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

Bartleet Produce Marketting (Pvt.) Ltd.
211/10, Veluwana Place,
Colombo 9.

PETITIONER

C.A 344/2011 (Writ)

Vs.

1. V.B.P.K. Weerasinghe
   Commissioner General of Labour
   Department of Labour
   Labour Secretariat,
   Colombo 5.

2. N.S. Atukorala,
   Assistant Commissioner of Labour
   Labour Secretariat,
   Narahenpita
   Colombo 5.

3. H. V. R. Caldera
   No. 35, Jayakontha Lane,
   Colombo 5.

RESPONDENTS

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: Shamil Perera P.C., with T. Weerakkody & D. Perera
For the Petitioner

Niel Unamboowe D.S.G., for 1st & 2nd Respondents

Vinodh Wickramasooriya for the 3rd Respondent

ARGUED ON: 11.11.2013

DECIDED ON: 16.05.2014

GOONEATNE J.

The Petitioner Company in this application has sought a Writ of Certiorari to quash the order of the 1st Respondent the Commissioner General of Labour marked P4 dated 10.3.2011. The said order conveys, inter alia, that the Petitioner has terminated the services of the 3rd Respondent, acting in breach of the provisions of the Termination of Employment (Special Provisions) Act No. 45 of 1971, as amended.

The position of the Petitioner briefly is that the 3rd Respondent was appointed as a consultant of the Petitioner Company on or about 7th January

2007 (P1) by a consultant agreement of 20th February 2007 (P1). By the Agreement P1 the 3rd Respondent was required to provide professional services, including advice on auctioneering, marketing, manufacture of tea, and all other services related to the business of a tea brokering company. Petitioner has produced P2 a letter terminating the above consultancy agreement of the 3rd Respondent. Consultancy terminated as from 30th October 2008. The Petitioner Company has taken up the following position, and learned President's Counsel for the Petitioner in his submissions before court in a summary referred to the following:

(a) Petitioner paid a monthly salary of Rs. 180,000/- for professional services.

(b) No fixed time to report for work

(c) Not subject to supervision or control of the Petitioner Company

(d) Employment in the nature of an independent contractions.

The learned President's Counsel submitted to court that at the relevant time, there was a drop in the demand for Sri Lanka Tea. As such business of the Petitioner Company seriously affected and it was not possible to continue to engage the 3rd Respondent and the 3rd Respondent was informed accordingly. Therefore the consultancy agreement was terminated on 30th October 2008. It is pleaded that to the surprise of the Petitioner Company the 3rd Respondent

complained to the 1st Respondent that his services were illegally terminated (P3). Thereafter an inquiry was held. At the inquiry before the 2nd Respondent as pleaded the following matters were duly presented.

(a) That the 3rd Respondent was not an 'employee' of the Petitioner;
(b) That the 3rd Respondent was an independent contractor who provided professional services for a fee under an Agreement for consultancy services;
(c) That the 3rd Respondent did not fall into the definition of 'employee' as provided in the Industrial Disputes Act No. 43 of 1950 (as amended) or any other statute that defines the term 'employee';
(d) That the termination unit had no jurisdiction to her and determine the complaint of the 3rd Respondent under the Termination of Employment (Special Provisions) Act No. 45 of 1971 (as amended).

In the petition (paragraph 17) it is pleaded that the Order P4 is illegal, ultra vires, erroneous, arbitrary and violation of the principles of natural justice and shall be set aside for the following reasons:

(a) The said order is contrary to law and has been made violating the principles of natural justice;
(b) The inquiry on the complaint made by the 3rd Respondent was heard by the 2nd Respondent however the said Order has been made by the 1st Respondent which by itself is erroneous in law;
(c) The 1st Respondent has failed to set out any reasons for arriving at the decisions made by him in the said Order;
(d) The 1st and/or the 2nd Respondents have failed to consider the position of the Petitioner that the 3rd Respondent was not an employee of the Petitioner company;

(e) The 1st and/or the 2nd Respondents have failed to analyze the definition of the term 'employee ' as provided in the Industrial Disputes Act No. 43 of 1950 (as amended) and the Termination of Employment (Special Provisions) Act No. 45 of 1971 (as amended);

(f) The 1st and/or the 2nd Respondents have completely confused the meaning of the term 'consultant' with the meaning of the term 'employee';

(g) The 1st and/or the 2nd Respondents have failed to consider the position of the Petitioner that the 1st Respondent did not have any Jurisdiction to hear and determine the complaint of the 3rd Respondent in law .

The 1st & 2nd Respondents inter alia plead that a due inquiry was held and an opportunity was given to both parties to present each other's case. The Order at 1R1 was made in compliance with the rules of natural justice. These Respondents also plead that the Petitioner has misrepresented and or suppressed material facts.

The 3rd Respondent in the objections filed of record maintains that he was on a fixed term contract for 3 years. He was to undergo hip replacement surgery on 2.10.2008 and obtained approval for leave from Chairman of the Petitioner Company. He was operated on 2,10.2008 and came home after the operation on 17.10.2008. The Chairman of the Petitioner Company wanted to see the 3rd Respondent and met the Petitioner on 30.10.2008 and informed him that his services will be terminated. It is the position of the 3rd Respondent that the termination is illegal, unlawful. The 3rd Respondent maintains that he

was an employee and not an independent contractor. In terms of the letter of appointment (P1 & A1 in 3R2 clause 4c & 4d) 3rd Respondent was an employee and not an independent contractor. 3rd Respondent paid a salary as opposed to a 'fee' and also paid a bonus on two occasions. However I observe that 'bonus' is not part of salary. It depends on profits and an ex gratia payment out of bounty or good will at the pleasure of the employer. Employee cannot claim a right.

The Petitioner Company and the Respondents have submitted numerous material to courts by way of written and oral submissions to support each others' case. The most important fundamental issue that need to be decided and which in fact should have been decided before the inquiry held by the 1st & 2nd Respondents is the question of employee 'and' independent contractors. As a matter of public law it is equally important to arrive at a conclusion as to whether in the context and circumstances of this case, whether there is a duty cast on the Commissioner General of Labour as required by the Termination Employment Act, to record 'reasons' in the Order marked P4. Courts have dealt with this aspect previously no doubt. The question is whether the reasons given in P4 are <u>adequate</u> in the context of this case to decide the very fundamental issue as stated above?

The agreement P1 in its opening paragraph states that 'we are pleased to offer you (3rd Respondent) the position of consultant"..... Thereafter the terms of the consultancy are embodied. I also find in paragraph 2 of P1, scope of work of the 3rd Respondent. This is something that in the context of the case in hand, one need to be mindful and ascertain the correct position since it is from the scope of work that is required to be performed that one could get a clue initially to decide on the type of employment. To demonstrate further clause 2 of P1 refer to (a) to provide professional services in developing the business of the company. (b) To provide advice on auctioneering, marketing, manufacture of tea and all other services related to the business and functions of a tea broking company. (c) The above services to be rendered to ensure the performance of the company is in accordance with the goals, objectives and targeting set down from time to time by the Board of Director of the company.

This is the beginning of the contract that gives a clue that the person appointed as a consultant possess special skills and competence in the field covered by the scope of work in clause 2. Consultant is a person who need to possess something special to enable the organization to achieve its goals by the work and advice of the consultant. In that agreement, clause 6 specifically

relate to relationship the consultant has with the organization which is self explanatory. Petitioner Company relies heavily on clause 6. Respondents puts more emphasis on clause 4(c) and (d) to emphasis that the 3rd Respondent is nothing but an employee of the Petitioner Company. 4(c) is to the effect that the consultant is required to observe and perform all instructions and directions given from time to time by the management and observe rules and regulations and procedure of the company.

Consultant is a specialist or expert. He is an expert who is required to give professional advice or services. In an organization the consultant need to be provided with a room or a chamber with privacy. That would also include secretarial services provided to him by the company or organization. Merely because clause 4(c) required adherence to rules of the organization would not mean he is in the category of an employee. Any organization need to maintain some discipline at all levels of employment. As such even a consultant cannot have the powers of a wild horse or act as one. I am not inclined to agree with the argument advanced on behalf of the Respondents mainly because of clause 4(c) of P1. On the other hand clause 4(d) and 4(e) are the attributes to P1. To engage in other consultancies of some other company may be detrimental to the organization engaged in a special type of business which is

competitive in nature. As such some secrecy also need to be observed, to protect the organization. It is in these circumstances that this court takes the view that the reasons embodied in Order P4 are certainly inadequate and such an order has not stated or analyzed and given reasons on the fundamental issue pointed out above in this judgment. There is no clue as to how the 1st & 2nd Respondents have decided on the question of 'employee' or 'independent contractor', according to P4. It is incumbent on the part of the 1st & 2nd Respondents to give its reasons on same briefly in the Order P4.

The Termination of Employment of Workman's Act as amended defines the term workmen. It has the same meaning as in the Industrial Disputes Act. I have also to refer to certain items of evidence and submissions relied upon by the Respondents to get some advantage over the Petitioner. The learned counsel for the 3rd Respondent submitted that his client was paid a bonus on two occasions. Bonus given to employees. In the case of *Kundanmals Industires Vs. Commissioner of Labour 1994(3) SLR 20. It was held:*

> "...Bonus is neither a deferred wage nor part of a wage. It usually comes out of profits. It is paid if after meeting prior charges, there is an available surplus. It is not based on contract. Wages in contract are not dependent on profits and are contracted for.

Bonus as the term implies is generally an ex gratia payment out of the bounty and goodwill at the pleasure of the employer and an employee has no claim on it as a matter of right".

As such nothing flow on a mere payment of Bonus. This is a matter for the company and not a deciding factor of employment.

I have also noted the observations of S.R de Silva pg. 43 in "The Contract of Employment". 1998 revised edition:

"...The test of control becomes difficult to apply where the employee exercises professional skill or performs work of a highly technical nature. According to the majority in Cassidy v. Ministry of Health (1951) 1 All E.R. at 536.7 visiting or consulting surgeons of a hospital are not employed under a contract of service and are therefore, not servants of the hospital and the hospital authorities cannot direct them as to 'what to do or how to do it'. Nor according to this view, are nurses the servants of the hospital when they are under the direction of a consulting surgeon in the hospital theatre..."

It was also pointed out that the 3rd Respondent did not have a fixed time to report for work. Nor was he supervised or controlled by the Petitioner Company. I note the following from 3R3.

ප්‍ර : උපදේශකවරයකු වශයෙන් සේවයට වාර්තා කරන්න ඕනෑ පෙ. ව. 8.30 කියලා නැහැ. අත්සන් කරලා නැහැ නේද තමුන් කිසිම විටෙක?

උ: මොකුත් නැහැ

ප්‍ර : තමන් සේවය අවසන් වෙලා පිටව යන වේලාව සඳහන් කරන්නේත් නැහැ?

උ නැහැ. අත්සන් කරන්න ත්බුණේ නැහැ.

ප්‍ර : නිවාඩු ලබාගැනිමේදි සමාගම අනුගමනය කරන වැඩ පිළිවෙල කුමක් ද?

උ : මා කියනවා සභාපතිතුමාට මට මෙහෙම ප්‍රශ්නයක් තියෙනවා ඒක නිසා මං එන්නේ නැහැ කියලා. ලියල කියලා නිවාඩු ලබාගත්තේ නැහැ.

ප්‍ර : මෙම සමාගමේ උපදේශක තනතුර තමුන් බාර ගන්න කොට කලින් සමාගම්වල ඒවාට මොනවාද කළේ?

උ : ටෙලිපෝන් එකෙන් උපදෙස් දුන්නා. මාර්කට් මේ විධියටයි තිබෙන්නේ ඒ අනුව වැඩ කරන්න කියලා මා උපදෙස් දුන්නා.

ප්‍ර : කාටද කළේ?

උ : තේ නිෂ්පාදනය කරන කාර්මාන්තශාලා වලට කර්මාන්තයේ අවුරුදු 40 ක් පමණ දැන ගෙන හිටි අයට.

ප්‍ර : මේ සමාගමේ උපදේශක තනතුර කරන කාලයේ තමුන් පිළිගත්තා අනිකුත් සමාගම් වලට ගිවිසුමක් නැති වුණත් තේ නිෂ්පාදකයින් සමාග ඒ ආකාරයෙන්ම කටයුතු කරගෙන ගියා කියලා.

උ : මාසයක් විතරයි. ඒ අය දැනගත්තා මට කලින් තිබුණ රක්ෂාව නැහැ කියලා.

ප්‍ර : තමුන් මෙම සමාගමට උපදෙස් සපයන කොට කිසියම් ගිවිසුමක් තිබුණේ නැහැ?

උ : ගිවිසුමක් ගැන හිතන්න කලින් මගේ ගෙදරට ඇවිල්ලා වැඩ කරන්න කියලා නේ කිව්වේ.

The above evidence in a gist indicates that the company did not control the 3rd Respondent nor was he supervised . The idea of a consultant is lost if he had been supervised. It has not happened in this case. The other

question is that the non-payment of statutory benefit. Evidence never transpired at the inquiry on this aspect.

In times of *Ceylon Ltd. Vs. Nidhahas Karmika Saha Velanda Sevaka Vurthiy Samithiya 63 NLR 126.* Court held that the 'workman' as defined in the Industrial Disputes Act does not cover an independent contractor.... for T.S. Fernando J. ... the ultimate test to be applied is whether the hires had authority to control the manner and execution of the act in question or whether there exists in the matter a right to supervise and control the work done... Not only in the matter of directing what work the servant is to do, but also the manner in which he shall do his work.

The case in hand does not indicate that the 3rd Respondent was subject to control and directions of the Petitioner Company, and its management. In fact the company had to rely on the expertise and evidence of the 3rd Respondent as regards all important functions of the company. He was selected and appointed for purpose to guide the company and not for the company to guide him, in connection with his skills, knowledge and expertise.

In fact the first thing that should have been considered by the 1st Respondent is the nature and type of employment of the 3rd Respondent. P4 does not demonstrate or explain any such thing. 1st Respondent should have

probed as to whether the 3rd Respondent was in fact a workmen within t he meaning of the Termination of Employments Act as amended. The main attributes of agreement P1 is in the nature of an independent contraction. It would be highly unfair and artificial to amplify and extend the term consultant to equate same as a workman or employee. The 1st & 2nd Respondents have exceeded their powers and jurisdiction and arrive at a decision (P4). I have in this regard fortified my views by perusing the following authorities.

H. W. R Wade & Forsyth in Administrative Law 10th Ed. Pg. 291.

"... directions must be exercised in the manner intended by the empowering Act. As Griffiths LJ has said: (R. v. Commission for Racial Equality ex. p. Hillingdon LBC (1982) QB 276)

> Now it goes without saying that Parliament can never be taken to have intended to give any statutory body a power to act in bad faith or a power to abuse its powers. When the court says it will intervene if the particular body acted in bad faith it is but another way of saying that the power was not being exercised within the scope of the statutory authority given by Parliament.... "

Per S.N. Silva J. in Liyanage vs. Gampaha U.C 1991(1) SLR 1

"..... the Courts have refused to declare invalid acts of statutory authorities that go beyond the strict letter of the enabling provision, on the basis that the acts in excess can reasonably be considered as being incidental to or consequential upon that which is permitted. It has to be so considered, with a view to promoting the general legislative

purpose in the conferment of power to the authority in question, in keeping with the purposive approach to statutory interpretation. For, anything that is contrary to or inconsistent with such general legislative purpose should not be held as valid by Courts in an exercise of statutory interpretation.

Base on the foregoing analysis the legal position with regard to the application of the doctrine of ultra vires, in this respect, can be stated as follows: An authority (Corporation) established by statute such as an Urban Council has, in law, a status, objects, powers, functions and duties, only as provided in the constituent statute or in any other statute. Beyond these it is legally incapable of doing anything.... "

On the question of failure to give reasons inadequate reasons, provided by the 1st & 2nd Respondent. I note the following.

Per Fernando J in Karunadasa vs. Unique Gem Stones Ltd. and others (1997) 1 SLR 256..

"To say that Natural Justice entitles a party to a hearing does not mean merely that his evidence and submissions must be heard and recorded; it necessarily means that he is entitled to a reasoned consideration of the case which he presents. And whether or not the parties are also entitled to be told the reasons for the decision, if they are with held, once judicial review commences, the decision "may be condemned as arbitrary and unreasonable"; certainly, the Court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion. The 2nd respondent's failure to produce the 3rd respondent's recommendation thus justified the conclusion that there were no valid reasons, and that Natural Justice had not been observed.

The fact that the 3rd respondent held a fair inquiry and otherwise acted within jurisdiction does not excuse the failure to give reasons.

While the mere fact that the 3rd respondent held the inquiry does not vitiate the 2nd respondent's order, the 2nd respondent's failure to give reasons is all the more serious because it was not he who held the inquiry.

The judgment of the Court of Appeal that Natural Justice required that reasons be given must therefore be affirmed...."

Lanka Multi Moulds (Pvt.) Ltd. vs. Wimalasena, per Fernando J.(2003) 1 SLR 143..

"Although the Commissioner has a discretion in respect of both limbs of section 6, that is not an unfettered or unreviewable discretion. As the Court of Appeal observed, he must give reasons for his decision. Although in Samalanka Ltd. v. Weerakoor (1994) 1 Sri LR 405, it was held by Kulatunga, J. (with G.P.S. de Silva, CJ and Ramanathan J. agreeing) that the Commissioner was not under a duty to give reasons, I took the contrary view in Karunadasa v. Unique Gemstones Ltd (1997) 1 Sri LR 256, (with Wadugodapitiya J. and Anandacoomaraswamy J. agreeing). That decision was considered and followed by Gunasekera J. in Ceylon Printers v. Commissioner of Labour (1998) 2 Sri LR 29. Since G.P.S. de Silva C.J agreed with Gunasekera J. on that occasion it is clear that he no longer agreed with Samalanka. In Mendis v Perera (1999) 2 Sri LR 110. 148 I observed that the audi alteram partem rule does not merely entitle a party to a purely formal opportunity of placing his case before a tribunal, and that natural justice would be devalued if the tribunal does not consider the evidence and the submissions, evaluate it properly and not in haste, and give reasons for its conclusions. However, in Yaseen Omar v. Pakistan International Airlines (1999) 2 Sri LR 375, Samalanka was followed, apparently without the attention of the Court being drawn to the subsequent decisions to the contrary and the relevant citations.

> It is therefore necessary to reiterate what has long been recognized that the statutory conferment of a right of appeal against the decision of a tribunal has the effect of imposing a duty on that tribunal to give reasons for its decision (Brook Bond Ceylon Ltd v Tea, Rubber (etc) Workers Union (1973) 77 NLR 6, Ratnayake v Fernando SC 52/86 SCM 20.5.91. The conferment of a right to seek revision or review necessarily has the same effect. As the decision cited show, if the citizen is not made aware of the reasons for a decision he cannot tell whether it is reviewable, and he will thereby be deprived of one of the protections of the common law – which Article 12(1) now guarantees. Today, therefore, the conjoint effect of the machinery for appeals, revisions, and judicial review, and the fundamental rights jurisdiction, is that as a general rule tribunals must give reasons for their decisions.

I am unable to agree with the submissions made on behalf of the Respondents by way of oral and written submissions. A consultant as the 3rd Respondent, according to the material placed before this court cannot be considered to be an employee or a workman within the meaning of the Termination of Employment (Special) Provisions Act. 3rd Respondent was not under the control or supervision/direction of the Board of Directors of the Petitioner Company as regards the actual execution of work as per agreement P1. 3rd Respondent with his skills/experience and knowledge was called upon by the Petitioner Company to advice the company and attend to the actual work undertaken by him as a independent contractor. At no stage could such

employment as a consultant be transformed to be an employee and the difference in each of those employment differ in its nature. An employee is subject to control and directions, but not an independent contractor or a consultant. There is an absence of details of control and the manner in which work need to be performed as far as a consultant is concerned. The 3rd Respondent is not a part and parcel of the organization but merely performs a duty or does his work as an accessory to the company since the Petitioner needs and depends on him for advice on auctioneering, marketing, manufacture of tea etc.

On the other hand as far as Order P4 is concerned I am firmly of the view that the reasons given are not adequate in the circumstances and in the context of the case in hand. Reasons means not just the evidence recorded by a termination of the contract prematurely and the calculation of the balance sum due on contract. There is a total lack of material of the 1st Respondent in P4, as to the fundamental question of liability of the Petitioner Company connecting the nature of work performed by the 3rd Respondent i.e workman or employee subject to the statute in question. To explain further question is whether the 3rd Respondent was an independent contractor or an employee?

In all the facts and circumstances of the case in hand, we are of the view that the Petitioner is entitled to the remedy of a Writ of Certiorari quashing Order P4. Application allowed as per sub paragraph (b) of the prayer to the Petition. Application allowed without costs.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL