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

In the matter of an Application for a mandate in the nature of Writ of Certiorari in terms of Article 140 of the Constitution of the democratic socialist Republic of Sri Lanka

C.A.(Writ) Application
No.158/2012

Janatha Garment Manufacturers
(Pvt) Ltd

17 Vivekananda Hill.

Colombo 13

Petitioner

Vs

1. Commissioner General of Labour
2. Assistant Commissioner of Labour
3. Ms I.G.B.M.Samarawickrema
   78/110, Queen Terrace Road,
   Morawatta, Nagoda,Kandana

Respondents

BEFORE : Deepali Wijesundera J.

M.M.A.Gaffoor J.,

COUNSEL: Suren Fernando with Natalia Hendahewa for the Petitioner

Nayomi Kahawita S.C., for the 1st and 2nd Respondents

ARGUED ON 25.01.2016

DECIDED ON: 03.05.2016.

M.M.A.Gaffor J.,

The Petitioner, a company duly incorporated under the laws of Sri Lanka, filed the above styled writ application taking up the position that the 1st and 2nd respondents have no jurisdiction to inquire into this matter as the matter related to disciplinary termination.

The 1st and 2nd Respondents are the Commissioner General of Labour and the Assistant Commissioner of Labour.

The 3rd Respondent, an employee of the Petitioner, on or around 22.09.2009, made a complaint to the 2nd Respondent regarding the alleged wrongful termination of her services by the Petitioner.

The Petitioner filed its response to the purported complaint on 17th March 2010. The Petitioner inter alia took up the position that the 1st and 2nd Respondents had no jurisdiction to inquire into the matter as the matter related to a disciplinary termination. Further the Petitioner stated that the 3rd Respondent had accepted the gratuity due to her consequent to her termination. Both parties filed written submissions to the objections filed by the Petitioner.

However, notwithstanding the Petitioner's objection to jurisdiction the Respondents decided to proceed with the matter holding that the details contained in the letter of termination did not amount to a disciplinary matter.

The Petitioner also admitted that he had issued a service certificate to the employee. Notwithstanding the fact that the 3rd Respondent had accepted gratuity and the evidence led showed that the services of the 3rd Respondent were terminated on disciplinary grounds, that the 1st Respondent had held that the complaint dated 22.09.2009 did not relate to a disciplinary termination and ordered re-instatement with back wages.

The Petitioner in his writ application dated 07.06.2012 sought relief inter alia as follows :

a) A writ of certiorari quashing the Order dated 3.2.2012 marked as P18;
b) A writ of prohibition, prohibiting the 1st and 2nd Respondents from taking further legal action regarding P18;
c) A stay order restraining the 1st and 2nd Respondents from taking any recovery action pursuant to P18;
d) A stay order directing the proceedings filed in the Magistrate's Court of Colombo in case No. 5462/5/12 be laid by till the final hearing and determination of this Petition;

The Petitioner by letter dated 29.2.2012 requested the 1st Respondent either to re-inquire into the matter or to refer it to the Labour Tribunal.

Thereafter the Petitioner received summons to appear on 13.07.2012 in the Magistrate's Court of Colombo to answer a charge of non-compliance with the Order.

In the aforesaid circumstances the Petitioner invoked the jurisdiction of this Court with regard to a purported Order of the Commissioner General of Labour in the purported exercise of powers under the Termination of Employment of Workmen (Special Provisions) Act No. 45 of1971, as amended.

Petitioner further averred that the 1st and 2nd Respondents lacked jurisdiction to exercise powers under the Termination of Employment of Workmen (Special Provisions) Act, in view of the Petitioner having stated that the termination of employment was for a disciplinary reason.

The Petitioner submitted that the 3rd Respondent's services were terminated by letter dated 16.6.2009 at the inquiry before the Labour Commissioner (2nd Respondent). The said letter had been signed and accepted on the very next day.

The said termination letter sets out several reasons for the termination of the services of the 3rd Respondent.

i) failure to heed warnings issued by the company;

ii) acting irresponsibly notwithstanding the undertaking given by the 3rd Respondent in letter dated 2.1.2009;

iii) failure to follow orders/instructions given by the company;

At the Inquiry before the Labour Commissioner (the Respondent), the Petitioner raised preliminary objection to the hearing in view of the termination being for disciplinary reasons.

However, notwithstanding the said jurisdictional objections the relevant Respondents sought to inquire into the matter to ascertain whether there were

disciplinary reasons for the termination, or the relevant Respondents embarked on a voyage of discovery into the merits of the termination. This is borne out by the Recommendations/Report of the 1st and 2nd Respondents.

The said Recommendations/Report bear out that :

The Petitioner raised a preliminary objection in the objections, which was the termination was for disciplinary reasons;

The Petitioner's position was that the Commissioner had no jurisdiction to inquire into the matter;

In the termination letter one of the grounds stated is "insubordination";

The employee had at one stage admitted that the termination was on disciplinary grounds, though later changed her stance;

However, the recommendation/report go on to assert that :

The employer did not establish sufficient grounds to justify the termination. The Employer did not adduce case law to demonstrate that insubordination amounted to misconduct. Finally the Recommendation/Report then purports to conclude that "inefficiency" is not misconduct.

The Petitioner further submitted as such it is clear that the relevant Respondents have failed to consider the aspect of "Insubordination" which is clearly misconduct, and a disciplinary reason warranting termination. When the Petitioner pleaded that the termination was for disciplinary reason, the Commissioner had no power to inquire under the Termination of Employment of

Workmen Act, and that the remedy of the Employee was to invoke the jurisdiction of the Labour Tribunal.

The relevant Respondents had also wrongly stated in their purported Order (P18) that the Petitioner had not established at the inquiry, that the termination was for a disciplinary reason where the termination letter sets out a disciplinary reason. Accordingly the Commissioner had no jurisdiction to go into the merits – which is a matter for the Labour Tribunal.

The Petitioner further submitted that it is trite law that the failure to follow the lawful instructions of the employer is insubordination/misconduct.

Petitioner cited the case of Janatha Estates Development Board vs Ceylon Workers' Congress (1994) 3 Sri LR 24 – where it was recognized that the failure to obey instructions was insubordination/misconduct.

Since submissions were made on behalf of the 1st and 2nd Respondents alleging that the Petitioner wrongly failed to hold a domestic inquiry. It is proposed to deal with whether there is a legal requirement to hold a domestic inquiry.

Although the holding of a domestic inquiry may show the bona fides of an employer, the matters proved at the domestic inquiry must be once more proved by evidence to the satisfaction of the Labour Tribunal.

Further the Petitioner submitted that in Sri Lanka, in the private sector there is no legal requirement of any domestic inquiry, prior to termination.

The Petitioner cited the case of Piyasena Silva vs Ceylon Fertilizer Corporation (1994) 2 sri LR 292 it was held :

> *"the learned counsel for the appellant submitted that there was a denial of natural justice. He submitted that there was no charge sheet served or a domestic inquiry held before the respondent took a decision not to re-instate the appellant. I cannot agree with his submission. Our law does not require to hold a domestic inquiry. This is well settled law in this country."*

The main contention put forward by the Petitioner is that in the light of the judgment of the Supreme Court in **Hiddelarachchi vs United Motors Lanka Ltd and others 2006 3 SLR 411,** the 1st and 2nd Respondents were legally estopped and automatically ousted from proceeding with the inquiry under the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 ("TEWSPA"), as amended, when an employee, in this instance the 3rd Respondent was subject to a disciplinary termination.

It is pertinent at this juncture to examine the provisions of TEWSPA under which the 3rd Respondent complained about her wrongful termination of service by the Petitioner by means of P2. It is conceded by the Petitioner that the 3rd Respondent's employment was covered as a scheduled employment, as such, the provisions of the TEWSPA applies to her employment.

The Petitioner in his submission stated that in the light of the judgment in Hiddelarchchi vs United Motors Lanka Ltd and others cited by the Petitioner the 1st and 2nd Respondents are estopped from proceeding with the inquiry.

Petitioner also cited the following provisions in the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 (as amended)

Section 2(4)

For the purposes of this act, the scheduled employment of any workmen shall be deemed to be terminated by his employer if for any reason whatsoever, otherwise than by reason of a punishment imposed by way of disciplinary action, the services of such workman in such employment are terminated by his employer, and such termination shall be deemed to include:

(a) Non-employment of the workman in such employment by his employer whether temporarily or permanently; or

In support of his case the Petitioner also cited the case of International Cosmetic Applicators (Pvt) Ltd., vs Ariyalatha (1995) 2 Sri LR 61 CA

Section 2(1) of the Act states

No employer shall terminate the scheduled employment of any workman without –

a) Prior consent in writing of the workman or;
b) The prior written approval of the Commissioner;

Section 2(4) states

a) Non-employment of the workman in such employment by his employer, whether temporarily or permanently or
b) Non-employment of the workman in such employment in consequence of the closure by his employer of any trade, industry or business;

Thereafter, an amendment was brought to the "TEWSPA" by way of Amendment Act No. 51 of 1988 – a new subsection as 2(5) which reads as follows:

Where any employer terminated the scheduled employment of any workman by reason of punishment imposed by way of disciplinary action, the employer shall notify such workman in writing the reasons for the termination of employment before the expiry of the second working date of such termination."

In the instant case the 3rd Respondent by means of letter dated 16.06.2009 had been informed that her services was no longer needed by the Petitioner company.

When perusing the contents of this letter, the 1st paragraph makes a general reference to the services of the 3rd respondent as "unsatisfactory" and also previously the 3rd Respondent had been advised to improve her work. However by a service letter dated 7.07.2009,the company had commended the work of the 3rd Respondent, thus contradicting the earlier position.

On a perusal of letter dated 16.06.2009 the Petitioner indicates several reasons as contributive as a whole to the unsatisfactory conduct of the 3rd Respondent but does not say specifically what the reasons are. Furthermore the heading of the letter dated 16.06.2009 is indicated as "Inefficient conduct of service".

Respondents further submitted that the obligation of inquiring into and setting out those instances is with the employer, and it is in this perspective that holding an inquiry prior to the issuance of a letter of termination is vital and important.

Respondents further submitted that the contents of letter of termination dated 16.06.2006 is infact incongruous with the heading of the said letter as well as the contents of P16 and P17 respectively.

Further it was submitted that in the case of St. Anthony Hardware Stores Ltd., vs Ranjit Kumara and another, it was held by Justice Wimalaratne that *"termination of service of a workman on the ground of inefficiency or incompetency is not a termination by reason of punishment imposed by way of disciplinary action."*

In the case of Hiddelarchchi vs United Motors Lanka Ltd and others – 2006 3 SLR 411 it was pointed out that the letter of termination specifically sets out a series of acts of misconduct committed by the employee and on that basis the Supreme Court upheld that in the light of such acts of misconduct the termination of service of the employee concerned would tantamount to a punishment imposed by way of disciplinary action under Section 2(4) TEWSPA. which

automatically outs the jurisdiction of the Labour Commissioner to entertain the application of the employee under TEWSPA.

A similar case of International Cosmetic Applicators (Pvt) Ltd vs Arialatha and others – 1995 2 SLR 61, was also cited. In this case the ground of termination of employee was a 'go slow' campaign, which was clearly recognized as a harmful labour practice as well a as a grave misconduct constituting a justifiable disciplinary ground for termination.

Further the termination of services of the 3rd Respondent was held to be in contravention of the provisions of TEWSPA and the recommendation of the Labour Inquiry Officer was approved by the Labour Commissioner.

Furthermore counsel submitted that the abovementioned writ application seeking to quash the Order (P18) had been made after a lapse of 4 months and by that time the Commissioner of Labour had already taken steps to implement the order.

Counsel further argued that the writ of certiorari will not be issued if the Petitioner had failed to adduce valid reasons. In the case of Issadeen vs The Commissioner of National Housing and others – 2003 2 SLR 10 the Supreme Court held :

> ".....the appellant was guilty of laches. He had failed to adduce any acceptable reason to excuse his delay..... in the aforesaid circumstances the court will generally not issue the writ in the exercise of its discretion."

The 3rd Respondent in this application stated in her objections that she is entitled to leave and that on one occasion she took leave to see her mother and it was informed to the management over the phone and the management has accepted that and she was never warned for taking leave. Furthermore she stated that although she resigned she was given reemployment because of the necessity of her services.

The 3rd Respondent further states that she was forced to sign on a blank paper and paid a certain sum of money but does not know whether it was a gratuity.

The 3rd Respondent denied that the there was no disciplinary inquiry against her and contended that at no time she has violated the rules of the company.

When considering the evidence led before the Court the position of the 1st and 2nd Respondents is that the termination was on "non-disciplinary grounds" as for the reason the heading of the letter says "inefficient service" 'අකාර්යක්ෂම සේවා කටයුතු

At the inquiry the 2nd Respondent observed :

2009.06.19 දිනැතිව ඉල්ලුම්කාරිය වෙත ලබාදෙන ලිපියක් මගින් 'අකාර්යක්ෂම සේවා කටයුතු' මත ඉල්ලුම්කාරියගේ සේවය තවදුරටත් අවශ්‍ය නොවන බව දක්වමින් ඉල්ලුම්කාරියගේ සේවය සේවා යෝජක විසින් අවසන් කර ඇත. මෙම ලිපිය මගින් විනය කරුණක් මත මෙම ඉල්ලුම්කාරියගේ සේවය අවසන් කළ බවට කරුණු දක්වන සේවා යෝජක මෙම පනත යටතේ පරීක්ෂණය පැවැත්වීමට නොහැකි බවට කරුණු දක්වා ඇත. නමුත් විනය කරුණු පිළිබඳ විනිශ්චිත තඩු තීන්දු අනුව අකාර්යක්ෂම සේවා කටයුතු යන්න මගින් විනය කරුණක් ගොඩ නොවන බවත් එම හේතු මත කරන සේවය අවසන් කිරීමත් 1971 අංක 45 දරන කම්කරුවන්ගේ රක්ෂ: අවසන් කිරීමේ විශේෂ විධිවිධාන පනතේ ප්‍රතිපාදනයන්ට පටහැනිව කරන ලද්දක් බවට කිසියේ පිළිගැනීම බවටත් තහවුරුව ඇත' .

Accordingly as for a 'non-disciplinary termination' the 1st and 2nd Respondents have cited and applied the legal positions in the following decided cases :

In the case of St. Anthony's Hardware Stores Ltd vs. Ranjith Kumara and another (1978-1979) 2 SLR 6 –

"Termination of service of a workman on the ground of inefficiency or incompetency is not a termination by reason of punishment imposed by way of disciplinary action."

Therefore the Respondent has acted upon the relevant sections relevant to a non-disciplinary Termination of Employment in the Termination of Employment of Workmen (Spl.Pro) Act.

Section 2(1) of TEWA states :

2(1) No employer shall terminate the scheduled employment of any workman without:

a) Prior consent in writing of the workman; or

b) The prior written approval of the Commissioner;

The employee was in a scheduled employment and therefore prior to the termination the Petitioner must fulfill the requirements stipulated in section 2.

Further a later amendment to TEWA (Act No. 51 of 1988) has introduced a new sub-section 2(5), which states :

(5) Where any employer terminates the schedule employment of any workman by reason of punishment imposed by way of disciplinary action

the employer shall notify such workman in writing the reason for the termination of employment before the expiry of the second working day after the date of such termination.

On the other hand the Petitioner states that on the following reasons it was a disciplinary termination.

The body of the termination letter says "..... උපදෙස් නොපිලිපැදීම වගකීමෙන් තොර වැඩ කටයුතු කිරීම
The above are categorized as disciplinary grounds.

According to TEWA – section 2(4) :

(4) for the purpose of this Act, the scheduled employment of any workman shall be deemed to be terminated by his Employer if for any reason whatsoever, otherwise than by reason of a punishment imposed by way of disciplinary action, the services of such workman in such employment are terminated by his employer and such termination shall be deemed to include –

a) non-employment of the workman in such employment by his employer, whether temporarily or permanently, or;

b) non-employment of the workman in such employment in consequence of the closure by his employer of any trade, industry or business;

as the termination is as for a disciplinary ground, the power of the Commissioner General of Labour does not apply.

As the positions taken up by parties are quite opposite, this Court has to make a decision on the evidence presented before it.

Firstly the Court has to decide the fact whether it was a disciplinary termination or non-disciplinary termination and for that purpose this Court has to consider the following:

According to the termination letter, its caption says "අකාර්යක්ෂම සේවා කටයුතු....." however, in its first paragraph it says "සේවා කටයුතු ඉතාමත් අසතුටුදායක තත්ත්වයක පවතින බැවි වාර්තා විේ."

Even though the caption is worded very clearly *"unsatisfactory state"* in the 1st para. it does not bear a definite meaning and in the 2nd para. It has been stated:

'එවත් වැරැදි නොකරන බවට සඳහන් කළ ද.....'

'තැවත තැවතත් එවැනිව වැරදි සමස්තයක් වශයෙන් වගකීමකින් තොරව සේවා කටයුතු කිරීම හා උපදෙස් නොපිලිපැදීම'

'තවදුරටත් අයහපත් සේවා කටයුතු පවත්වාගෙන යාමට ඉඩ ලබාදිය නොහැකි බැවි.....'

Hence this court has to interpret the said letter with other evidence presented and on case law.

The letter dated 07.07.2009 issued by the Petitioner to the Employee commends her work. Paragraphs 3 and 4 of that letter states :

"..... We observed her capability of handling the entrusted duties under any critical conditions.

"She is an versatile figure among the employees of this establishment....."

Letter written by the Employee dated July 2009 to the Asst: Commissioner of Labour, Colombo North, where she says that she is going to make a complaint. Further the Employee has forwarded the letter dated 2.01.2009 to the Commissioner.

By letter dated .....09.2009 she complains to the Asst Commissioner of Labour (Termination Unit).

In the letter dated 22.12.2008, which the Petitioner has written to the employee, the caption states ..... But the Employee has replied to the letter by giving reasons for the incident by letter dated 22.12.2008. she states that the incident occurred because she had done the work in a wrong way but not in an efficient way. she undertook not to repeat any lapse in the future.

In the recommendation of the Assistant Commissioner of Labour to the Commissioner General of Labour, in the last para. it is mentioned termination letter's caption as ..... .

Therefore according to the evidence before court, even though the termination letter says it is ....". It is observed that the subject termination was a disciplinary termination. Therefore the subject termination was not under the purview of TEWA.

In the case of **International Cosmetic Applicators (Pvt) Ltd vs Ariyalatha** (1995) 2 Sri L.R 61 a p.63 it was held that :

"A reading of section 2 sub-section (4) of the T.E Act would show that the Commissioner's powers are ousted when the termination has been made on disciplinary grounds under the terms of the TE Act. In such circumstances the Employer need not get the prior written approval of the Commissioner. The Commissioner is a creature of the statute and he has no inherent powers as that of a court of law".

In the case of Janatha Estates Development Board vs Ceylon Workers Congress (1994) 3 SLR 24 It was recognized that the failure to obey instructions was insubordination/misconduct.

In the case of Hiddelearachchi vs United Motors Lanka Ltd 3 SLR 411 the facts set out at page 414 were that :

"the inquiry before the 2nd Respondent –respondent-respondent had been resumed and despite objections in respect of jurisdiction of the 2nd Respondent Respondent to hear the same, being taken by the Petitioner-Respondent, the 2nd Respondent Respondent by his order dated 29.05.2001 (P2 6(a) in annexure X1) had made order directing that the Petitioner Respondent should commence leading evidence to establish that the termination was effected as a punishment on disciplinary grounds."

In the Book "Law of Dismissal" by S.R.de Silva - Monograph on 08 (Revised Edition) 2004 page 45 para.71 –

"..... In the case of incompetence or inefficiency which is due to inability. It is beyond the employee's control in the sense that it is not deliberate or culpable and is the result of the employee's inability to

perform his job. The distinction becomes important in relation to the termination of employment of workmen (spl. Pro) Act, because mere incompetence s distinct from negligence falls within the purview of that Act. In short the difference lie in the element of fault which exists in the case of negligence and which is non-existent in the case of incompetency and, sometimes, inefficiency..."

As such it is clear that the relevant Respondents have failed to consider the aspect of insubordination which is clearly misconduct and a disciplinary reason warranting termination. As will be demonstrated below the relevant Respondent also failed to appreciate that when the Petitioner pleaded that termination was for a disciplinary reason the Commissioner has no power to inquire under the Termination act and that the remedy of the Employee was to revoke the jurisdiction of the Labour Tribunal.

Since submissions were made on behalf of the 1st and 2nd Respondents alleging that the Petitioner wrongly failed to hold a disciplinary inquiry. It is proposed to deal whether there is a legal requirement to hold a disciplinary inquiry. The holding of a disciplinary inquiry may show the bona fides of an employer. The matter proved at the disciplinary inquiry must once more be proved by evidence to the satisfaction of the Labour Tribunal.

In Piyasena Silva vs Fertilizer Corporation 1994 2 SLR 292, it was held that our law does not require the holding of a disciplinary inquiry. This is well settled law in the country. The rules of natural justice vary with varying constitution of stability besides the rules prescribed by the legislature under which they have to

act and the question whether on a particular case they have been contravened must be judged by any preconceived notion what they may be but in the light of the relevant Act., where the statute or rules did not give the Applicant any right to be heard and it cannot be said that natural justice have been violated – Bindu Nath vs State of Assam 1959 AIR 118.

In the case of Tairam vs Union of India – AIR 1959 Punjab 478 it was held:

"Delay of two years was considered sufficient merit refusal of issuance of writ. In this case where the Petitioner has been paying surcharge on electricity since 1944. It was too late in the day for him to contest the levy after the enforcement of the Constitution in 1950."

A writ of certiorari or writ in the nature of certiorari cannot be issued declaring an act or an Ordinance unconstitutional or void. A writ of certiorari only and only be issued by Supreme Court or the High Court to direct an inferior court, tribunal or authority to transmit to the court the record or the proceedings pending thereon and if necessary quashing the same. Prabath Verma vs State of Uttara Pradesh 1985 1 SLR 216 at 262.

As such it is clear that the relevant Respondents have failed to consider the aspect of insubordination which is clearly mis-conduct and a disciplinary reason warranting termination.

On a consideration of the facts and circumstances of this case I make Order allowing the reliefs (c), (e) and (l) prayed for by the Petitioner in his Petition.

Costs fixed at Rs. 25,000/-.

JUDGE OF THE COURT OF APPEAL

Wijesundera J., I agree.

JUDGE OF THE COURT OF APPEAL