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

In the matter of an Application for a prerogative Writ in the nature of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 273/2011

Sea Consortium Lanka (Pvt.) Limited,
4th Floor, Setmil Maritime Centre,
256, Srimath Ramanathan Mawatha,
Colombo 15.

PETITIONER

Vs.

1. P. Weerasinghe,
   Commissioner of Labour,
   District Labour Office, (Colombo North),
   4th Floor, Labour Secretariat, Colombo 5.

2. C.W.M.G. Wickramasinghe,
   Assistant Commissioner of Labour,
   District Labour Office, (Colombo North),
   4th Floor, Labour Secretariat, Colombo 5.

RESPONDENTS

Before: **Arjuna Obeyesekere, J**

Counsel: Faisz Musthapha, P.C with Chanaka De Silva, P.C, Ms. Faisza Markar and Ms. Thushani Machado for the Petitioner

Milinda Gunatilake, Senior Deputy Solicitor General for the Respondents

Written Submissions: Tendered on behalf of the Petitioner on 19th October 2018 and 25th February 2019

Tendered on behalf of the Respondents on 29th January 2019

Decided on: 3rd June 2019

Arjuna Obeyesekere, J

The issues that arise for determination in this application are twofold. The first is whether the decision by the 1st Respondent, Commissioner General of Labour that the Petitioner must pay its employees who were engaged in providing services in terms of the agreement annexed to the petition marked '**P2**', wages in accordance with the Wages Board for the "Dock, Harbour and Port Transport" category is illegal and/or unreasonable. The second issue is whether there has been any procedural impropriety on the part of the 1st Respondent in arriving at the said decision.

The background facts relating to the dispute that led to the above decision are briefly as follows.

The Petitioner states that it carries on *inter alia* the business of operating a category of vehicles commonly known as "Prime Movers" which are used for the purpose of transporting containers. The Petitioner states further that as part of its operations, it uses its Prime Mover vehicles to transport laden or unladen containers within the premises of the South Asia Gateway Terminal (SAGT) situated inside the Colombo Port. The Petitioner states that the above operation is limited to the transporting of the containers from the shipside to the designated container stacks or *vice versa* and that the said operation does not include any aspect of loading or unloading the containers, or any other affiliated service.

The Petitioner states that in or about 2002, it was appointed by SAGT as its exclusive Inter Terminal Vehicle operator. Although proof has not been submitted of any written arrangement entered into in 2002, the Petitioner has annexed to the petition marked '**P2**', an agreement it entered into with SAGT in 2007. The preamble to '**P2**' reads as follows: "Whereas SAGT is desirous of obtaining the services of a suitable organisation to operate its fleet of container transport vehicles within the container terminal SAGT". The said vehicles have been referred to in the agreement as "ITVs", which the Petitioner claims stand for "Inter-Terminal Vehicle".

It is not in dispute that the Petitioner was the sole provider of the said service to the SAGT; that the said vehicles were operated only within the SAGT terminal;[1] that the services provided in terms of the agreement '**P2**' did not require the Petitioner to transport any container on a public road; and that the said agreement was valid for a period of three years.

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[1] Vide paragraph 7 of Annexure 'A' of 'P2'.

According to Clause 2.1 of the said agreement '**P2**', the Petitioner was required to provide operators to operate SAGT's fleet of ITVs, and was responsible for the operation of the said fleet of ITVs on a 24 hours a day, 365 days of the year basis subject to prescribed operational procedures laid down by SAGT. Clause 3.7 of '**P2**' provided that the Petitioner shall be responsible for the statutory and all other dues arising from the employer/employee relationship between the Petitioner company and the operators provided to SAGT under **'P2'**.

This Court must observe that in the body of the agreement '**P2**', the persons employed by the Petitioner to carry out the said service are referred to as 'operators'. '**P2**' does not contain any reference to the term 'Prime Mover Drivers' as referred to by the Petitioner company,[2] nor does **'P2'** refer to the vehicles that are used as 'Prime Movers'. Clause 3.3(a) of '**P2**' however specifies that the operators are required to possess a valid driving license to drive heavy vehicles and have experience in driving container haulage vehicles.

The Petitioner has annexed to the petition marked '**P7c**', a standard form of the contract of employment offered to its employees. This Court has examined **'P7c'** and notes that the post is identified as 'Prime Mover Driver' and the duty entrusted to an employee was to transport containers. While the place of posting was the registered address of the Petitioner, paragraph 12 of '**P7c**' provided that an employee must obtain a special pass from the Sri Lanka Ports Authority "in the event you are required to be employed at the port premises". It is therefore clear to this Court that although employment had been offered as drivers of Prime Mover vehicles, the Petitioner had reserved its right to assign them to work within the Port, which shows that the employees were

[2] Paragraph 2 of Annexure 'A' of 'P2' does refer to the operator as a driver.

not selected solely to perform services under and in terms of the agreement '**P2**'.

This brings this Court to the issue of wages payable to the employees who were carrying out duties in terms of '**P2**'. The Petitioner states that since the inception of its operations in 2002, the Petitioner had paid wages to the said employees according to the scale of wages prescribed from time to time in terms of Section 29(3)[3] of the Wages Board Ordinance, under the classification of the "Motor Transport Trade".[4]

The Petitioner states that in July 2010, the employees of the Petitioner struck work and refused to carry out their duties unless twelve of their demands contained in the letter annexed to the petition marked **'P12'** were met. By letter dated 30th July 2010, annexed to the petition marked **'P13'**, the National Union of Seafarers, Sri Lanka informed the 1st Respondent *inter alia* that the 'Container Truck Drivers' have stopped working due to a dispute in the payment of their wages by the Petitioner company and have requested the 1st Respondent to intervene and resolve the said dispute. The Petitioner states that the aforementioned dispute caused severe disruption to the ability of the Petitioner to carry out its services in terms of **'P2'.** The Petitioner states further that pursuant to the involvement of the 1st Respondent, 71 employees reported back to work and recommenced their duties, and that the contracts

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[3]Section 29(3) of the Wages Board Ordinance reads as follows: (3) No decision transmitted to the Minister under subsection (1) or returned to him under subsection (2) shall have effect unless it has been approved by the Minister. Every decision which has been approved by the Minister shall, together with a notification of such approval, be published in the *Gazette* and in one Sinhala, one Tamil and one English newspaper.

[4] The categories of workers and the wages payable have been published by way of notifications in Gazette Extraordinary No.1494/14 dated 25th April 2007, marked 'P8'; Gazette Extraordinary No.1556/4 dated 30th June 2008, marked 'P9'; Gazette Extraordinary No. 1660/35 dated 30th June 2010, marked 'P10'.

of employment of 189 employees who did not return to work were terminated.[5]

The employees thus complained to the Department of Labour that the Petitioner did not make payments in accordance with the Notifications issued from time to time by the Wages Board for the "Dock, Harbour and Port Transport Trade". The investigations commenced by the Department of Labour into the said complaint, culminated in the 2nd Respondent, the Assistant Commissioner of Labour issuing the Petitioner with the letter dated 28th January 2011, annexed to the petition marked '**P18**'.

Aggrieved by the said decision in '**P18**' that the wages of the employees must be paid in terms of the Wages Board for the "Dock, Harbour and Port Transport Trade", the Petitioner filed this application, seeking a Writ of Certiorari to quash the decision contained in '**P18**'. At the hearing of this application, the learned President's Counsel for the Petitioner submitted that he is challenging '**P18**' on the following three grounds:

a) The Petitioner was not afforded a hearing;
b) The Respondents have failed to provide reasons for its decision; and
c) The classification of the employees as 'riggers' is wrong and unreasonable.

In reviewing '**P18**', this Court would strictly limit itself to considering whether '**P18**' is illegal, irrational or whether there was any procedural impropriety in

[5]The Petitioner states that these 189 employees have filed applications at the Labour Tribunal for unfair termination of employment and that the Petitioner company is resisting these applications before the Labour Tribunal.

arriving at the said decision in '**P18**'. In doing so, this Court would bear in mind the following paragraph of Lord Diplock in **Council of Civil Service Unions vs Minister for the Civil Service**[6], when considering this application:

> "Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety".

This Court will now proceed to consider each of the three grounds urged by the learned President's Counsel, in the light of the discussions that took place between the Petitioner and the officers of the Department of Labour since the first complaint was made in July 2011, and the correspondence that was exchanged between the parties thereafter.

The Respondents have submitted that the employees of the Petitioner, having resorted to industrial action on 30th July 2010, had submitted a letter on the same date, produced by the Respondents marked '**R1**' stating that they have not been paid wages in terms of the applicable Wages Board for the Harbour and Port Trade[7] set up under the Wages Board Ordinance.

[6] 1985 AC 374.

[7] R1 ශ්‍රී ලංකාවේ කම්කරු ආඥා පනත් වලට යටත්ව වරායවල්, ගුවන් තොටුපොළවල්, සහ සම්බන්ධයෙන් අධාල පඩි පාලක සභාවේ නියමයන්ට සහ නිගමනයන්ට.

The Respondents state that it invited the Petitioner as well as the employees for a discussion on 30th July 2010 in order to discuss a resolution of the industrial dispute that had arisen, in an expeditious manner. Accordingly, the Petitioner and the representatives of the employees had attended a meeting with the 2nd Respondent on 3rd August 2010. A copy of the minutes of the meeting has been produced by the Respondents marked **'R3'**. This Court observes that the Human Resources Manager and the Director (Operations) of the Petitioner Company had attended the said meeting. According to the Respondents, the representative of the National Union of Seafarers had handed over a letter stating that the said employees were not being paid in accordance with the Wages Board Ordinance. A copy of the said letter has been produced marked **'R2'**.

The Respondents submit further that the dispute between the Petitioner and its employees had not been resolved at the said meeting and therefore, two further meetings were held with the representatives of the Petitioner and the employees. According to the minutes of the meeting held on 5th August 2010 marked **'R5'** and the minutes of the meeting held on 17th August 2010, marked **'R6'**, this Court observes that the Managing Director of the Petitioner Company had participated at the said meetings along with the Human Resources Manager. The Respondents, while conceding that 71 of the employees who resorted to industrial action, had been reinstated, states that the Department of Labour proceeded to inquire into the complaint that the Petitioner did not make payment of wages in accordance with the Wages Board relating to the "Dock, Harbour and Port Transport Trade".

The fact that three meetings were held with the Senior Management of the Petitioner demonstrates that the Petitioner was aware of the scope of the investigations that were being carried out by the Department of Labour and that it involved a consideration of the correct Wages Board in terms of which the employees should be paid their wages. The learned Senior Deputy Solicitor General has in fact drawn the attention of this Court to the final paragraph of **'<u>R5</u>'** which reads as follows:

> "....... තවද, නෞකා තටාක තොටුපලවලදි සහ වරායන්හි ප්‍රවාහන කර්මාන්තය තුලට මෙම සේවකයින් වැටෙන්නේනම් ඒ පිළිබඳව සොයා බලා කටයුතු කරන බවත් ඔවුන් වෙත දන්වන ලදි ...... මෝටර් රථ ගමනා ගමන ප. ස. 1 යටතේ මොවුන් ආවරණය කර තිබු අතර A 27937 යටතේ සේ.අ 2 ගෙවිම්ද කර තිබුණි ......"

It is his position that the Senior Management of the Petitioner was put on notice that the Respondents would inquire into whether the applicable Wages Board was the "Dock, Habour and Port Transport Trade", and that there was no objection by the Petitioner to such an investigation. The Respondents state further that Officers of the Department of Labour had accordingly investigated whether the said employees should be paid according to the notifications of the Wages Board for the "Dock, Harbour and Port Transport Trade" and in the course of the said investigation, visited the office of the Petitioner in order to seek relevant material and information. It is admitted by the Petitioner that subsequent to the termination of employment of the said 189 persons, Officers of the Department of Labour visited the office premises of the Petitioner from time to time, on five separate occasions and carried out inspections and gathered information and material in respect of the said persons whose employment had been terminated. This too points out to the

fact that the Petitioner was aware of the scope of the investigation that was being carried out by the Department of Labour.

Having recorded statements from some of the employees who had worked at the SAGT, the 2nd Respondent had submitted an internal letter dated 17th September 2010, marked **'R8'** to the relevant Commissioner in the Department of Labour, seeking an opinion on the correct classification that should be applied to the said employees.

'**R8**' reads as follows:

> "සී කොන්සෝටියම් ලංකා ප්‍රයිවට් ලිමිටඩ්
>
> 256, ශ්‍රීමත් රාමනාදන් මාවත, කොළඹ 15
>
> ඉහත ආයතනය විසින් වරාය තුල කන්ටේනර් ප්‍රවාහනය සඳහා ටයිම් මූවර් රියදුරන් (Prime Mover Driver) රැසක් සේවයේ යොදවා තිබූ අතර හදිසියේ ඇතිවූ ආරවුලක් මත ඔවුන් 204 කගේ පමණ සේවය අහිමි කර ඇත.
>
> මේ පිලිබඳව පැවති සාකච්ජාවේදී ඔවුන් යලි සේවයට ගැනීම සේව්‍යයා ප්‍රතික්ෂේප කල අතර ලබා දී නැති ව්‍යවස්ථාපිත හිමිකම් ලබා දෙන ලෙස සේවකයින් ඉල්ලා සිටින ලදී.
>
> අදාල රියදුරන් මෝටර් රථ ගමනා ගමන කර්මාන්තය යටතේ D පංතියේ ටේලර් සහිත ලොරි රියදුරන් (ස්කැමල් හෝස් වර්ගයේ) ලෙස සලකා සේව්‍යයා විසින් වැටුප් ගෙවා ඇති අතර මොවුන් නෞකා තටාක තොටුපලවල් සහ වරායන්හි ප්‍රවාහන කර්මාන්තයට අයත් වන්නේද යන්න පිළිබඳව ඉදිරි කටයුතු සඳහා පැහැදිලි කර ගැනීමට අවශ්‍ය වී ඇත.
>
> අදාල කර්මාන්තයේ වැටුප් 2008 ජුලි සිට සංශෝධනය වී ඇති අතර නැව් බඩු හසුරවන්නා (Rigger) හෝ වෙනත් පංතියක් මගින් මෙම රියදුරන් (වරායතුල පමණක්

සේවයේ නියුතු බැවින්) ආවරණය කල හැකිද යන්න පිළිබඳව මා දැනුවත් කරන ලෙස කාරුණිකව ඉල්ලා සිටිමි."

The reply to **'R8'** has been produced by the Respondents marked **'R9'** and reads as follows:[8]

"සී කොන්සෝටියම් ලංකා (පුයි) ලිමිටඩ්

256, ශ්‍රීමත් රාමනාදන් මාවත, කොළඹ 15

ඔබගේ සාමංක සහ 2010.09.17 දිනැති ලිපිය හා බැදේ.

ඉහත ආයතනයේ සේවය කළ රියදුරන්ගේ කාර්ය භාරය සම්බන්ධව 2010.09.30 දින ඔවුන් සමග සාකච්ඡාවක්ද පවත්වා වරාය පර්යන්තය තුල කටයුතු සම්බන්ධවද, අධ්‍යානයක් කර මගේ නිර්දේශ පහත පරිදි දක්වමි.

මෙම රියදුරන් සේවය කර ඇත්තේ වරාය තුළ පමණක් නැව් බඩු හසුරුවන අන්තර් පර්යන්ත වාහනවලය (INTER TERMINAL VEHICLE). මේවා නැව් බඩු හැසිරවීම සඳහා නැව් සහ ගුදම් අතර බහාලුම් රැගෙන යාමක් සිදු කරන අතර පරිඝණක ජාලයක් මගින් ක්‍රියාකරවන්නන්ට අවශ්‍ය ස්ථාන සහ වෙලාවන් සහ කලයුතු කාර්යයන් නියම කරයි. මොවුන් රියදුරන් යන සේවක වර්ගයට වඩා ක්‍රියාකරු (OPERATOR) යන සේවක වර්ගයට වඩාත් සමීප වේ.

මෙම සේවක වර්ගය වරාය පර්යන්තය තුල පමණක් නැව්බඩු හැසිරවීමේ රාජකාරී කටයුතුවල පමණක් යෙදෙන නිසාත් මෝටර් රථ ප්‍රවාහන කර්මාන්ත පනතේ අර්ථ කතනයට පරිබාහිර වූ විශේෂිත රැකියාවක් නිසාත් මොවුන් "නැව් තටාක, තොටුපොලවල් හා වරායන්හි ප්‍රවාහන කර්මාන්තය" නම් වූ පඩිපාලක සභාවේ තීරණ වලින් "නැව් බඩු හසුරුවන්න" නම් සේවා වර්ගය යටතේ ආවරණය කලහැකි බව කරුණාවෙන් දන්වමි."

[8] 'R9' is dated 5th October 2010.

According to **'R9'**, the applicable Wages Board for the said employees was the Wages Board established in respect of the "Dock, Harbour and Port Transport Trade", taking into consideration the fact that the said employees were engaged in employment only within the Port and that their duties were limited to transporting containers to and from the ship and the storage area.

Thereafter, by letter dated 7th January 2011 marked **'P16'**, the 2nd Respondent had communicated the preliminary findings of the said investigation to the Petitioner company.

'**P16**' reads as follows:

"නැව් තටාක, තොටුපලවල් සහ වරායන් හි ප්‍රවාහන කර්මාන්තය
පිළිබඳ පඩි පාලක සභා තීරණ අනුව වැටුප් නොගෙවීම

අප විසින් ඔබ ආයතනයේ සේවක සේවිකාවන් පිළිබඳව කරන ලද පරීක්ෂණ හා බැඳේ.

අදාල පරීක්ෂණයයේ දි ඔබ විසින් වරාය පරිශ්‍රය තුළ බහාලුම් ප්‍රවාහනයේ යොදවා ඇති රියදුරන් වෙනුවෙන් මෝටර් රථ ගමනා ගමන කර්මාන්තය යටතේ වැටුප් ගෙවීමට කටයුතු කර ඇති බව අනාවරණය විය.

මෙම සේවකයින් වරාය පරිශ්‍රය තුළ සුවිශේෂි වාහන විශේෂයක නැව් බඩු (බහාලුම්) හැසිරවීමේ කටයුතු වල යෙදි ඇති අතර, ඒ අනුව ඔවුන්ට ඊට අදාල පඩි පාලක සහ තිරණ අනුව ඔබ විසින් කටයුතු කළ යුතු වේ.

මේ පිලිබඳව වැඩි දුරටත් කරුණු දැක්වීමට ඔබ අදහස් කරන්නේ නම් 2011.01.26 වන දින ප.ව 2.00 ට මෙම කාර්යාලයේ දි මා හමුවන මෙන් කාරුණිකව දන්වා සිටිමි."

It is the view of this Court that '**<u>P16</u>**' makes it clear to the Petitioner the basis on which the Respondents had determined that wages of the employees must be paid in accordance with the Wages Board for the "Dock, Harbour and Port Transport Trade". Thus, **<u>'P16'</u>** contained the reasons for the said decision, which incidentally is not being challenged in these proceedings.

What is more important however is that by '**<u>P16</u>**', the 2nd Respondent invited the Petitioner to meet him personally on 26th January 2011 at 2p.m., if the Petitioner was desirous of making further representations on the said issue. It is the view of this Court that the Petitioner had been provided with a golden opportunity of clarifying matters, and/or making further representations and/or contesting the facts in **<u>'P16'</u>**, in the event the Petitioner was desirous of doing so.

By letter dated 18th January 2011 annexed to the petition marked **<u>'P17'</u>**, the Petitioner responded to '**<u>P16</u>**' as follows:

> "(we) would like to seek your clarification to the contents in para 3 of your letter, specifically to the decision of the Wages Board as to which category in English Translation of the Gazette notification that these workmen are assigned to."

At this stage, this Court must advert to the fact that even though the classification adopted by the Respondents was "නැව් බඩු හසුරුවන්නන්", the English translation thereof was 'riggers'. It is the position of the Petitioner that the word 'rigger', denotes a person who actually and physically handles cargo.

The Petitioner states that it made representations at the office of the 1st and 2nd Respondents on 26th January 2011 in support of the position that the said employees should not be classified as 'riggers' and that they ought to continue to be classified as 'Drivers under the Motor Transport Trade'. This position of the Petitioner is refuted by the Respondents who argue that the Petitioner did not make any such representations, nor did they make any objections to the position contained in the letter **'P16'**. The Petitioner has not stated anywhere in the petition, the material that it made available to the Respondents at the said discussion or the representations that it made to the Respondents. While it is not the function of this Court to inquire into the authenticity of both claims, what is important and what is agreed by both parties is that an opportunity was afforded to the Petitioner to contest the findings contained in **'P16'** and make representations to the contrary, if required.

Be that as it may, the 2nd Respondent, by letter dated 28th January 2011, annexed to the petition marked '**P18**' informed the Petitioner as follows:

> "නැව් තටාක, තොටුපලවල් සහ වරායන් හි ප්‍රවාහන කර්මාන්තය පිළිබඳ පඩි පාලක සභා තීරණ අනුව වැටුප් නොගෙවීම
>
> ඉහත කරුණ පිළිබඳව ඔබ විසින් මා වෙත එවා ඇති 2011.01.18 දිනැති ලිපිය හා බැදේ
>
> අදාල පඩි පාලක සභා තීරණ අනුව මෙම සේවකයින්ගේ සේවා වර්ගය "නැව් බඩු හසුරවන්නන්"[9] ලෙස සලකා කටයුතු කල යුතු බව කාරුණිකව දන්වමි.
>
> අදාල ගැසට් නිවේදනයේ ජායා පිටපතක් ද මේ සමග ඔබ වෙත එවමි."

[9] The English term for 'නැව් බඩු හසුරවන්නන්' has been given as 'riggers'.

It is the view of this Court that **'P18'** is only a reiteration of the decision in **'P16'** and that **'P18'** should be read together with **'P16'**. The Petitioner has not replied **'P18'**, nor has the Petitioner informed the Respondents that **'P18'** had been issued without taking into consideration the representations that the Petitioner claims it made on 26th January 2011.

Thereafter, by notice dated 8th February 2011 annexed to the petition marked **'P19'**, issued under Section 3(2)[10] of the Wages Board Ordinance, the 2nd Respondent requested the Petitioner to provide details of the salaries paid to all employees in its employment from July 2008 to July 2010, before 28th February 2011. This Court observes that the Petitioner has not challenged the authority of the Respondents to request such information.

By its letter dated 25th February 2011 annexed to the petition marked **'P20'**, the Petitioner requested a period of 3 months to submit the said information. In response to the said letter, the 2nd Respondent by letter dated 10th March 2011 marked **'P21'**, informed the Petitioner that adequate time had been provided and that if the Petitioner fails to provide the requested information by 31st March 2011, all further action that will be taken by the Petitioner will be on the basis of records previously provided. Instead of complying with the request for information, the Petitioner filed this application seeking to quash the document **'P18'**.

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[10] Section 3(2) reads as follows: Every person who as an employer maintains or has maintained under subsection (1) a wage record in respect of any wage period shall preserve such record for four years commencing on the last day of such period, and shall, when required to do so by the Commissioner of Labour or any prescribed officer, produce such record for inspection and furnish a true copy of such record or of any part of such record or permit such a copy to be made.

Our Courts have consistently held that prior to a decision affecting the rights of an individual are taken, such person must be afforded a right to respond. Some laws contain specific provisions with regard to the procedure that should be followed in affording a hearing. The Wages Board Ordinance however is silent as to the kind of hearing that should be afforded to an employer, before determining the correct Wages Board that should be applicable to a particular employee. Therefore, what is important in the view of this Court is that the employer concerned or the Petitioner in this case, must be made aware of the nature or scope of the investigation that is being carried out, must be told the reasons why a particular classification is being made and must be given an opportunity to respond and clarify matters, thus enabling the Respondents to arrive at a decision which is reasonable by both parties.

It is appropriate at this stage to quote the following passage from the judgment of the Supreme Court in **Karunadasa vs Unique Gem Stones Limited and others**[11]:

> "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."

It is the view of this Court that in ensuring procedural fairness and the adherence with the principles of natural justice, Courts must not impose requirements that make it impossible for administrative bodies to arrive at

[11] (1997) 1 Sri L.R. 256 at page 263.

decisions in an expeditious manner or impose unnecessary shackles on their ability to take decisions.

This Court has already set out the sequence of events that transpired from the date of the strike right until **'P18'** was issued. As observed earlier, the Petitioner was made aware right at the commencement in July 2010, the scope of the investigation that was being carried out. Thus, the Petitioners cannot, and is in fact not pretending to be ignorant of that fact.

It is clear from letter **'P16'** that the 2nd Respondent, whilst communicating the findings of the investigation and the reasons for its decision, had provided the Petitioner with an opportunity to make representations to the Respondents with regard to the findings contained therein. It is the position of the Respondents that the Petitioner did not contest the findings of the Respondents contained in **'P16'** and **'P18'**, nor did it respond to **'P18'**. It is the view of this Court, that if **'P18'** had been issued without taking into consideration the Petitioner's response, that fact could have been stated when details of employees were called for by **'P19'**. As referred to earlier, even the letter **'P20'** sent by the Petitioner subsequent to being issued a notice under Section 3(2) of the Wages Board Ordinance[12], only requested the Respondents to provide the Petitioner with further time to submit the required information, but did not challenge the decision either in **'P16'** or in **'P18'**.

Taking into consideration all of the above, this Court is satisfied that the Petitioner has been afforded an opportunity of explaining its position and that the Respondents have in fact given reasons for its decision in **'P18'**. This Court

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[12] P19.

is satisfied that the principles of natural justice have been complied with and therefore, does not see any merit in the argument of the Petitioner.

The next argument advanced by the learned President's Counsel for the Petitioner is that the decision in **'P18'** is unreasonable or irrational, in that the said employees were in fact drivers who therefore should be brought under the Wages Board for the "Motor Transport Trade" as opposed to the Wages Board for the "Dock, Harbour and Port Transport Trade."

In considering the said argument of the Petitioner, this Court must be mindful that in this application, this Court is exercising its Writ jurisdiction as opposed to its Appellate jurisdiction. This distinction has been referred to in **Administrative Law by Wade and Forsyth**[13] in the following manner:

> "The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful'?"[14]

This Court is mindful that the function of this Court when considering an application for a writ is to look at the legality of the decision and not whether it is right or wrong. As Lord Brightman stated in the House of Lords in **Chief**

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[13] 11th Edition; at page 26.
[14] Eleventh Edition at page 26.

Constable of North Wales Police v Evans[15], applications for judicial review are often misconceived:

> "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power..... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."

In fact, Lord Diplock[16], having laid out the grounds on which a Writ would lie, went onto explain in the following manner what is meant by "irrationality":

> "By "irrationality" I mean what can now be succinctly referred to as 'Wednesbury unreasonableness'[17]. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

This Court must state that it is not in a position, nor is it its function to determine which Wages Board the said employees should come under, but will only determine if all the relevant factors were considered by the Respondents in making their decision in **'P16'** and **'P18'**, and whether the said decision is reasonable as opposed to being "outrageous in its defiance of logic."

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[15] [1982] 1 WLR 1155 at 1174.
[16] Supra.
[17] Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948 (1) KB 223.

It is admitted between the parties that there is a Wages Board for the "Motor Transport Trade" made under Section 30 of the Wages Board Ordinance. The notification made by the Minister of Labour in terms of Section 29(3) of the Wages Board Ordinance for the "Motor Transport Trade" with effect from 1st May 2007 has been annexed to the petition marked '**P8**'.

This Court has examined '**P8**' and observes that the schedule to the said notification sets out the amendments that were made to the existing notification. '**P8**' has introduced two amendments, the first with regard to the category of workers and the second, with regard to the minimum wages payable for a month. It is the contention of the Petitioner that the employees of the Petitioner are essentially drivers driving a long vehicle to which a trailer has been attached and therefore, the Wages Board that is applicable to them should be the Wages Board for the "Motor Transport Trade". The Petitioner has submitted further that its employees should be classified under Class D, namely, 'drivers of tractors with trailers used for transport purpose, drivers of lorries with trailers (including those of the Scammel Horse type).' This class of workers for the "Motor Transport Trade" has been repeated in '**P9**' to cover 'drivers of tractors with trailers used for transport purpose, drivers of lorries with trailers.' This Court does not see any objection to the position of the Petitioner that a driver employed by the Petitioner to drive its Prime Mover vehicles with a trailer can be classified under the Wages Board for the "Motor Transport Trade", subject of course to the qualification that such transport must take place on a public road.

Similarly, it is also not in dispute that there is a Wages Board for the "Dock, Harbour and Port Transport Trade" made under Section 30 of the Wages Board

Ordinance. The notification published under Section 29(3) of the Wages Board Ordinance, effective from 1st July 2008 in respect of the "Dock, Harbour and Port Transport Trade" has been annexed to the Petition marked '**P9**'.[18] Part II thereof sets out the minimum monthly wages payable to the categories of workers referred to therein. It is the contention of the Petitioner that the said notification does not have a category for 'drivers' and therefore the employees in question cannot be classified under the Wages Board for the "Dock, Harbour and Port Transport Trade". It is in fact significant to note, as submitted by the learned Senior Deputy Solicitor General, that the Petitioners are not contesting that the said employees cannot be brought under the Wages Board for the "Dock, Harbour and Port Transport Trade" but are only claiming that there is no category in the Wages Board for the "Dock, Harbour and Port Transport Trade" under which the said employees can be classified and therefore, they should be brought under the Wages Board for the "Motor Transport Trade".

It is not in dispute that the Wages Board for the "Dock Harbour and Port Transport Trade" was established in 1941. The Order establishing the said Wages Board published in the Ceylon Government Gazette No. 9863 dated 14th May 1948 has been produced by the Respondents marked '**R13**'. The reverse page of '**R13**', contains a notification published in the Ceylon Government Gazette No. 9790 dated 24th October 1947. The Order contained in the schedule to the said Notification reads as follows:

> "The provisions of Part II of the Wages Board Ordinance, No. 27 of 1941, shall apply to the following trade:

[18] Page 30A of 'P9'. The said notification has been produced by the Respondents marked 'R15'.

The dock, harbour and port transport trade consisting of the following types of work carried on within the limits of the Ports of Colombo, Galle and Trincomalee as defined under the Customs Ordinance:

(a) Loading or unloading of goods, livestock, oil or coal to or from any ship or vessel;

(b) Conveyance of goods, livestock, oil or coal to or from any ship or vessel."

The Respondents have submitted marked '**<u>R14</u>**' an extract relating to the "Dock, Harbour and Port Transport Trade" taken from the 'Consolidated orders relating to the description of the trades for which Wages Boards have been established and consolidated decisions of such boards' published in 1962.[19] It is submitted by the learned Senior Deputy Solicitor General that the decision of the Wages Board setting out the activities/ types of employment within the "Dock, Harbour and Port Transport Trade" listed in **<u>'R13'</u>** is reiterated in '**<u>R14</u>**' in the following manner: "නැවකට හෝ යාත්‍රාවකට බඩු, සතුන්, තෙල් හෝ අඟුරු ගෙනයාම හෝ ගෙන ඒම".

The notification under Section 29(3) for the "Dock, Harbour and Port Transport Trade" made in 2008 has been produced by the Respondents marked '**<u>R15</u>**'. The Schedule thereto reads as follows:

"The decisions made by the Wages Board for the Dock, Harbour and Port Transport Trade, set out in the Schedule to the Notification published in

[19] It appears that 'R14' is an extract from the Ceylon Labour Gazette – Volume XIII, No. 1 of January 1961.

Gazette number 9790 of 24th October 1947 as varied from time to time and last varied by the schedule to the Notification published in Gazette number 11463 of 31st July 1958, shall be further varied by the substitution of the following new part for Part II of that schedule."

Part II of **<u>'R15'</u>**[20] specifies that, "the minimum monthly wages and annual increments payable to workers specified in Column I shall be the corresponding rates set out in Column II." Column I contains a category of workers known as "නැව් බඩු හසුරවන්නන්", which is the category under which the Respondents state the employees of the Petitioner should be classified.[21]

It is the position of the learned Senior Deputy Solicitor General that all functions of the employees employed in terms of the agreement **<u>'P2'</u>** are carried out in the course of transporting containers from the ship to the storage yard or *vice versa* within the Port of Colombo. This Court is in agreement with the said position that the existence of a Wages Board for the "Dock Harbour and Port Transport Trade" which deals expressly with the Port Transport Trade should be sufficient by itself to support the argument that where the employment involves any kind of transport within the Port, it should fall within the Wages Board for the "Dock Harbour and Port Transport Trade". Furthermore, the work performed by the said employees falls under the description of "නැව් බඩු හසුරවන්නන්", thereby bringing the said employees under the Wages Board for the "Dock Harbour and Port Transport Trade".

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[20] 'R15' is the Notification published in Gazette Extraordinary of 30th June 2008 and is found at page 38A of 'R9'.

[21] The English term for which is 'rigger'.

In this background, this Court will now review '**P16**', the relevant parts of which, for convenience, are re-produced below:

> "<u>නැව් තටාක, තොටුපලවල් සහ වරායන් හි ප්‍රවාහන කර්මාන්තය පිළිබඳ පඩි පාලක සභා තීරණ අනුව වැටුප් නොගෙවීම</u>
>
> මෙම සේවකයින් වරාය පරිශ්‍රය තුළ සුවිශේෂී වාහන විශේෂයක නැව් බඩු (බහාලුම්) හැසිරවීමේ කටයුතු වල යෙදී ඇති අතර, ඒ අනුව ඔවුන්ට ඊට අදාල පඩි පාලක සභා තීරණ අනුව ඔබ විසින් කටයුතු කළ යුතු වේ."

Are the above reasons given by the Respondents unreasonable or irrational? This Court does not think so. It is not in dispute (a) that the employees who were the subject matter of the investigation were all employees who had been employed under the agreement '**P2**'; (b) that the said employees worked exclusively within the Port of Colombo; and (c) that their work involved transporting of containers from the ship side to the storage yard and *vice versa*. It is admitted that the said employees could not drive the ITVs on a main road and that they could only drive within the Port. Thus, their primary function was to transport containers within the Port. It is the view of this Court that to bring such employees within the Wages Board for the "Dock Harbour and Port Transport Trade" is certainly reasonable. It would in fact have been unreasonable and irrational had the Respondents brought such employees under the Wages Board for the "Motor Transport Trade" when a Wages Board specially for the Port Transport Trade was available, and where the said employees did not carry out any duties outside the Port, including driving the Prime Movers on a public road.

Having brought the said employees under the Wages Board for the "Dock Harbour and Port Transport Trade", is it unreasonable to bring them under the classification of "නැව් බඩු හසුරවන්නන්"? This Court does not think so, for the simple reason that this is the exact function that such employees were carrying out. In the above circumstances, this Court cannot agree with the submission of the learned President's Counsel for the Petitioner that the decision in '**P18**', or for that matter '**P16**', is unreasonable or irrational.

The Petitioner has also complained to this Court that the decision contained in **'P18'** was *mala fide* and done with an ulterior motive. The Petitioner has however failed to demonstrate the basis on which it claims the said decision was *mala fide* and has also failed to illustrate what the alleged ulterior motives of the Respondents were. If the Petitioner was seeking to prove bad faith on the part of the Respondents, such allegations ought to have been substantiated with evidence and facts.

The Respondents in their written submissions have submitted that the Petitioner has not challenged, either in its petition or counter affidavit, the power of the Respondents to categorise workmen. The Petitioner in its reply written submissions has attempted to refute this position of the Respondents by alleging that the Respondents have in fact issued **'P18'** in excess of their power, as they have failed to show that they are authorized persons to carry out functions under the Wages Board Ordinance under Section 53 and that in any case, the Respondents do not have the authority to "categorise workers", an argument which was presented for the first time in the reply written submissions.

This Court is of the view that a Petitioner cannot present a case which has not been pleaded in its petition. This Court is under no obligation to consider the said argument due to the Petitioner's delay in presenting it and considering the fact that the Respondents weren't given an opportunity to respond to the same. In any event, it is the view of this Court that this argument has no merit as the Commissioner General of Labour is empowered in terms of Sections 14 and 21 of the Wages Board Ordinance to take the decision set out in '**P16**' and '**P18**' directing the Petitioner to pay wages in accordance with the Wages Board for the "Dock, Harbour and Port Transport".[22]

In the above circumstances, this Court does not see any legal basis to issue the relief prayed for. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal

[22] Section 14 of the Wages Board Ordinance reads as follows: "If any doubt arises or any question is raised as to which of two or more Wages Boards is entitled or required to exercise and perform in any matter the powers, duties and functions of a Wages Board under this Ordinance, the Commissioner shall decide such question and his decision thereon shall be final."