

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

Sri Lankan Airlines Limited
Level 22, East Tower,
World Trade Centre,
Echelon Square, Colombo 1.

PETITIONER

C.A 273/2007 (Writ)

Vs.

1. Hon. Gamini Lokuge M.P.,
Minister of Labour Relations & Productivity
Improvement
Ministry of Labour Relations & Productivity
Improvement
2nd Floor, Labour Secretariat
Colombo 5.
2. Mr. D. Somaweera Edirisinghe
Commissioner General of Labour
Labour Secretariat
Colombo 5.
3. Mr. Mahinda Madihahewa,
Secretary,
Ministry of Labour Relations & Manpower
and former Commissioner General of
Labour
2nd Floor, Labour Secretariat
Colombo 5.
4. Mr. V. Vimalarajah
153/1, Kirulapone Avenue,
Colombo 5.

5. Mr. T. Raveendran
No. 151/1, Collingwood Place,
Colombo 6.

RESPONDENTS

BEFORE: Anil Gooneratne J. &
H. N. J. Perera J.

COUNSEL: Sanjeeva Jayawardena P.C., with Senani Dayaratne
For the Petitioner

Respondent M. A. Sumanthiran with Ms.E. Tegal & S. Arulanantham for 5th

Arjuna Obeysekera D.S.G., for 1st, 2nd & 3rd Respondents

ARGUED ON: 20.02.2013 & 21.02.2013

DECIDED ON: 28.03.2012

GOONERATNE J.

Mandates in the nature of Writs of Certiorari and Mandamus are sought by the Petitioner Company namely Sri Lankan Airlines Limited, to quash the arbitration award marked P17 & P17(a) (as in sub paragraphs b, c & d of the prayer to the petition) and as in sub paragraphs (e) & (f) of the prayer to the petition for a Writ of Mandamus respectively.

The facts are set out in the affidavit filed in this court by the Senior Manager – Human Resources of the Petitioner Company. The 5th Respondent was an employee of the Petitioner Company who joined the organization in June 1991 and whose services were terminated on or about 26.3.1999. As at the date of termination 5th Respondent was an Air Craft Technician. It was submitted to this court by learned President's Counsel for the Petitioner that the nature of work entrusted to the 5th Respondent is constant and highly sensitive which gives access to aircraft, at all important time intervals. By an internal memo marked P2 information was received that the 5th Respondent was arrested on 23.3.1999 by the Terrorist Investigation Unit of the Sri Lanka Police, on suspicion of having close links, with members of the Liberation of Tigers of Tamil Elem (LTTE). Letter P3 sent by the Terrorist Investigation Unit of the police gives details of arrest and the connection 5th Respondent had with the above terrorist organization and remanding him to fiscal custody. Documents P4, P5 & P6 relate to interdiction, recommendation to terminate services and termination of services of the 5th Respondent respectively.

Thereafter the Petitioner Company, was by letter marked P7a & P7b (by Attorney at Law and 5th Respondent) informed of the 5th Respondent being discharged by the Magistrate on 1.12.1999. By P7b Petitioner had sought reinstatement in the company. The letter P7a is self explanatory of the 5th Respondent's position in the process of requesting for reinstatement. The learned President's Counsel for Petitioner drew the attention of this court to documents P9 & P10. Learned President's Counsel for Petitioner very correctly and in the spirit of a learned counsel, assisted court by disclosing all the relevant facts which may be favourable to the 5th Respondent, who in law could not be held liable or

responsible for any criminal prosecution under the Prevention of Terrorist Act or the relevant Emergency Regulations in view of the decision made by the Hon. Attorney General, not to prosecute in terms of the said laws. However notwithstanding above it was the contention of learned President's Counsel for the Petitioner Company that the relationship of employer and employee is not and cannot be dependent on a mere discharge or exoneration of charges preferred against its employee the 5th Respondent. He added that the Arbitrator (4th Respondent) has erred in law in his order, in ordering reinstatement of the 5th Respondent and in lieu of reinstatement the order should be made for payment of reasonable compensation. The law mandates the award of compensation in lieu of reinstatement when the circumstances so warrants.

In making submissions to this court by learned President's Counsel for Petitioner, emphasized the importance of the Petitioner Company as the National Carrier where people of all walks of life are dependent in the Petitioner Company to travel overseas and the sensitive nature and the safety that had to be ensured to the public and country in the performance of functions and duties of the Petitioner Company as a national carrier. In the context of the case in hand and in the circumstances of this case reinstatement cannot be awarded in law, as the case itself is different to the other normal cases where reinstatement could have been granted? This court has taken serious note of the above submissions of learned President's Counsel for Petitioner and see no basis to disagree or retract from the views expressed on behalf of the Petitioner Company. As such the Petitioner Company need to very seriously consider the reports P3 & P10 issued by the Director, Terrorists, Intelligence Division, which pin point and pose material to demonstrate a security threat.

The learned counsel for the 5th Respondent in reply to the above submissions was not averse to the legal position of awarding compensation in lieu of reinstatement. Nevertheless learned counsel sought to draw a comparison with other cases filed under the Prevention of Terrorism Act when suspects are held in detention for fairly long period of time and in the case in hand the 5th Respondent had been discharged and released within a short period of time (less than 6 months). The learned counsel for 5th Respondent also drew the attention of this court that his client had been unemployed since termination of his services for a period of over 14 years. On this basis learned counsel sought to impress that the early or quick release from custody would indicate that no adverse inference against the 5th Respondent could be drawn, and as such 5th Respondent should not be labeled or considered to be involved in any activity of the above organization.

In the course of arguments the learned Deputy Solicitor General indicated to this court that he has no role to play in this case since the Petitioner had not insisted on the relief sought in subparagraph (F) of the prayer to the Petition (refer the matter for Arbitration afresh).

The Petitioner Company maintains that the termination of the 5th Respondent is justified in the circumstances of the case and draw the attention of this court to the contents of documents P3 & P10 which indicate that the 5th Respondent should be perceived as a security threat, notwithstanding the failure on the part of the Government machinery to prosecute him. The justification to terminate the services of the 5th Respondent is more fully described in paragraphs 8(k) & 9, 10 of the petition and the corresponding paragraphs of the affidavit. However the Petitioner company was informed of an industrial dispute on or

about 15.9.2000 and the matter was referred for Arbitration. The statement of the matter in dispute reads thus according to document 10(b)

“Whether the termination of the services of Mr. T.Raveendran who was in employed at Sri Lankan Airlines by the said Company is justified and if not, to which relief is he entitled.”

The Arbitrator who inquired into the matter died and the matter was referred for fresh arbitration on the same matter in dispute as above. Paragraph 32 of the Petition indicate that the 4th Respondent was appointed Arbitrator and parties had agreed to adopt the proceedings before the earlier Arbitrator and consented for the 4th Respondent to make his award. The award made by the 4th Respondent, are produced P17 & P17a. According to the Petitioner the gist of the award is as follows:

- (i) Be re-instated with effect from 26.3.2007 with four years back wages (Rs. 26,825/- x 48) amounting to Rs. 1,287,600/-;
- (ii) The period out of employment (26.03.1999 to 26.03.2007) being treated as continuous and uninterrupted for purposes of seniority, promotions, gratuity and other employment related benefits;
- (iii) Be placed on the appropriate point of scale as if he had remained in employment continuously and without interruption from 26.3.1999 onwards.

The grounds of review are particularly contained in paragraph 46 of the petition and inter alia emphasis as referred to above is the contents of paragraph 46L i.e law mandates the award of compensation in lieu of reinstatement when the circumstances so warrant it. I would attempt to briefly refer only to the salient points in the award P17 as follows:

(a) The award refer to the evidence of the Petitioner Company in relation to termination and the 5th Respondent's evidence, which support illegal termination. On the letter of 14.6.1999 (R6 & P5), the Arbitrator states and that the reasons for termination are far from satisfactory and not acceptable. The reasons being as in R6 i.e taking into custody, producing before a Magistrate and remanding. Arbitrator holds that termination of 5th Respondent for reasons stated in the said letter is unjust unfair and unreasonable.

Perusal of R6 very plainly state that annexed is a report from Director, Terrorist Investigation Division an involvement of 5th Respondent in LTTE activities.

This court observes that there is also the fact that the 5th Respondent is a security threat. This is an internal memo. One cannot expect a full disclosure of facts other than representing LTTE involvement and security threat in the given circumstances and the period in which the authorities took the 5th Respondent into custody. Further this is only an internal memo and only correspondence between officials of the Petitioner Company. Arbitrator has erred in his conclusions by stating that the reasons stated in letter (P5 & P6) is unjust. The Company obviously had to consider the annexed report and take steps accordingly. Petitioner Company is certainly not equipped or required to ascertain information provided by the Terrorist Investigation Unit. Company would be entirely dependent on such information to take the required steps based on confidential information of a highly sensitive nature.

(b) Award point out that the evidence offered by the Petitioner Company was weak and inadequate to establish allegations against the 5th Respondent. The learned Arbitrator states that 5th Respondent's employment terminated without; calling for explanation, a charge sheet being served and an independent investigation. Evidence of the Petitioner Company as stated by the learned Arbitrator does not reveal any involvement or complaint of the 5th Respondent during his period of service. No adverse report against 5th Respondent by the Petitioner Company.

This court would not on the above matters fault or interfere with the learned Arbitrator's views on same. However the peculiar nature of this case is such that even if termination of the employee could be held to be unlawful it is certainly a case where reinstatement cannot possibly be ordered when the matter concerns a national security threat. I agree with the views of the learned President's Counsel for the Petitioner that the Petitioner Company cannot have the capacity or expertise or authority to inquire into a matter of this nature, and cannot conduct an independent inquiry. As such need to be totally dependent in the material furnished by the Government machinery on investigating terrorist activity.

- (c) In the analysis of evidence the learned Arbitrator having observed that the evidence of the Petitioner Company is weak and inadequate to establish a serious allegation, and support the position of the 5th Respondent employee, to demonstrate his non-involvement with subversive activities. The learned Arbitrator seems to rely heavily on the discharge procedure of the 5th Respondent and or his non-prosecution in criminal proceedings to express his views on unjustifiable termination of employment.

This court cannot endorse the views of the learned Arbitrator in so far as granting relief to reinstate the 5th Respondent. Reasons to conclude in this way as observed above would as a matter of law be demonstrated by reference to case law.

The award of the learned Arbitrator has referred to the following case law to support the view when reinstatement awardable, as follows:

Bank of India Ltd Vs. LAT 1955 (2) LLJ 214 (cal) deals with the powers in regard to re-instatement. Held –

“The normal rule should be re-instatement. The past record of the employee the nature of the alleged, present lapse and the grounds on which the order of the management is set aside are also relevant factors for consideration:

In the case of workman employed in Ennore Foundries Ltd. Vs. Manager of Ennore – Foundries Ltd. 1970 (2) LLJ 222 and 227 Held –

“The normal relief in cases of unjustified dismissal is re-instatement and compensation in lieu is awarded only in special or exceptional circumstances”

In Brooke Bond (Ceylon) Ltd. Vs. Tea Rubber Coconut and General Produce Workers' Union (1974) 77 NLR 6.

Held – “A workman's past record is relevant to the issue of re-instatement and may result in an order for compensation even where termination is unjustified.

No doubt the normal relief in case of unjustified termination is reinstatement. Compensation is granted in exceptional and special cases. This court take the view without any reservation that this case is a exceptional and a special case which is directly connected with terrorist activities, notwithstanding the discharge of the 5th Respondent from criminal prosecution. All this took place during the worst era of this country. As such I have no hesitation in putting this case to the category of exceptional case, with a primary security concern of the country, and has to be distinguished from the above cases cited in the award. Nor can I support the views of the learned Arbitrator who rely on another case (FR case No. 54/95). The above case was a case involving a Clerk attached to the Telecommunication Department who had been arrested for subversive activities. I

reject the learned Arbitrators comparison with the above case which link the LTTE. The case in hand falls into a category of a very high degree of national security, which could, if not correctly decided be disastrous to the country as a whole inclusive of the national carrier.

I wish to fortify my views with the judgment of the Supreme Court in *Jayasuriya Vs. Sri Lanka Plantations Corporation* 1995 (2) SLR 379. It is a case where due consideration is given to circumstances when compensation rather than reinstatement will be awarded for wrongful termination.

It was held inter alia as stated in the head note.

Even where the dismissal is unlawful, reinstatement will not invariably be ordered where it is not expedient or where there are unusual features. In such event an award of compensation instead of reinstatement will meet the ends of justice. Considering the petitioner's uneasy relationship with the Trade Unions and the likelihood of industrial strife if he is reinstated and the fact that the employer had alleged a lack of confidence in the petitioner, compensation rather than reinstatement would be the appropriate remedy.

Justice Dr. Amarasinghe at pg. 405 referring to the judgment of a case where dismissal was wrongful and it may be ordered that Petitioner be reinstated as observed by Sharvananda J. in *Caledonan Estates Vs. Hillman* (Supra) at P. 435, see also per Silva Supramaniam J. in *United Industrial Local Government & General Workers Union Vs. Independent Newspapers Ltd.* (1) (1992) 75 NLR 529, 531, that remedy is "not absolute or of universal application. There can be cases where it might not be expedient..."

Having considered all the facts and circumstances of this case, we are of the view that the award in so far as it relates to reinstatement of the 5th Respondent need to be quashed by way of a Writ of Certiorari. The Arbitrator

must give his mind to the question of determining compensation after weighing the evidence and probabilities of the case. That is best left in the hands of the learned Arbitrator. As such we grant the remedy prayed for in sub paragraph (e) of the prayer to the petition without costs

Application allowed in terms of prayer (e).

JUDGE OF THE COURT OF APPEAL

H. N. J. Perera J.

I agree.

~~JUDGE~~ OF THE COURT OF APPEAL