

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution.

Ceylon Fertilizer Company Ltd.
Ministry of Agriculture Development and
Agrarian Services,
Hunupitiya, Wattala.

PETITIONER

C.A. Writ No. 761/2010

Vs.

W.J.L.U. Wijeyaweera
The Commissioner General of Labour,
Labour Department,
Colombo 05.
And 3 others.

RESPONDENTS

BEFORE : **S. SRISKANDARAJAH, J (P/CA)**
COUNSEL : Sanjeewa Jayawardane P C with Sandamali Chandrasekara,
for the Petitioner
Sobitha Rajakaruna DSG,
for Respondents

Argued on : 13.03.2013
Written Submission on : 29.04.2013 & 30.04.2013 (Respondents & Petitioner)
Decided on : 12. 07.2013

S.Sriskandarajah,J

The Ceylon Fertilizer Corporation was converted into a limited liability company from 15/09/1992 under and in terms of the Conversion of Government Corporations and Government Owned Business Undertakings into Limited Liability Companies Act No.23 of 1987. All the employees of the Ceylon Fertilizer Corporation, including the 4th Respondent, were automatically absorbed into the Petitioner's company. The Petitioner company is a 100% fully owned State entity and, as a government owned company, all financial and administrative functions of the Petitioner Company are based on circulars issued by the Department of Public Enterprise and the Ministry of Public Administration and Home Affairs. The Public Administration Circular No.5 of 2002 has stipulated, the optional age of retirement of all public officers is deemed to be 55 years and the compulsory age of retirement was deemed to be 60 years. The said circular further provided, that an officer could continue in service up to 57 years without seeking extension and, thereafter, the officer should apply for extension of service up to 60 years. The granting of extension of service was with the approving authority, depending on the quality of service of the officer and the exigency of service.

The Petitioner submitted that the Board of Directors of the Petitioner Company, upon due consideration of the opinion/views submitted to the Department of Public Enterprises, the Public Administration & Home Affairs, and the Attorney-General, decided to implement the provisions of the said Circular No.5 of 2002, without amendment, with effect from 8/05/2006. The Public Enterprises Circular No.PED/44 issued by the Department of Public Enterprises has laid down the optional age of retirement of all public officers as 55 years, and any extension of service thereafter will be made upon the application of the employee and at the discretion of the employer. The employer may extend the services of the employee for a period of one year upon the consideration of the stipulated criteria. Thereafter the said circular was amended by the Department of Public Enterprises Circular No.PED/52 and the Board of Directors of the Petitioner Company, at the meeting held on 26/02/2009, considered the circular and it has decided to apply the said circular to the Petitioner Company. According to this circular, the optional age of retirement is 55 and it could be extended till 57, and after 57, up to 60, the extension could be given if the Board is of the view that his services are necessary.

It is the submission of the Petitioner that in view of the provisions of the said circular, the retirement age of an employee is 55 years of age and, if an employee wishes to continue, he should make an application for an extension of service on a yearly basis up to 57 years, and that extension would be granted if the Petitioner is satisfied of:-

- (a) Satisfactory service record of the employee;
- (b) Satisfactory behaviour standard of the employee;
- (c) Attendance of the employee;
- (d) Efficiency of the employee; and
- (e) Standard of health of the employee;

and, if the Petitioner is of the opinion that the specialized service of the employee is essential for the due and proper functioning of the company, the Directorate of the Petitioner Company may consider extending the services of such employee on a yearly basis up to 60 years of age. It is the position of the Petitioner that all employees of the Petitioner Company are aware of this procedure.

The Petitioner, in this application, is challenging the decision of the Commissioner of Labour, made in relation to the 4th Respondent to continuously employ him until he reaches the age of 60 years. The said order was made under Section 2 of the Termination of the Workmen's Service (Special Provisions) Act. The Petitioner contended, the Commissioner has no jurisdiction under Section 2 of the said Act to entertain the 4th Respondent's application for non-extension of the services of the 4th Respondent. The Petitioner further contended that the 4th Respondent's service has come to an end by reaching his age of retirement after giving the 4th Respondent 2 extensions of service up to 57 years of age. The Petitioner submitted that it could adopt and formulate its own policies with regard to terms and conditions of employment of its employees, including age of retirement, and the policy adopted by the Petitioner is that the extension beyond 57 years of age up to 60 years will be given only on exigency of service and on exceptional circumstances. In those circumstances the Petitioner claims that the 4th Respondent cannot claim an extension of service beyond 57 years service as of right, and the decision of the Commissioner of Labour dated 14/10/2010 had been based on irrelevant considerations and ultra vires and, therefore, it should be quashed. The Petitioner relied in the judgment of this Court delivered in *Kodituwakku Kankanamalage Somalage Vs. The Ceylon Fertilizer Corporation*

Limited, CA Application No 2370/2004, C.A. Minutes 17th July 2006. In this judgment, this Court has held that an extension after the age of 57 years is at the discretion of the employer and, in this case the company has not granted extension to any of its employees beyond the age of 57 and, therefore, it cannot be said that the refusal of extension beyond the age of 57 to the Petitioner employee is unreasonable, and the Petitioner was notified by documents marked P11(a) that he will be retired at the age of 57 and, therefore, the Petitioner's application to quash the decision to retire him (the employee) at the age of 57 was refused.

In the instant case the facts are different, and there is evidence to show that about 15 other employees were given extension up to the age of 60 years and, therefore, the 4th Respondent's expectation that he would be given an extension up to 60 years cannot be denied.

The Petitioner submitted that it is the duty of the 4th Respondent to satisfy that there is exceptional circumstances to retain him after 57 years, and to give him extension up to 60 years. This submission has no merit as the extension of service is on exceptional circumstances and on exigency of service this is a matter for the employer. The Petitioner has no absolute discretion to decide on this issue, when the Petitioner refuses an application for extension beyond 57, the Petitioner should give reasons and explain that the 4th Respondent's services are no more required, and his extension need not be given as there is no exigency of service, but without giving any reason, the Petitioner cannot refuse the extension of the 4th Respondent service when the 4th Respondent has requested for extension beyond 57 years. The 4th Respondent's employment will not come to an end due to reflection of time, when he reaches the age of 57 years. In these circumstances, if the 4th Respondent's services are terminated, he is entitled to complain to the Commissioner of Labour under Section 2 of the Employment Act, and the Commissioner has jurisdiction to entertain such an application. In these circumstances, the Commissioner has given a fair hearing to the Petitioner and the 4th Respondent and has come to the conclusion that the termination of the services of the 4th Respondent at the age of 57 years is unreasonable, and he has made an order to reinstate him with back wages.

As there is a Stay Order obtained in this application, the Commissioner's Order was not implemented and, as such, when this case was finally decided, the 4th Respondent has reached the age of 60 years the age of compulsory retirement and, as such, the Petitioner cannot now be directed to re-employ him in the Petitioner Company. In these circumstances the only relief

that could be given for the 4th Respondent is compensation due to the loss of his employment up to the age of 60 years. This Court dismisses the petition of the Petitioner and directs the Commissioner of Labour to compute the compensation that could be awarded to the 4th Respondent.

The application of the Petitioner is dismissed without cost.

President of the Court of Appeal