award of the Arbitrator. However the evidence led before the Arbitrator does not indicate any item of evidence which fault the 6<sup>th</sup> Respondent in the performance of her work or duties. The 6<sup>th</sup> Respondent on the other hand relies on circular No. 27 of 2001(A41). My attention was drawn to letter marked A97 and the evidence of Dr. Amarasena (in cross examination). The letter A97 state that one need to have a substantial basic training which can only be received in the school for cardiographer and those who lack that qualification are unsuitable for permanent employment. In cross examination the witness admit the following:

- (a) Trade test conducted and satisfied about the outcome of the test regarding all three Respondents.
- (b) The three of them did not possess the certificate of competence but they had other certificates and being satisfied recruited them.
- (c) Continuity of service of all 3 Respondents confirmed without a break in service.

The Arbitrator is required only to make a just and equitable award. There is material placed before the Arbitrator that the Respondent hospital did not attempt to release the 6<sup>th</sup> Respondent and the other two Respondents to the Health Department to enable them to obtain the required training and obtain the certificate. There was evidence that others who had not obtained the certificate of competency were made permanent. In the proceedings Petitioner did not contest the above position of one ECG Recordist D.K. Kanthi Samanmalee Perera who was made permanent. Nor could the Petitioner make any complaint on the performance of work of the 6<sup>th</sup> Respondent. The case presented to the Arbitrator was not one which demonstrate any kind of incompetence on the part of the 6<sup>th</sup> Respondent. Nor did the Petitioner show that the 6<sup>th</sup> Respondent did not possess any other certificate of failed in the trade test. I agree with the views of the Arbitrator that the 6<sup>th</sup> Respondent and the other two Respondent had been discriminated.

In the manner argued on behalf of the Petitioner can one conclude that Arbitrator had completely failed to consider the far reaching medical ramifications of granting permanency to applicants. If that be so why did the hospital authorities permit the 6<sup>th</sup> Respondent to continue to perform her duties for 7 ½ years?

This is indicative of the fact and point that the 6<sup>th</sup> Respondent's employment though termed as contractual or casual, by the work performance it was apparent that the performance was good and assumed a regular character. I have had the opportunity to include the dicta in the following case laws to support the above views.

In River Valleys Development Board V United Engineering Workers' Union (SC 56/71 decided on 27.3.73), the Supreme Court held that although the workmen were termed 'casual' their employment had assumed a regular character which was openly recognized by the employer by the mode of payment which was fortnightly and not daily, and also by the climate created by the employer who, throughout held out to them that they were not casual but were employed on a regular basis despite the artificial breaks which were periodically imposed on their employment. In Superintendent of Pussella State Plantations, Parakaduwa V Sri Lanka Nidahas Sewaka Sangamaya (1997) 1 SLR 108, where His Lordship the Chief Justice, G.P.S. de Silva held that "It seems to me, thereafter, that whilst there is no legal objection to the employment of temporary or casual employees who do not have the rights of permanent employees, in the instant case the facts show the description of the workman as "casual" is not true, and that the real character of his employment is that of a permanent employee.

Having considered the above decided cases, it is apparent that the real character of employment of the Respondents take the character and nature of permanent employment. The Petitioner had in fact settled the case of the other two Respondents for good reasons and granted them the status of permanency. Why should the 6<sup>th</sup> Respondent be denied of the benefit merely because she left the employment of the hospital? Further annexure III of document A40 and document A40 itself, is good and sufficient material to decide on proficiency. A certificate of proficiency as Electro Cardiograph Recordist have been obtained by the 6<sup>th</sup> Respondent. Annexure III above is self explanatory.

....."The Board (Petitioner) had decided to amend the recruitment criteria for the post by having only a recognized ECG Recordist certification as the qualification.

In view of the above it is not possible to fall back on the argument advanced on behalf of the Petitioner that 6<sup>th</sup> Respondent not having a certificate of competence.

The real character of employment is of a permanent nature and the evidence before the Arbitrator with emphasis to the terms of recruitment, qualifications obtained, service record are not matters faulted by the employer and no material placed before the Arbitrator of any inefficiency on the part of the 6<sup>th</sup> Respondent as regards her service record, to deny the 6<sup>th</sup> Respondent relief, sought before the Arbitrator. The Arbitrator's award is a just and equitable award. I see no basis to interfere with same.

In the submission on behalf of the Petitioner much emphasis is placed regarding the 6<sup>th</sup> Respondent's voluntary resignation on 26.10.2004, whilst the arbitration was pending. It is argued that specific terms of reference constitute the ambit and scope of the Arbitrator's powers.

In other words as described by the learned President's Counsel the employment must be a live issue. The operative words emphasized in the submissions with reference to the above matter in issue are the words "who are employed". I have given my mind to every word in the written submissions of the Petitioner.

No doubt the Arbitrator does not have the power to exercise any power outside the terms of reference. But what flows from the matter in dispute is whether or not the granting of permanency is justifiable? The operative part, to my view is to ascertain whether it is just and equitable to make the 3 employees permanent. Obviously as at the date of reference to Arbitration the other part of the matter in dispute relates to the 3 Respondents



'who are employed' as Electro Cardiograph Recordist. What is important is to decide on the three Respondents permanency. What follows is that those Respondents are employed as above. The 6<sup>th</sup> Respondent had a service record of 7 ½ years without being made permanent. If permanency is granted some financial and other benefit from the service would accrue to the 6<sup>th</sup> Respondent. I would take the view as demonstrated by the 6<sup>th</sup> Respondent that the Arbitrator had observed that "It is uncontroverted fact that the matter in dispute occurred while the workman was on duty then the workman is entitled to relief even if she had left the service. What is relevant and important is the service record of the 6<sup>th</sup> Respondent, and decide, the question of permanency. The term 'who are employed' should not be read in isolation, but in the context of the question of permanency.

Another issue that is raised by the Petitioner is that the 6<sup>th</sup> Respondent remained unmarried expecting permanency. There is reference to this fact at paragraph 9 (Pg 4 of P 7). No doubt the Arbitrator has given his mind to this and said so, but the Arbitrator's conclusions are not solely dependent on this, and the evidence led at the inquiry goes into very substantial questions of permanency. The above question of marriage is somewhat a comment and conclusions in P7 are independent of this point. It is only a mere observation and nothing else.

I wish to add that circular No.27/2001 dated 29.1.2001 issued by the Ministry of Public Administration cannot be ignored (A 41). The operative date according to the said circular is 01.10.2001. As such this court takes the view as stressed by the Petitioner (who objects to back dating from date of recruitment) and court holds that the award of the Arbitrator is a just and

equitable award but permanency of the 6<sup>th</sup> Respondent is with effect from - 01.10.2001. Subject to this variation the award remains a just and equitable award. The Arbitrator in this inquiry has made all such inquiries and heard all such evidence tendered by parties, and arrived at his conclusions.

The term 'just and equitable' in the Industrial Disputes Act has been the subject of extensive judicial interpretation, and an examination of these decisions would indicate the part that the concept of equity plays in industrial disputes. In a very broad sense, it may be said that "the test of a just and equitable order is that those qualities would be apparent to any fair-minded person reading that order" 78 CLW 46 & 48. It may be objected that this test is a vague one – that it helps little to clarify the already vague or imprecise concepts of justice and equity. But it has the merit of suggesting or implying that an order would be just and equitable if it appears to the sense of justice of a fair-minded man, in turn implying that the fair-minded man's sense of justice is as close as one can get to some objective standard of equity. Of course, we may have difficulty in agreeing on who is a fair-minded man, and one suspects that the fair-minded man contemplated is none other than the appellate court.

(Pg. 11, some concepts of labour law – S. R de Silva)

In all the above circumstances this court is not inclined to disturb the award and findings of the Arbitrator in P17 & P17a. This court does not wish to exercise its discretion in favour of the Petitioner in this Writ application. As such

subject to the above variation as regards the effective date of permanency I  
dismiss this Writ application without cost.

Application dismissed.

JUDGE OF THE COURT OF APPEAL