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

In the matter of an application for mandates in the nature of Writs of Certiorari and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) Application
No. 192/2013

1. **Kapila Budhapriya Weerasinghe**
   of "Brooklyn", Pahala Kadurugamuwa,
   Diyatalawa.
2. **Thuwan Raffaideen Lailadeen**
   No.A1/G3, National Housing Scheme,
   Surpentine Road,
   Borella.
3. **Jayasooriya Arachchige Premadasa**
   No.330/K/3/2, National Housing Scheme,
   Serpentine Road,
   Borella.
4. **M.P.S. Vinitha Cooray Balendran**
   No.11, 5th Lane, Koralawella,
   Moratuwa.
5. **Nannithamby Sivarajah**
   No.240, Hendala Road,
   Hendala.
6. **M. Ibrahim Muhammadu Sideek**
   No.40, Paraththa Road,
   Keselwatte, Panadura.

PETITIONERS

-Vs-

1. **V.B.R.K. Weerasinghe,**
   Commissioner General of Labour,
   Department of Labour,
   Colombo 05.
2. **Hon. Gamini Lokuge,**
   Minister of Labour and Labour Relations,
   Ministry of Labour and Labour Relations,
   2nd Floor, Labour Secretariat,
   Narahenpita,
   Colombo 05.

2A. Hon. S.B. Nawinna,
Minister of Labour and Labour Relations,
Ministry of Labour and Labour Relations,
2nd Floor, Labour Secretariat,
Narahenpita,
Colombo 05.

3. **Brown and Company PLC,**
   No.481, T.B. Jaya Mawatha,
   Colombo 10.
4. **J.R. De Silva,**
   No.9/1, Galawala Road,
   Mount Lavinia.

RESPONDENTS

BEFORE : **A.H.M.D. Nawaz, J.**

COUNSEL	:	M.A. Sumanthiran, PC with Sarita de Fonseka for the Petitioners Chaya Sri Nammuni, SC for the 1st and 2nd Respondents Shantha Jayawardena with Chamara Nanayakkarawasam, Dinesh de Silva and Hiranya Damunupola for the 3rd Respondent
Decided on	:	23.05.2019

A.H.M.D. Nawaz, J.

The Petitioners seek judicial review of the decision of the 1st Respondent Commissioner General of Labour to compute the compensation payable to them, as per their salaries at the time of their unjustified termination of services that took place on the 23rd November 1994. They seek a writ of certiorari to quash the decision of the 1st Respondent Commissioner General of Labour to compute the compensation based on the above criterion. Apart from the above writ of certiorari which is sought to quash the decision of the Commissioner General of Labour to compute the compensation based on the 1994 salaries which I would call the 1st remedy, the Petitioners also seek the following remedies:-

2. a writ of certiorari to quash the decision of the 1st Respondent not to take into consideration the quantum of back wages, as part of the compensation payable to the Petitioners, in the direction to the 3rd Respondent Brown and Company Ltd;
3. a writ of mandamus compelling the 1st Respondent to compute the compensation payable to the Petitioners based on the salaries they would have been entitled to had they been reinstated at the time of the judgement of this Court delivered on 13th January 2011;
4. a writ of mandamus compelling the 3rd Respondent to pay back wages, based on the salaries the Petitioners would have been entitled to had they been reinstated, as part of the compensation payable to the Petitioners.

In this backdrop the antecedents of the case repay attention. The Petitioners had beenemployees of the 3rd Respondent Company for several years and were transferred to a subsidiary or associate company called Browns Engineering Ltd., with effect from 01st March 1992.

Subsequently, on or about 23rd November 1994, Browns Engineering Ltd., issued them with letters of termination.

The dispute regarding such termination was referred to arbitration and the 4th Respondent (the arbitrator) awarded compensation to each of the Petitioners on 17th May 2008 on the basis that the dismissal from employment was illegal and not valid and that they were the employees of the 3rd Respondent (Brown and Company PLC) at the time of termination.

The 4th Respondent in the aforesaid award (**P1**) directed that the 3rd Respondent should make payments to the Petitioners in the following manner:-

i. for wrongful dismissal Rs.100,000/- for each employee;

ii. pay full salaries from the date of termination till their retirement at the rate given in the annexure 9;

iii. pay the gratuity calculated up to their retirement age.

Consequent to this award rendered by the 4th Respondent, the 3rd Respondent sought judicial review thereof in this Court by way of CA (Writ) Application No.1046/2008.

By a judgment dated 13th January 2011, this Court endorsed the finding of the arbitrator that the termination of services of the Petitioners was unjustified and that the 3rd Respondent Brown and Company PLC was in fact the employer of the Petitioners.

Be that as it may, Sriskandarajah, J. took the view that the 4th Respondent (the arbitrator) had awarded excessive compensation.

> *"In the instant case he has awarded excessive compensation and when compensation is awarded there is no necessity to award a separate sum for wrongful dismissal. The gratuity payment is a statutory payment and it has to be paid according to law..."*

Thereafter Justice Sriskandarajah went on to quash the separate sum of Rs 100,000/- that had been awarded for wrongful dismissal and directed the 1st Respondent to calculate the quantum of compensation payable to the Petitioners ***as per the formula published in Government Gazette Extraordinary No.1348/07 dated 15.03.2005*** (P3).

It has to be noted that the upshot of all this boils down to the fact that the Petitioners had continued to be in service despite their unjustified termination on 23.11.1994 and at all material times Brown and Company PLC had continued to be the employer of the Petitioners.

In the judgment dated 13.01.2011, Sriskandarajah, J. made the following observation:-

> *"In these circumstances the arbitrator could have considered the relief of reinstatement with back-wages or compensation in lieu of reinstatement. The arbitrator has chosen to grant compensation. In that event he should have awarded compensation that is awarded to a workman whose services are terminated in similar circumstances."*

Thus it is clear from the above passage that the learned Judge acknowledged that either reinstatement could have been ordered or compensation could have been granted in lieu of reinstatement, but because the 4th Respondent Arbitrator had chosen to grant compensation, it had to be calculated in terms of the formula spelt out in ***Government Gazette Extraordinary No.1348/07 dated 15.03.2005*** (P3). As is well known, the compensation formula was *gazetted* in 2003 (*Gazette* No.1321/17 of 31.12.2003) and it was subsequently amended and the amended formula was introduced via *Gazette* No.1384/07 dated March 15, 2005. By virtue of powers vested in the Commissioner of Labour by Section 6D of the Termination of Employment of Workmen (Special Provisions) Act, No.45 of 1971 as amended by Act, No.12 of 2003 (TEWA), the then Commissioner of Labour, in consultation with the Minister in charge of the subject of Labour Relations and Foreign Employment published this formula in the aforesaid *Gazette* for the purpose of computation of compensation to be paid to a workman.

His Lordship Justice Sriskandarajah directed the Commissioner of Labour to compute the quantum of compensation in accordance with the formula in the previous judgement

of this Court in CA Writ Application No.1046/2008, and eventually the 1st Respondent-Commissioner General of Labour by **P5** dated 04.03.2013 communicated the quantum of compensation, calculated as per the salaries of the Petitioners at the time of termination of their services in 1994.

This is the decision that is challenged before this Court as amenable to be quashed by a writ of certiorari.

The learned Counsel for the Petitioners Sarita de Fonseka contended strongly that this computation is *ultra vires* inasmuch as the 1st Respondent has not taken into account the unbroken contract of services of these Petitioners as it is the corollary that follows consequent to the declaration by both the Arbitrator and the Court of Appeal that the termination of services of these Petitioners was illegal and invalid. If their services are not terminated at all in 1994, they continued in service and therefore the computation of compensation cannot be pegged to what their salaries were at the time of termination namely in 1994. The process of anchoring the compensation to the year 1994 was irrelevant and was actuated by extraneous considerations and therefore the decision smacks of illegality-so argued Sarita de Fonseka the learned Counsel for the Petitioners. She pointed out that Section 14 of the Industrial Disputes (Hearing and Determination of Proceedings) Special Provisions Act No.13 of 2003 mandates an arbitrator to make an award in respect of a reference within 3 months of such reference. But the award came about almost 14 years later in 2008 and even after the termination was confirmed by this Court in 2011, the Petitioners are yet to receive their solatium as the matter is *lis pendente lite*, about 23 years after the unjustified termination of the Petitioners from employment.

When there is such a long lapse of time notwithstanding the statutory stipulation of 3 months within which a resolution of the dispute should be made, it is inequitable to peg the computation of compensation at the salaries of the Petitioners at the time of termination. The learned Counsel for the Petitioners argued that the base salary ought to be what the Petitioners would have received in January 2011 (the date of the judgment of Sriskandaraja, J.), had they continued in service.

Thus, the learned Counsel for the Petitioners contended that the computation of compensation by the 1st Respondent consequent to the direction of this Court in CA (Writ) No.1046/2008 **(P2)** is manifestly erroneous and has been reached upon a misconstruction of the said judgment, a misunderstanding of the law, a consideration of irrelevant factors and having disregarded relevant factors and is therefore *ultra vires*. If I were to put it in Lord Diplock's formula in the *GCHQ* case (***R v. Minister for the Civil Service ex p Council of Civil Service Unions*** (1985) 1 AC 374, the challenge was on the ground of illegality and if I hark back to the seminal decision of ***Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*** (1948) 1 KB 223, it would be *Wednesbury* unreasonableness in the umbrella sense.

The learned State Counsel Chaya Sri Nammuni for the 1st and 2nd Respondents submitted that the formula in the TEWA would admit of no discretion and in following the formula one cannot take into account a forward date such as January 2011 as the formula is straight jacketed and hidebound by two terminal dates. As this Court too drew the attention of all Counsel to the two dates specified in the formula, it is convenient at this stage to look at the compensation formula that prevails now.

Compensation Formula

Number of year(s) service at the Date of Termination	Number of months to be paid as Compensation for each year of service	Maximum Compensation (Cumulative)
1 to 5	2.5	12.5 months
6 to 14	2.0	30.5 months
15 to 19	1.5	38.5 months
20 to 24	1.0	43.0 months
25 to 43	0.5	48.0 months

Total payments shall not exceed Rs.1,250,000/-

As one could see, the first column in the formula refers to the number of years of service at the date of termination. So if termination takes place under the TEWA, the

computation has to perforce factor in the dates of commencement of services and the dates of termination in order to arrive at the number of years of service. So it is the base salary at the time of termination that has to be looked at to work the formula-so argued Chaya Sri Nammuni the learned State Counsel.

According to her contention, the formula is rigid and applies across the board to all and sundry. She pointed out that had these Petitioners been in service, out of the six Petitioners before this Court, some would have retired in 1999 and only two would have proceeded beyond January 2011-the date of the judgment of this Court which confirmed the fact of unjustified termination. Thus she identified, as when the Court posed the question, two categories of workmen- *1)* those who would have retired before Sriskandarajah, J. declared their termination unjustified in 2011 and *2)* those who would have proceeded up to 2011 and beyond.

So the issue before this Court is-what would be the base salary for the two categories of workmen who compose these 6 Petitioners?

As the arguments proceeded and the Court probed all Counsel for these searching issues which surfaced to the fore, the Court met with two answers. The learned Counsel for the Petitioner Sarita de Fonseka stated that the two groups would have two different base salaries namely salaries in their retirement years as for those who retired before 2011 and for those who went up to 2011 and beyond, the terminal salary has to be what they would have received in 2011. She abandoned her argument for 2013-the year of computation as pegging the base salary to 2013 would instinctively become burdensome on the employer.

As for the learned State Counsel the compensation formula is inflexible and would leave no room for the requirement of discretion to come into play in the computation of the quantum of compensation.

Mr. Shantha Jayawardene the learned Counsel for the 3rd Respondent, whilst associating with the submissions made by the learned State Counsel, joined issue with the argument of the Counsel for the Petitioners that the contract of employment continued as soon as the arbitrator found that the termination was unjustified. He argued that according to

the facts of the case, this was a situation of retrenchment due to redundancy and the contract of service came to an end with the termination, albeit unjustified. In the circumstances a mechanical application of the compensation formula pegging the base salary to 1994 (the date of termination) is an indispensable concomitant.

I set out *in extenso* the argument before this Court in order to bring out in sharp relief the rival arguments of counsel and as it turns out, the issue before Court is which base salary has to be taken into account as the base salary for computation of compensation.

Needlessly to say, the proceedings in this case never took place under the TEWA. The ascertainment of the fact of unjust termination took place under the provisions of Industrial Disputes Act (IDA). Section 33 of the Industrial Disputes Act No.43 of 1950 as amended specifies the reliefs that can be awarded by Arbitrators, Industrial Courts and Labour Tribunals.

It has to be remembered that the industrial dispute between the Petitioners and the 3rd Respondent was referred to an arbitrator for settlement by arbitration. Section 17(1) of the Industrial Disputes Act requires the Arbitrator to make such award as may appear to him "just and equitable". When the 3rd Respondent invoked the writ jurisdiction of this Court to quash the award, His Lordship Justice Sriskandarajah, whilst quashing the award dated 17th may 2008, agreed with the findings of the arbitrator that the termination of the employment of the Petitioners was not justified. But His Lordship Justice Sriskandarajah made an important observation namely "He should have awarded compensation that is awarded to a workman whose services are terminated in similar circumstances". It is in this backdrop that the learned Judge directed the 1st Respondent Commissioner to compute the quantum of compensation according to the formula.

The direction of the Court of Appeal has to be understood in the context of the two components of compensation that was referred to-namely the compensation must be consonant with what is given to a workman in similar circumstances and the formula in TEWA must also be employed. What is the type of compensation that is then awarded

to a workman in similar circumstances? Reinstatement is the normal relief where the termination is found to be illegal, wrongful or unjustified.

Compensation in lieu of reinstatement has been awarded in specific instances and a slew of case law has grown around the concept of compensation in lieu of compensation and most of the dicta relating to compensation are from cases which sprang from decisions of Labour Tribunal and Arbitrators.

In a special situation where the arbitrator ordered compensation which was found to be excessive by the Court of Appeal and having regard to the fact that no inquiry under the TEWA Act took place, could those principles adumbrated in the case law on compensation in lieu of reinstatement be utilized in this matter?

The cardinal matter that seems to be dispositive is that Justice Sriskandarajah used the expression "workmen in similar circumstances". Bearing in mind that Sriskandarajah, J. directed the Commissioner General to use the compensation formula, I am inclined to take the view that there cannot be a mechanical application of the formula. The facts and circumstances of this case demand that the application of the formula must of necessity be interlinked with the concomitant concepts of justice and equity.

While giving effect to the formula, one cannot overlook the stipulation of Justice Sriskandarajah that these Petitioners must be similarly treated on par with those whose services are terminated illegally.

A few cases throw light on the guidelines that our Courts laid down in the award of compensation. First, the question whether back wages and compensation could both be given in the aggregate came up for resolution in the case of ***Associated Newspapers of Ceylon Ltd., v. Jayasinghe*** (1982) 2 Sri L.R (SC).

The Supreme Court stated, "To order back wages, and compensation as an alternative would be to duplicate one factor which should enter into the compilation of compensation.....The object of the exercise should be to ascertain as far as possible the money equivalent of the loss of employment from the date of unjust dismissal....Wages can provide a useful unit for the calculation but it is neither possible nor desirable to lay

down a formula for application in all cases. When a Tribunal is called upon to determine compensation it should take into account the back wages lost but it is not entitled to make a separate award of back pay in addition to compensation."

In ***Nanayakkara v. Hettiarachchi*** (1971) 74 N.L.R 185, the Supreme Court took into account the workman's age, the number of years of service, the benefit he received from his employer and the capital of the business, in arriving at it decision.

Lord Denning MR in ***Ward v. James*** (1965) 1 AER 564 at 571 states; "From time to time consideration may change as public policy changes, and so the pattern of decision may change. This is all part of evolutionary process."

In ***Jayasuriya v. Sri Lanka State Plantations Corporation*** (1995) 2 Sri L.R 379 (SC)-The Supreme Court discussed the computation of compensation in detail. In this case Labour Tribunal held that the termination was justified and dismissed the workman's application and the Court of Appeal affirmed the Tribunal order. The Supreme Court, however, set aside the judgment of the Court of Appeal and the order of the Labour Tribunal and held that termination of the employment of the Appellant by the Respondent was wrongful. The Court, however, thought that compensation, rather than reinstatement, was the appropriate remedy in this case, considering the Petitioner's uneasy relationship with the Trade Unions and the likelihood of industrial strife if he is re-instated and the fact that the employer had alleged a lack of confidence in the Petitioner.

I have already pointed out that the Commissioner General of Labour indicated in his letter dated 14th February 2011 **(P4)** that he was having in his mind as a base for computation the salaries that the Petitioners would have received in 2011.

When termination is unjustified, the contract of service must be treated as unbroken and the Petitioners must be deemed to have been in service without any break. The Court of Appeal confirmed the fact of unjustified termination in 2011 and it follows that the Petitioners would have continued in service till 2011 unless some of them retired prior to 2011.

Because the Commissioner General of Labour was conscious of the fact that some of the Petitioners, if not all, would have continued till 2011 and that the salaries receivable in 2011 could have been ascertained, he dispatched **P4**-the letter dated 14th February2011.

But later in the day he deviated from his earlier stance and followed the formula mechanically by adopting the salaries in 1994 (the year of termination) as the base salaries. There is no reason given as to why this volte-face took place. The Petitioners contend that the 1st Respondent acted under dictation from the 3rd Respondent by adopting the salaries given by them, when they had been asked by **P4** to give the 2011 salaries within two weeks.

The document marked **P5** only intimates that the formula has been used to compute the quantum. It does not give any reasons as to how the 1994 salaries were taken as the base, when these Petitioners were terminated for no wrong on their part and the Court of Appeal had directed that they must be put on the same footing as those similarly circumstanced.

In my view it would be consonant with justice and equity that these Petitioners could be discharged only with adequate compensation and the concept of just and equitable relief must be factored in the formula when compensation is going to be awarded many years after the termination.

The delay is not imputable to them nor is it attributable to the employer but I am of the view that for the 1st category of Petitioners namely those who retired before 2011, the base salary must be taken to be the wages they would have received in the event of their retirement before 2011. As for the others, it is just and equitable that the base salary should be the wages that the Petitioners would have received had they continued in service till 2011. Since the formula itself is silent on the base salary for purposes of compensation, the formula must be employed with the salaries that the two categories of employees would have earned at their respective terminal dates namely the salary that would have be paid at the retirement date and the salary that would have been payable in 2011.

It is these indicia that should govern the computation of compensation for the two groups of employees among the Petitioners.

In the circumstances, the failure to take into account the aforesaid consideration as a relevant consideration taints the decision of the 1st Respondent with illegality-*see* ***Tesco Stores Ltd., v. Secretary of State for the Environment*** (1995) 1 W.L.R 759.

I therefore quash the decision in P5 dated 04th August 2013 inasmuch as P5 has taken into consideration an irrelevant consideration namely the 1994 salaries as the base for computation.

I also issue a writ of mandamus directing the Commissioner General of Labour to compute the number of years in the formula up to the retirement dates or the year 2011 depending on the peculiar circumstances of the Petitioners. The base salaries for this purpose would be the salaries at the times of retirement for the Petitioners who retired before 2011 and in the case of the others it would be the salaries they would have received in 2011.

These are two remedies I deem it appropriate to grant and subject to these reliefs being granted, the application for judicial review is allowed to that extent.

JUDGE OF THE COURT OF APPEAL