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

S.A. Nirosha Lalani,
No. 190/53F,
Weera Mawatha,
Depanama,
Pannipitiya.
Petitioner

CASE NO: CA/WRIT/124/2016

Vs.

Eastern University of Sri Lanka,
Wentharumoolai,
Chenkalady.
And 11 Others
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: K.G. Jinasena for the Petitioner.
Anusha Fernando, D.S.G., for the 1st-7th Respondents.
H. Withanachchi for the 9th-11th Respondents.
Ershan Ariaratnam for the 12th Respondent.

Decided on: 16.09.2019

Mahinda Samayawardhena, J.

The Petitioner's services as the Senior Assistant Bursar of the Eastern University were terminated after an *inter partes* formal inquiry during her probationary period on charges relating to financial irregularities.

The Petitioner filed this application seeking to quash by way of writ of certiorari:

(a) her interdiction by P14
(b) the charge sheets served on her marked P17 and P20
(c) the termination of her services by P24
(d) the decision of the University Services Appeal Board marked P30

I must straightway say that it is too late in the day to canvass her interdiction made prior to the formal inquiry. That could at least have been canvassed in the former writ application, which has later been withdrawn.[1]

The charge sheets and the decision to terminate the services are challenged not on merits but largely, if not solely, on the high technical ground that they did not emanate from the lawful authority.

The Petitioner says that the charge sheet signed by the Vice Chancellor of the University is bad in law as he is not the disciplinary authority of the Petitioner. According to the Petitioner, the disciplinary authority of her is the University

[1] Vide P27 and P27A.

Council (of which the Vice Chancellor is the Chairman[2]). The Respondents do not accept that position on the premise that her appointment as the Senior Assistant Bursar is to the Swami Vipulananda Institute of Aesthetic Studies, which is a Higher Educational Institute established under the Universities Act. In the facts and circumstance of this case, however, there is no necessity for me to rule on that question as it is in my view not decisive to arrive at the final decision in this case. Therefore I assume that the Council of the University is the disciplinary authority of the Petitioner.

Then the Petitioner says that the termination of her services by the University Council (which was done mainly upon the Disciplinary Inquiry Final Report marked 2R2) is bad in law as, according to the Letter of Appointment marked P1, the appointing authority is the University Grants Commission and therefore, in terms of section 14(f) of the Interpretation Ordinance[3], person who has the power to appoint any officer shall have the power to remove him.

However, this argument is not entitled to succeed because section 14(f) of the Interpretation Ordinance is applicable when the legislature has not provided for the ground or mode of dismissal, which is not the case here. In terms of section 45(2)(xii) of the Universities Act, the Council has that power. This has also been acknowledged by the University Grants Commission by 2R7B.

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[2] Vide section 44(2) of the Universities Act, No. 16 of 1978, as amended.
[3] No. 21 of 1901, as amended

Then the question is whether the decision to terminate the services of the Petitioner by the Council can be quashed on the basis that the charge sheet was issued under the hand of the Vice Chancellor without the proof of prior approval by the Council.

Learned Deputy Solicitor General for the Respondents vigorously submits that the application of the Petitioner shall be dismissed *in limine* on the basis that the Petitioner, who was undergoing the probationary period at the time of termination of her services after a long-drawn out formal inquiry conducted in consonance with the rules of natural justice, has no right to challenge the termination on high technical grounds unless the decision is tainted with *mala fides*.

Learned counsel for the Petitioner in his written submissions candidly admits that legal position.[4] Learned counsel for the Petitioner says that "*in public institutions the normal practice is that no disciplinary inquiries are conducted against the employees except in case of permanent employees when there are allegations against them*" and "*the aforesaid approach was followed in the past and our judiciary has accepted and followed said principle until recently*", and cites a number of Judgments which followed the traditional approach.

For completeness, let me cite some of those Judgments.

[4] Vide pages 16-18 of the written submissions of the Petitioner dated 05.03.2019.

In *Ceylon Trading Co. Ltd. v. The United Tea Rubber and Local Produce Workers' Union*[5] it was held that:

> *The employer must remain the sole judge of whether the conduct and work of the workman were satisfactory during the period on probation and if it decided it is not so, it would be inequitable and unfair in the absence of malice to foist the view of the Tribunal on that of the Management of Labour, maintenance of discipline and other allied questions.*

In *Ceylon Cement Corporation v. Fernando*[6] this Court held:

> *The employer is the sole judge to decide whether the services of a probationer are satisfactory or not. A probationer has no right to be confirmed in the post and the employer is not bound to show good cause where he terminates the services of a probationer at the end of the term of probation or even before the expiry of that period. The Tribunal cannot sit in judgment over the decision of the employer. It can examine the grounds for termination only for the purpose of finding out whether the employer had acted mala fide or with ulterior motives or was actuated by motives of victimisation. There is no law which requires that an employee should be forewarned in writing so that he may adjust himself to the requirements of the service. The very word 'probation' implies that he is on trial.*

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[5] [1986] II CALR 62
[6] [1990] 1 Sri LR 361

The same sentiments were echoed in *University of Sri Lanka v. Ginige*[7]:

> *During the period of probation, the employer has the right to terminate the services of the employee if he is not satisfied with the employee's work and conduct. Where the employee is guilty of misrepresentation of facts, use of unbecoming language and misconduct, the termination is justified and bona fide. If the employer has acted mala fide the probationer has a right to relief.*

Thereafter, learned counsel for the Petitioner states as follows:

> *However, the position taken in State Distilleries Corporation v. Rupasinghe [1994] 2 Sri LR 395 is not similar to the said traditional approach that the employer has the sole authority. As stated below Justice Mark Fernando in the said State Distilleries Corporation has taken a different view in respect of the Probationer. An excerpt of the said judgment is stated below:*
>
> > *The acceptance of the principle that a Labour Tribunal has jurisdiction to examine whether a termination is mala fide, necessarily involves the corollary that the employer must disclose (to the tribunal) his reasons for termination; and that means that he should have had some reason for termination.*
> >
> > *An employer who refuses to disclose his reasons for dismissal cannot be in a better position than if he*

[7] [1993] 1 Sri LR 362

> *had no reason, and must also be regarded as having acted mala fide or arbitrarily.*
>
> *What then is the principal difference between confirmed and probationary employment? In the former, the burden lies on the employer to justify termination; and this he must do by reference to objective standards. In the latter, upon proof that termination took place during probation the burden is on the employee to establish unjustifiable termination, and the employee must establish at least a prima facie case of mala fides, before the employer is called upon to adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified.*
>
> *It is also submitted that although there is no requirement of conducting disciplinary inquiries to justify the termination (of a probationer) the present trend is to permit the employees to explain their position in respect of any allegation made against them. This is to satisfy the principles of the Rules of Natural Justice. It is submitted that the Natural Justice contains two Rules as stated below: Audi Alteram Partem (right to fair hearing), Nemo Judex Causa Sua (rule against bias).*

Then it is clear, according to the learned counsel for the Petitioner himself, there is no requirement of conducting disciplinary inquiries to justify the termination of a probationer, and the burden is first on the probationer employee to establish

unjustifiable termination wherein he must establish at least a *prima facie* case of *mala fide*s before the employer is called upon to state his reasons for dismissal.

Has the Petitioner in the instant case established *mala fide*s on the part of the employer in terminating her services during the period of probation? The answer is unmistakably in the negative. In fairness to the learned counsel for the Petitioner, I must say that the learned counsel does not at least in the written submissions state that the termination was actuated by *mala fide* intentions or ulterior motives on the part of the Respondents. Learned counsel's arguments are mainly based on technical grounds regarding the procedure of the formal Disciplinary Inquiry, which he himself now admits in the above quoted written submission, is not an indispensable requirement for dismissal of a probationer such as the Petitioner in this case.

Notwithstanding the Petitioner did not establish at least a *prima facie* case of *mala fide*s on the part of the Respondents, the Respondents have given satisfactory reasons for the dismissal. In this regard, *inter alia*, the Disciplinary Inquiry Report marked 2R2 is of particular importance.

At the formal Disciplinary Inquiry held, as much as nine witnesses have been called, and the last witness at the request of the Petitioner. Throughout the inquiry the Petitioner has willingly participated and even made a statement without taking the risk of giving evidence (which prevented the employer from testing the veracity of that statement by cross examination). This shows lack of *mala fide*s on the part of the employer.

With respect, I cannot fully understand the subsequent argument of the learned counsel for the Petitioner that "*although there is no requirement of conducting disciplinary inquiries to justify the termination (of a probationer) the present trend is to permit the employees to explain their position in respect of any allegation made against them. This is to satisfy the principles of the Rules of Natural Justice*", which the learned counsel says: right to a fair hearing and rule against bias.

Be that as it may, there is no complaint either by the Petitioner herself or by the learned counsel on behalf of the Petitioner that there was no fair hearing or the inquiring authority was bias against her when she was dismissed from the employment.

The high-flown technical objection that there is no documentary evidence that the University Council approved the charge sheet before it was signed by the Chairman of the University Counsel, does not, in my view, violate the *audi alteram partem* rule, which means, listen to both sides before a decision is taken. That also does not violate the rule against bias unless there is evidence to the contrary.

Learned counsel for the Petitioner has relied on two decisions of the Supreme Court in support of his argument. They are *Jinasena v. University of Colombo*[8] and *University of Ruhuna v. Dr. Darshana Wickramasinghe*.[9] Both these cases, in my view, are unhelpful and inapplicable to resolve the issue at hand.

[8] [2005] 3 Sri LR 9
[9] SC Appeal 111/2010 decided on 09.12.2016

Let us remind ourselves that the Petitioner in the instant case was a probationer (in the position of the Senior Assistant Bursar). In the former case the Appellant was a confirmed officer in the University. In the latter, the Appellant was a Lecturer (Probationary) of the Faculty of Medicine of the University of Ruhuna.

Learned counsel stresses that despite the Appellant being a probationary, in University of Ruhuna case, this Court quashed the decision to dismiss the Appellant from service, which was affirmed by the Supreme Court.

Let me pause for a while to emphasize that a Judgment is only an authority for what it actually decides and it cannot be applied universally by only having a superficial look at the conclusion as facts involved substantially differ from case to case.

In *Gunaratne Menike v. Jayatilaka Banda*[10], G. P. S. de Silva, C.J. remarked:

> *The principle laid down in a decision must be read and understood in the light of the nature of the action, and the facts and circumstances the Court was dealing with.*

In *Mary Beatrice v. Seneviratne*[11] Senanayake J. quoted with approval the following relevant observation of Lord Halsbury in the House of Lords case of *Quinn v. Leathem.*[12]

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[10] [1995] 1 Sri LR 152 at 157
[11] [1997] 1 Sri LR 197 at 203
[12] [1901] AC 495 at 506

> *[T]hat every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found they are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.*

Coming back to the matter at hand, in University of Ruhuna case, this Court quashed the dismissal on the sole basis that the charge sheet issued to the Petitioner in that case was not approved by the Council, which was the disciplinary authority, before it was issued by the then Vice Chancellor. Accordingly, this Court held that all proceedings and decisions arrived at on the basis of the said charge sheet were a nullity.[13]

In appeal by the University, this conclusion was affirmed by the Supreme Court[14], and upon further analysis of the facts of the case stated *inter alia* that there was real likelihood of bias in the manner in which disciplinary action was taken by the Council against the Petitioner-Respondent in that case.

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[13] Vide the Judgment in CA/WRIT/624/2007 dated on 05.05.2010 marked P29A.

[14] SC Appeal 111/2010 decided on 09.12.2016—Although there were no annexures with the written submissions of the Petitioner, I read the Judgment.

According to section 45(2)(xii) of the Universities Act, it is the Council of the University which has the authority "*to appoint persons to, and to suspend, dismiss or otherwise punish persons in the employment of, the University*". The proviso to that section states that "*except in the case of officers and teachers, these powers may be delegated to the Vice Chancellor*".

Section 147 of the Universities Act defines "*teacher*" in the following manner.

> *"Teacher" means a Senior Professor, Professor, Associate Professor, Senior Lecturer Grade I, Senior Lecturer Grade II, Lecturer and Lecturer (Probationary) and the holder of any post, declared by Ordinance to be a post, the holder of which, is a teacher.*

That means, not only a Permanent or Confirmed Lecturer, even a Probationary Lecturer falls into to the category of "*teacher*" under the Universities Act. There is no such concession to an "*officer*" of the University.[15]

Then it is clear that in University of Ruhuna case, although the Petitioner was a Lecturer who was undergoing the probationary period, his charge sheet could not have been issued without the approval of the University Council.

Further, in the facts and circumstances of that case, it was clear, as the Supreme Court has held, there was real likelihood of bias in the manner in which disciplinary action was taken by the Council

[15] Vide section 33 of the Universities Act.

against the Petitioner-Respondent in that case. There is no such allegation in the instant case.

In the instant case, there was no malice or personal vendetta between the University or the Vice Chancellor and the Petitioner. The University did not have a plan to get rid of the Petitioner and recruit another. There is not even an allegation of *mala fides* on the part of the University or the Inquiring Officer. This inquiry was initiated or rather triggered by audit queries made by the Auditor General. The Petitioner was given a full hearing to unfold her side of the story. At the end of the inquiry she has *inter alia* been found guilty for violation of Financial Regulations, Procurement Guidelines, University Establishment Code, purchasing items at higher prices than the market value thereby causing loss to the Institution. The financial irregularities found to have been committed during the probationary period by the Petitioner do not justify her being retained in her designated appointment as the Senior Assistant Bursar.

In *State Distilleries Corporation v. Rupasinghe*[16], the Judgment relied upon by the learned counsel for the Petitioner, Justice Mark Fernando admitted the following subject to the condition that the dismissal of the probationer shall not be vitiated by *mala fides*.

> *[T]here are differences between confirmed and probationary employment, and especially in regard to the termination thereof. Probation, as the word implies, is a period during which an employee is "tried" or "tested", and given the opportunity of "proving" himself, in relation to his*

[16] [1994] 2 Sri LR 395 at 400 and 401

employment. As observed by Moonemalle, J., in Moosajees Ltd. v. Rasiah [1986] 1 Sri LR 365, 367, 369:

"The period of probation is a period of trial during which the probationer's capacity, conduct or character is tested before he is admitted to regular employment. For the purpose of confirmation, the [probationer] must perform his services to the satisfaction of his employer. The employer, therefore, is the sole judge to decide whether the services of a probationer are satisfactory or not."

If the employee is found wanting in respect of his work, conduct, temperament, compatibility with the organization and his fellow employees, or any other matter relevant to his employment, the employer is entitled to dismiss him.

In relation to charges, learned counsel for the Petitioner says that the Petitioner has been found guilty for unknown charges. What really has happened is, for clarity, the 4th charge has been divided into six components in the final analysis, and that has not caused prejudice to the Petitioner.

I must reiterate that a probationer, unlike a confirmed employee, cannot cling on high technical grounds to challenge dismissal. The probationer can only challenge the dismissal on the basis of *mala fides* on the part of the employer. *Mala fides* includes "*arbitrariness, ulterior motives, irrelevant considerations and the like.*"[17] There is nothing of that sort in the present case.

Learned counsel for the Petitioner also states that decision of the Council to recover from the Petitioner a sum of Rs. 762,100/= as

[17] State Distilleries Corporation v. Rupasinghe [1994] 2 Sri LR 395 at 402

half amount of the loss caused to the University by purchasing items at higher prices than the market value prevailed at the time of purchase is unjustifiable as there was no specific charge for that amount to be surcharged. This assessment of loss, admittedly, has been done after the conclusion of the formal inquiry and without any notice to or participation by the Petitioner. The Petitioner did not get any opportunity to challenge the accuracy of the figure. The explanation that the loss could not have been included in the charge sheet, but could only have been assessed after the formal inquiry is unacceptable. That could have been ascertained, if they were keen, before the charges were framed. I am of the view that, on that aspect of the matter, the Petitioner has not been afforded a fair hearing, and therefore that part of the punishment cannot be allowed to stand. Hence I quash that part of the punishment to recover a portion of the loss from the Petitioner. That shall have no bearing to the decision to dismiss the Petitioner probationer from service.

Subject to that, the application of the Petitioner is dismissed but without costs.

Judge of the Court of Appeal