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

Packwell Lanka (Private) Limited.,
No.26, Second Cross Lane,
Off Kandawela Road,
Ratmalana.
Petitioner

**CASE NO: CA/WRIT/328/2016**

Vs.

1. M.D. Chandani Amaratunga,
   Commissioner of Labour,
   Department of Labour,
   Labour Secretariat,
   Colombo 5.
2. G.W.N. Viraji,
   Deputy Commissioner of Labour,
   Termination of Employment Unit,
   Department of Labour,
   Labour Secretariat,
   Colombo 5.
3. E.C.S. Weerasinghe,
   Assistant Commissioner of Labour,
   Termination of Employment Unit,
   Department of Labour,
   Labour Secretariat,
   Colombo 5.

4. D.M. Gunawardena,
   No.180/24, Samagipura,
   Borupana,
   Ratmalana.
   Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Saliya Edirisinghe for the Petitioner.
Anusha Fernando, D.S.G., for the 1st-3rd Respondents.

Decided on: 13.06.2019

Mahinda Samayawardhena, J.

The petitioner-employer filed this application seeking to quash by way of certiorari the order of the 1st respondent Commissioner General of Labour marked P1 made in terms of section 6 of the Termination of Employment of Workmen (Special Provisions) Act, No.45 of 1971, as amended, whereby the petitioner was ordered to reinstate the 4th respondent employee with back wages.

Learned counsel for the petitioner challenges this order on several grounds.

One such ground is that the 1st respondent did not have jurisdiction to hold the inquiry and make the said determination.

According to section 2(1) of the Act, no employer shall terminate the scheduled employment of any workman without (a) the prior consent in writing of the workman or (b) the prior written approval of the Commissioner General of Labour.

Section 2(4) of the Act states that:

> *For the purposes 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.*

That means, if the termination is a punishment imposed by way of disciplinary action, the Commissioner General of Labour has no jurisdiction to hold the inquiry.

Section 2(5), introduced to the principal Act by Act No.51 of 1988, reads as follows:

> *Where any employer terminates 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 day after the date of such termination.*

The effect of section 2(5) is that, when the employer informs the employee in writing the reasons for termination of employment given as a punishment by way of disciplinary action within two working days of such termination, the jurisdiction of the

Commissioner General of Labour is automatically ousted. The Commissioner has, in such circumstances, no jurisdiction to inquire the genuineness or correctness of that assertion, or reasonableness or justifiability of the termination of employment on disciplinary grounds. (*Hiddelarachi v. United Motors Lanka Ltd [2006] 3 Sri LR 411*)

However, non-compliance with section 2(5), in my view, does not confer jurisdiction to the Commissioner General of Labour, if the Commissioner has otherwise no jurisdiction, because the termination is a punishment imposed by way of a disciplinary action.

When there is non-compliance with section 2(5), the moment the Commissioner General of Labour is *prima facie* satisfied that the termination of employment is a punishment imposed by way of disciplinary action, the jurisdiction, in my view, is ousted. That can happen before, in the course of, or after the inquiry into the question whether the termination is in contravention of the provisions of the Act. (Section 5 of the Act)

The word "*prima-facie*" was used here because if there is material to satisfy at first sight that the termination is a punishment meted out by way of a disciplinary action, the Commissioner is not expected to go into minute detail of the matter to be absolutely satisfied that the assertion is a genuine one.

The employer is not without remedy. He can go before the Labour Tribunal in terms of section 31B(1)(a) of the Industrial Disputes Act, No.43 of 1950, as amended, seeking relief for

termination of his services whether it be by way of a disciplinary action or otherwise.

Here the Commissioner shall be quicker as the workman shall go before the Labour Tribunal, in terms of section 31B(7), within six months from the date of termination.

What has happened in this case? The 4th respondent employee was admittedly an unskilled worker on probation at the time of termination of his services on 04.07.2014. His complaint to the Commissioner of Labour dated 29.08.2014 marked X1, when translated into English reads as follows:

*Termination of Employment*

> *I, the aforementioned D.M. Gunawardena, joined Packwell Lanka establishment under service No. 1391 on 20.02.2013. On 04.07.2014, my services were terminated unjustifiably. The reason for the termination of my services was, my stopping machine and proceeding to meet the Head of the Institution in order to get the sum of Rs.5741/= deducted from my salary. Upon me being questioned by Mr. Mangala and H.R. officer on this matter, they asked me to leave the institution immediately with my belongings if any, as a workman such as me is not suitable to the institution. I expect some relief from you, having conducted an inquiry into this matter.*

On the back of this letter under "*Reason for Termination*", the employee has mentioned "*because of stopping the machine and because of going to meet the Head (of the Institution)*".

From this complaint itself it is abundantly clear that the termination of employment was, rightly or wrongly, a punishment imposed by way of a disciplinary action.

What is the meaning of "*punishment imposed by way of disciplinary action*" mentioned in section 2(4) of the Act? In *St. Anthony's Hardware Stores Ltd v. Ranjith Kumar [1978-79] 2 Sri LR 6 at 8*, Wimalaratne J. stated:

> *By section 2 the Commissioner of Labour has been vested with jurisdiction to order reinstatement if the termination has been "otherwise than by reason of a punishment imposed by way of disciplinary action". Only termination by way of disciplinary action ousts the jurisdiction of the Commissioner. Retrenchment and lay off are not the only non-disciplinary grounds covered by the Act.*
>
> *It is also important to note that to oust the Commissioner's jurisdiction the termination has had to be not only by way of disciplinary action, but also by reason of punishment imposed by way of disciplinary action. What then is meant by termination on disciplinary grounds? When an employee is guilty of misconduct then termination would be by way of punishment on disciplinary grounds. Insubordination, dishonesty, drunkenness whilst at work, malicious damage to employers' property, are types of misconduct which readily come to mind. Negligence may sometimes amount to misconduct, depending on the gravity of the breach of the duty of care. But inefficiency and incompetence denote a person's inability to perform the work allotted to him, and it*

> *is difficult, to see how they could be equated to misconduct for which punishment by way of disciplinary action may be imposed within the meaning of the Act.*

In my view, on the strength of the complaint of the workman marked X1, the Commissioner, without holding an inquiry could have come to the conclusion that termination is a punishment imposed by way of a disciplinary action and asked the employee to go before the Labour Tribunal seeking relief because the employee has come before the Commissioner within less than two months of the termination of employment. Far from doing that, the Commissioner, even after the inquiry, has, in item No.3 of P1, come to the conclusion that termination was as a punishment by way of a disciplinary action has not been established. This is unmistakably an error on the face of the record.

In view of this strong finding, there is no necessity to consider the other valid arguments taken up by the learned counsel for the petitioner against the impugned order.

The Commissioner has made the order P1 without jurisdiction. P1 is therefore quashed by way of certiorari.

Application is allowed with costs.

Judge of the Court of Appeal