

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

In the matter of an application for a Writ of
Certiorari under Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

Sri Lanka Telecom Limited,
Head Office, Lotus Road,
Colombo 1.

PETITIONER

CA (Writ) Application No. 519/2008

Vs.

1. Human Rights Commission of Sri Lanka,
No. 36, Kynsey Road,
Colombo 8.
2. Justice S. Ananda Coomaraswamy,
Former Chairman.
- 2A. Dr. Deepika Udagama,
Chairperson.
3. Justice D. Jayawickrama,
Former Member.
- 3A. Ghazali Hussain,
Member.

4. M.T. Bafiq,
Former Member.
- 4A. Saliya Peiris, P.C.,
Member.
5. N.D. Abeywardena,
Former Member.
- 5A. Ambika Sathkunanadan,
Member.
6. Mahanama Thilakaratne,
Former Member.
- 6A. Dr. Upananda Vidanapathirana,
Member.
7. Nimal G. Punchihewa,
Former Additional Secretary.
- 7A. S. Jayamanna,
The Secretary.

All of the Human Rights Commission of
Sri Lanka,
No. 36, Kynsey Road, Colombo 8.

8. M.M.M. Zaheed,
585/1/A, 2nd Division,
Maradana,
Colombo 10.

RESPONDENTS

Before: Arjuna Obeyesekere, J

Counsel: Sanjeeva Jayawardena, P.C., with Ms. Pubudini Wickramaratne for the Petitioner

Parinda Ranasinghe, P.C., Additional Solicitor General
for the 1st – 7th Respondents

W. Dayaratne, P.C., for the 8th Respondent

Argued on: 5th September 2018

Written Submissions: Tendered on behalf of the Petitioner on 7th August 2018, 11th January 2019 and 30th May 2019

Tendered on behalf of the 8th Respondent on 15th February 2019

Decided on: 4th September 2019

Arjuna Obeyesekere, J

The Petitioner has filed this application, seeking *inter alia* a Writ of Certiorari to quash the recommendation of the 1st – 6th Respondents, annexed to the petition marked 'G' by which the Petitioner was directed to:

- (a) Place the 8th Respondent on salary scale A6 from 22nd June 1999 with all allowances and other payments which are no less than of his colleagues;
- (b) Pay reasonable compensation to the 8th Respondent for the full loss of career.

This application was initially dismissed by this Court¹ on a preliminary objection raised by the Respondents that a recommendation of the Human Rights Commission is not liable to be quashed by a Writ of Certiorari. On appeal, the Supreme Court held that this Court was in error in dismissing this application and held that *"if a recommendation of a Public Body affects the right of an individual, Superior Courts, in the exercise of their writ jurisdiction, have the power to quash such a recommendation by issuing a writ of certiorari."*² Having set aside the judgment of this Court, the Supreme Court directed this Court to re-hear this application on its merits.

The facts of this matter very briefly are as follows.

The 8th Respondent had joined the Department of Telecommunications in 1983 as a Clerk and had been absorbed to the Petitioner company in the same capacity. The Petitioner had been selected as an Assistant Sales Manager in 1998 and had been transferred to the Marketing Division on 26th April 1999. The issue which gives rise to this application arose in August 1999, when the Petitioner received a complaint from a customer, that the 8th Respondent had solicited a bribe from him to provide five telephone lines and IDD facilities to his business establishment under the premium package. The Petitioner states that a preliminary investigation was held in respect of the said complaint, and that the Investigation Officer, by his report annexed to the petition marked 'P1', had arrived at the conclusion that the 8th Respondent was *"not fit to hold the responsible position of Assistant Sales Manager"* and *"allowing him to continue there would not win customers, but will bring disrepute to the*

¹ Judgment dated 30th January 2012.

² SC Appeal No. 215/2012; SC Minutes of 1st March 2017; judgment by Sisira De Abrew, J.

company". The Inquiry Officer, while holding that *"it is difficult to establish bribery ... for bribes had not been given or taken, but the gravity of the offence will not be reduced"* had recommended that the 8th Respondent be transferred out of the Marketing Division.

The Petitioner states that it took into consideration the recommendation in 'P1', and by letter dated 4th November 1999, transferred the 8th Respondent to the Commercial Division with immediate effect, pending formal disciplinary action. The Petitioner states further that it was compelled to take prompt action in order to maintain the reputation of the company. The 8th Respondent had however refused to report to work at the Commercial Division and about a month later had protested against the said transfer. The formal inquiry had commenced on 17th January 2000 and had been re-scheduled for 21st January 2000. The 8th Respondent, having attended the inquiry on the first date, had failed to attend the inquiry on the latter date as well as on the subsequent dates to which the inquiry had been postponed. By letter dated 18th January 2000, annexed to the petition marked 'P2', the 8th Respondent had informed the Petitioner that he has made an application to the Labour Tribunal on the basis that there has been a constructive termination of his employment by the Petitioner and that in view of the said application, he would not be attending the formal inquiry. The Petitioner states that the formal inquiry was abandoned in view of 'P2'.

It is therefore observed that the incident that gave rise to the application to the Labour Tribunal is the transfer of the 8th Respondent to the Commercial Division.

By letter dated 24th April 2000, annexed to the petition marked 'P4', the 1st Respondent, the Human Rights Commission had called for observations of the Petitioner on a complaint filed by the 8th Respondent with the 1st Respondent. This Court has examined the said complaint annexed to the petition marked 'P3', and observes that the grievance of the 8th Respondent was that, *"suddenly, I received a transfer order on 4th November 1999 stating no reason, transferring me to Commercial Section, demoting my position/grade without notice whatsoever, for no reason."*

When the matter came up for inquiry before the 1st Respondent on 19th June 2001, the Counsel for the Petitioner had raised a preliminary objection that the 1st Respondent did not have jurisdiction to hear the application of the 8th Respondent for the reason that the act complained of by the 8th Respondent did not constitute an executive or administrative action. This Court has examined the extensive written submissions filed by the parties³ and must observe that the said written submissions were limited to the question of jurisdiction and that the parties did not address the 1st Respondent on the merits of the complaint of the 8th Respondent.

By a letter dated 3rd April 2006 annexed to the petition marked 'P15', the 1st Respondent had informed the Petitioner as follows:

"The Human Rights Commission rejected the preliminary objections forwarded by the Respondent and inquired into the above matter."

³ The Written Submissions have been annexed to the petition marked 'P9'-'P14'.

According to the report prepared by the retired Judge of the Court of Appeal in relation to the above application, there is a violation of Article 12(1) of the Constitution. Therefore it is recommended:

- i. To grant the salary scale of A6 from 22nd June 1999 and place at appointment with all allowances and other payment which are not less than that of his colleagues V. Niles, Neteumam and P.M.W. Kumara;*
- ii. To pay a reasonable compensation for the full loss of career."*

Dissatisfied by 'P15', the Petitioner had invoked the jurisdiction of this Court by way of CA (Writ) Application No. 1373/2006 seeking to quash 'P15'. Apart from the argument that the 1st Respondent had erred on the aforementioned preliminary objection, the Petitioner had also argued that it was deprived of an opportunity to present its case on the substantive issue of whether the complaint of the 8th Respondent is a violation of the 8th Respondent's fundamental rights. The said application had however been withdrawn by the Petitioner on an undertaking given by the 8th Respondent that he was willing to have a fresh inquiry conducted by the 1st Respondent.

By letter dated 12th March 2007, annexed to the petition marked 'C', the 1st Respondent informed the parties that an inquiry would be held before the 6th Respondent on 20th March 2007, thereby demonstrating the agreement of the 1st Respondent to conduct a fresh inquiry. The parties had thereafter been

requested to file written submissions.⁴ At the inquiry held on 24th April 2007, the Petitioner had raised the following two preliminary objections:

- a) The actions of the Petitioner are not executive or administrative acts as contemplated by Article 17 and 126 of the Constitution and therefore the Human Rights Commission does not have the jurisdiction to hear the complaint of the 8th Respondent;
- b) As the Labour Tribunal has decided on the complaint of the 8th Respondent with regard to his transfer, the 1st Respondent cannot go into the identical question.⁵

The 1st Respondent by its recommendation dated 3rd March 2008, annexed to the petition marked 'G', overruled the said objections and proceeded to grant the 8th Respondent the same relief contained in 'P15'.

It is in the above background that the Petitioner has filed this application seeking a Writ of Certiorari to quash the said Recommendation of the 1st Respondent marked 'G'. During the course of the hearing, the learned President's Counsel for the Petitioner submitted that he is challenging the decision of the 1st Respondent on four grounds. This Court will now consider each of the said grounds.

⁴ Annexed to the petition, marked 'D', 'E' and 'F'.

⁵ It is admitted between the parties that the Labour Tribunal, by its order dated 3rd March 2005, annexed to the petition marked 'P29' had held that the services of the 8th Respondent had not been constructively terminated by the Petitioner and that the 8th Respondent had vacated his post. The application had accordingly been dismissed by the Labour Tribunal.

The first ground urged by the learned President's Counsel for the Petitioner was that Sri Lanka Telecom is not a State entity and therefore, the 1st Respondent does not have the jurisdiction to inquire into the complaint of the 8th Respondent as the acts of the Petitioner do not amount to "executive or administrative actions" as required by the Human Rights Commission of Sri Lanka Act No. 21 of 1996. In order to address this issue, this Court is required to consider whether the acts of the Petitioner which forms the subject matter of this application, can be considered as executive and administrative actions.

The power of the 1st Respondent to look into complaints of alleged Fundamental Rights violations is contained in Section 14 of the Human Rights Act, No. 21 of 1996, and reads as follows:

"The Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, investigate an allegation of the infringement or imminent infringement of a fundamental right of such person or group of persons caused-

(a) by executive or administrative action; or

(b) as a result of an act which constitutes an offence under the Prevention of terrorism Act No. 48 of 1979, committed by any person."

The Petitioner had originally been a Department of the Government of Sri Lanka. Its status had been changed to a Corporation known as 'Sri Lanka Telecom' in terms of an order made under the provisions of the State Industrial

Corporations Act No. 49 of 1957. 'Sri Lanka Telecom' had thereafter been converted into a public company by the name of 'Sri Lanka Telecom Limited' under and in terms of an order made under Section 2 of the Conversion of Public Corporations and Government Owned Business Undertakings into Public Companies Act No. 23 of 1987. In 1997, the Secretary to the Treasury, in whose name the shares of the Petitioner was held, had sold 35% of the shares in the Petitioner to Nippon Telephone and Telegraph Corporation (NTTC). 3.5% of the shares of the Petitioner had been distributed among the employees, leaving the Government with 61.5% of the shares in the Petitioner. This is the position that prevailed at the time the 8th Respondent filed a complaint with the 1st Respondent.

Over the years, the Supreme Court has sought to define and interpret what is meant by 'executive and administrative action'. In Hemasiri Fernando vs. Hon. Mangala Samarweera, Minister of Posts, Telecommunication and Media and others⁶, the Secretary to the Treasury, purporting to act on behalf of the Government of Sri Lanka, removed the Chairman / Director of Sri Lanka Telecom. In considering the issue whether the said action was a violation of the petitioners fundamental rights, the Supreme Court held as follows⁷:

"As observed earlier the Government of Sri Lanka owns 61.5% of the shares of the company and it is the beneficial owner of 35% of the shares held by the NTTC. Behind the veneer of the commercial company is the State. The power of the State is conferred on the 3rd Respondent to be held for the benefit of the public."

⁶(1999) 1 Sri LR 415.

⁷Ibid. at page 420.

In Leo Samson vs. Sri Lankan Airlines Ltd and Others⁸ the Supreme Court adopted the “deep and pervasive control” test to determine whether the acts complained of falls within the ambit of the meaning of executive and administrative action. In Jayakody v Sri Lanka Insurance and Robinson Hotel Co. Ltd and Others⁹, the Supreme Court adopted the “agency test” to hold that the impugned acts in that case fell within the meaning of executive and administrative actions. The “agency test” in this case was when the Government owns the majority of shares in a company, such a company becomes a “state agency” and when the Government hands over the management of such a company to minority shareholders, the acts of that person becomes executive or administrative action.

In Prof Dharmaratne and Others vs. Institute of Fundamental Studies and Others¹⁰, the Supreme Court was called upon to determine whether the Institute of Fundamental Studies, which was a corporate body established by Statute, was an agency or instrumentality of the State. Justice Marsoof, having identified the several tests that have been developed to ascertain whether a corporate body is an agency or instrumentality of the State, stated as follows:

“... our Courts have applied various tests to determine whether a particular person, institution or other body whose action is alleged to be challenged under Article 126 of the Constitution, is an emanation or agency of the State exercising executive or administrative functions. Where the body whose action is sought to be impugned (is) a corporate entity these tests have focused, among other things on the nature of the

⁸(2001) 1 Sri LR 94.

⁹(2001) 1 Sri LR 367.

¹⁰(2013) 1 Sri LR 367.

functions performed by the relevant body, the question whether the state is the beneficiary of its activities, the manner of (its) constitution, whether by statutory incorporation or otherwise, the dependence of the body whose action is sought to be challenged on state funds, the degree of control exercised by the State, the existence in it of sovereign characteristics or features, and whether it is otherwise an instrumentality or agency of the State. However, as will be seen, these tests flow into each other."

In the recent case of **Captain Channa D.L. Abeygunewardena vs. Sri Lanka Ports Authority and Others**¹¹ Justice Prasanna Jayawardena, having analysed the development of the interpretation of "executive and administrative actions" held as follows:

"Drawing from the aforesaid decisions of this Court and Indian decisions, some of the identifying characteristics which show a corporate body to be an agency or instrumentality of the State, may be collated as follows:

- 1. The State, either directly or indirectly, having ownership of the corporate body or a substantial stake in the ownership of the corporate body;*
- 2. The corporate body performing functions of public importance which are closely related to Governmental functions;*

¹¹SCFR 57/2016 SC Minutes of 20th January 2017.

3. *The corporate body having taken over the functions of a Department of the State;*
4. *The State having deep and pervasive control of the corporate body;*
5. *The State having the power to appoint Directors and Officers of the corporate body;*
6. *The State providing a substantial amount of financial assistance to the corporate body;*
7. *The corporate body transferring its profits to the State;*
8. *The State deriving benefits from the operation of the corporate body;*
9. *The State providing benefits, concessions or assistance to the corporate body which are usually granted to organs of the State;*
10. *The Accounts of the corporate body being subject to audit by the Auditor General or having to be submitted to the State or an official of the State;*
11. *The State having conferred a monopoly or near monopoly in its field of business to the corporate body or the State protecting such a monopoly or near monopoly;*

12. *Officers of the corporate body enjoying immunity from suit for acts done in their official capacity.*"

Having laid out the above characteristics, Justice Jayawardena proceeded to state as follows:

"Although I have, for purposes of easy reference, set out the above list of some of the identifying characteristics of a corporate body which is an agency or instrumentality of the State, it is important to keep in mind that, this list is by no means exhaustive. Further, it must be stressed that, the presence of one or more of these identifying characteristics does not, necessarily, lead to the conclusion that a corporate body is an agency or instrumentality of the State. Instead, it is, usually, the cumulative effect of some of these identifying characteristics being found in a corporate body, which leads to the conclusion that it is an agency or instrumentality of the State. As Bhagwati J, as he then was, emphasised in Ramana Dayaram Shetty vs. the International Airport Authority of India¹², "..... it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether a corporation is governmental instrumentality or agency....It is the aggregate or cumulative effect of all the relevant factors that is controlling."

This Court will now consider the position of the Petitioner in the light of the above judgments of the Supreme Court.

¹² AIR 1979 SC 1628.

As observed earlier, at the time the 8th Respondent was transferred, the Government, through the Secretary to the Treasury, held 61.5% of the shares in the Petitioner.

After the sale of 35% of the shares in the Petitioner to NTT, the Government, as the majority shareholder had entered into a Shareholders Agreement (SHA) with NTT, which has been annexed to the petition marked 'P25' Clause 6.1 of the said SHA provides that the Board of Directors of the Petitioner shall consist of up to ten Directors, up to six of whom shall be appointed by the Government. Of the said Government directors, one shall be the Chairman of the Petitioner. In terms of Clause 7.3 of the SHA, the quorum for a meeting of the Board of Directors shall be any four Directors present in person thereat of whom at least two must be Government Directors. Clause 5.3 of the SHA provided that the quorum for a General Meeting shall include the Government.

Schedule 2 of the SHA sets out a list of items referred to as 'Restricted Matters', which include the ability of the Petitioner to raise finance, acquisition and sale of assets having a value in excess of USD 10m etc. Clause 7.2 of the SHA provides that any resolution in relation to the 'Restricted Matters' shall require approval by a majority of the votes cast at such meeting of the Directors with at least one Government Director and at least one Investor Director voting in favour of the resolution.

When this Court considers the above facts, it is clear to this Court that at the relevant time, the Government held the majority of the shares in the Petitioner and through its Directors, controlled the Petitioner. Thus, the Government was

in control of the Petitioner, both at the Directors' level as well as at the members level. In these circumstances, this Court takes the view that the acts of the Petitioner fall within the description of 'executive and administrative' action, and therefore this Court is not in agreement with the first submission raised on behalf of the Petitioner. This Court is therefore of the view that the decision of the 1st Respondent in rejecting the first preliminary objection is correct.

The second ground urged by the learned President's Counsel for the Petitioner was that the 1st Respondent Commission made their recommendation 'G' on the substantial issue of whether the Petitioner violated the fundamental rights of the 8th Respondent, without affording the parties a hearing on the merits, which is mandatory in terms of Section 15(5) of the Human Rights Commission Act, which reads as follows:

"No recommendation shall be made by the Commission under the preceding provisions of this section in respect of the infringement or imminent infringement of a fundamental right except after affording an opportunity of being heard to the person alleged to be about to infringe or to have infringed such fundamental right."

A consideration of this argument requires this Court to briefly re-examine the sequence of events that led to the making of the recommendation 'G'. This Court has examined the initial complaint of the 8th Respondent to the 1st Respondent, annexed to the petition marked 'P3'. Having narrated the relevant facts pertaining to the allegation of bribery made against him, the 8th Respondent states that, *"But suddenly I received a transfer order on 4th*

November 1999 stating no reason, transferring me to S/Commercial Section, demoting my position / grade without notice whatsoever for no reason. I protested against this arbitrary transfer and returned the order to CAO."

The 8th Respondent's complaint to the 1st Respondent was therefore two fold – the first is that he was transferred, and the second was that he had been demoted in the process of being transferred. The task of the 1st Respondent was therefore to inquire into this complaint and consider whether the fundamental rights of the 8th Respondent were infringed by this act of the Petitioner.

Having called for and received the observations of the Petitioner,¹³ the hearing before the Inquiry Officer had commenced on 31st May 2000. The preliminary objection that the 1st Respondent does not have the jurisdiction to inquire into the said complaint as the act complained of does not constitute executive or administrative action was raised on 19th June 2001. The Petitioner states on a direction made by the Inquiry Officer, the parties had tendered written submissions on the jurisdictional objection, which have been annexed to the petition marked 'P9' - 'P14'. As observed earlier, the said written submissions have dealt solely with the jurisdictional objection. The said submissions do not contain a discussion on the merits of the aforementioned complaint of the 8th Respondent.

¹³ The letter sent by the 1st Respondent is annexed to the petition marked 'P4' while the response of the Petitioner has been annexed to the petition marked 'P5'.

Having filed the last written submission 'P14' in December 2001, the Petitioner states it did not hear from the 1st Respondent until it received the letter dated 3rd April 2006 marked 'P15', which reads as follows:

"The Human Rights Commission rejected the preliminary objections forwarded by the Respondent and inquired into the above matter.

According to the report prepared by the retired Judge in relation to the above application, there is a violation of Article 12(1) of the Constitution. (A copy of the report is attached).¹⁴ Therefore it is recommended:

- i. To grant the salary scale of A6 from 22nd June 1999 and place at appointment with all allowances and other payment which are not less than that of his colleagues V. Niles, Neteunam and P.M.W. Kumar;*
- ii. To pay a reasonable compensation for the full loss of career."*

This Court finds annexed to 'P15', the observations of the retired Judge, marked 'P16', which consists of the following parts:

Part I - containing the findings on the preliminary objection; and

Part II - containing the findings of fact, which led to the aforementioned recommendation.

¹⁴ The report has been annexed to the petition, marked 'P16'.

The Petitioner states (a) that the person who eventually made the recommendation in 'P16' was not the Inquiry Officer before whom the parties had appeared; (b) that it was never informed that a retired Judge had been appointed to inquire into the complaint 'P3'; and (c) that it was not afforded an opportunity of making representations before the said retired Judge. More important however is the allegation of the Petitioner that the 1st Respondent did not afford the Petitioner a hearing on the substantive complaint, either orally or by way of written submissions and did not conduct an inquiry into the primary complaint of the 8th Respondent. The Petitioner states that as a result, it was deprived of an opportunity of placing before the 1st Respondent, its case on the merits of the complaint of the 8th Respondent.

It is in these circumstances that the Petitioner filed CA (Writ) Application No. 1373/2006 challenging 'P15' and 'P16'. As referred to earlier in this judgment, the said application had been withdrawn by the Petitioner on 23rd February 2007 upon being informed that the 8th Respondent is agreeable to a fresh inquiry being conducted. The 1st Respondent had accordingly informed the parties by its letter marked 'C' to be present before it for an inquiry on 20th March 2007 before a new Inquiry Officer, thus demonstrating the agreement of the 1st Respondent to conduct a fresh inquiry.

The Petitioner had raised the aforementioned two preliminary objections at the fresh inquiry.¹⁵ This Court has examined the written submissions tendered by the parties annexed to the petition marked 'D', 'E' and 'F' and observes that

¹⁵ The objections being that the acts complained of is not an 'executive or administrative act' and the fact that the issue before the 1st Respondent has already been decided by the Labour Tribunal and therefore cannot be gone into by the 1st Respondent.

the said written submissions have been tendered only in respect of the said preliminary objections, and that a discussion of the merits has not taken place.

The decision of the 1st Respondent has been communicated to the parties by letter dated 3rd March 2008, annexing the recommendation of the 1st Respondent, marked 'G'. This Court has examined 'G' and observes that, having overruled both preliminary objections and having determined that it has jurisdiction to determine the said application, the 1st Respondent had held as follows:

"Since the application is nearly nine years old, and in the recommendation the question of jurisdiction too was adverted to, there is no need now to hold a fresh inquiry. Therefore the previous recommendation has to stand."

The above recommendation gives rise to two issues. The first is, having agreed to conduct a fresh inquiry, and having informed the parties that a fresh inquiry will be conducted, the Inquiry Officer has erred by arriving at a conclusion that a fresh inquiry need not be held. The second issue is, having rejected the preliminary objections, the Inquiry Officer ought to have fixed the matter for a hearing on the merits. Instead of doing that, the Inquiry Officer has erred by adopting the previous recommendation, which had not considered the merits at all, and thereby deprived the Petitioner of presenting its side of the story. In other words, the 1st Respondent has not afforded the Petitioner a hearing on the merits either at the first inquiry or at the second inquiry. The 1st Respondent has therefore acted not only in violation of Section 15(5) of the

Act but contrary to the legitimate expectation of the Petitioner that it would be afforded a hearing on the merits.

This Court is of the view that it is fundamental that an Inquiry Officer follow the principles of natural justice and affords both parties a proper hearing, thereby enabling each party to present their side of the story.

In Gamlathge Ranjith Gamlath vs Commissioner General of Excise and two others,¹⁶ Sripavan J (as he then was) held as follows:

"It is one of the fundamental principles in the administration of justice that an administrative body which is to decide must hear both sides and give both an opportunity of hearing before a decision is taken. No man can incur a loss of property by judicial or quasi-judicial proceedings unless and until he has had a fair opportunity of answering the complaint made against him. Thus, objectors at public inquiries must be given a fair opportunity to meet adverse evidence, even though the statutory provisions do not cover the case expressly. (Vide Errington v. Minister of Health¹⁷). The court would certainly regard any decision as having grave consequences if it affects proprietary rights. In Schmidt and another v. Secretary of State for Home Affairs¹⁸ Lord Denning M. R. suggested that the ambit of natural justice extended not merely to protect rights but any legitimate expectation of which it would not be fair to deprive a person without hearing what he has to say."

¹⁶ CA (Writ) Application No. 1675/2002; CA Minutes of 28th March 2003.

¹⁷ (1935) 1 KB 249.

¹⁸ (1969) 2 Ch. 149 at 170.

This Court is of the view that the 6th Respondent who conducted the inquiry the second time round, should have gone into the evidence and made a factual determination as to whether there was infact a violation of the fundamental rights of the 8th Respondent arising from 'P3'. This Court is further of the view that in the light of the agreement reached in CA (Writ) Application No. 1373/2006 to conduct a fresh inquiry, the 6th Respondent could not have resorted to the earlier recommendation contained in 'P16'. The fact that nine years had lapsed since the complaint should not be held against the Petitioner. It is significant to note that the 1st Respondent had made no reference to, nor made any factual determination as to the liability of the Petitioner with regard to the alleged fundamental rights violation arising as a result of the transfer, even though it has recommended the payment of compensation to the 8th Respondent.

This Court is therefore in agreement with the second ground placed before this Court by the learned President's Counsel for the Petitioner that the 1st Respondent did not afford the Petitioner a hearing on the substantive dispute and is of the view that the recommendation 'G' is liable to be quashed by a Writ of Certiorari.

As the 1st Respondent had adopted the recommendations made in 2006 contained in 'P16', and as 'P16' contained findings of fact which had been arrived at without hearing the parties, this Court is of the view that it is appropriate for this Court to consider the recommendation made by the Inquiry Officer in 2006 in order to ascertain the basis for such finding of fact in 'P16'.

Having filed the initial complaint in 2000, the 8th Respondent, by a letter dated 18th April 2001, annexed to the petition marked 'P7', had reiterated the circumstances that led to his transfer in 1999. It appears from paragraph 11 of 'P7' that while the inquiry was proceeding, a proposal had been made that the 8th Respondent return to employment on the last paid salary and face a disciplinary inquiry. The 8th Respondent had agreed to the said proposal on the condition that he be permitted to resume work in the post of Assistant Manager. However, the Petitioner had not been agreeable to the said condition, as by then, the Marketing Division of the Petitioner had been reorganised and the position of 'Assistant Manager, Sales' had been redesignated as 'Senior Marketing Representative', and the 8th Respondent was of the view that the new designation was a post inferior to what he held and that the restructuring had frustrated his legitimate expectations. The 8th Respondent had stated further that three others who had been selected as Assistant Manager, Sales together with him, had been placed on salary scale 'A6' with effect from 22nd June 1999 and that he too should be placed on the same salary scale.

The complaint that the 1st Respondent had to adjudicate upon was the complaint that was made by the 8th Respondent in March 2000, marked 'P3', that he had been unfairly transferred and in the process of which he had been demoted. The fact that the Marketing division of the Petitioner had undergone re-structuring and the fact that the position held by the 8th Respondent had been abolished, becomes relevant, if at all, only once a determination is made by the 1st Respondent on the complaint 'P3', since 'P3' was the complaint that the Petitioner had been called upon to answer. In this background, this Court examined Part II of 'P26' and finds that the Inquiry Officer has not considered

at all the matters set out in 'P3'. Instead, the Inquiry Officer had focussed his attention to what was set out by the 8th Respondent in 'P7' and made the following observations:

"The complainant states that according to the re-organised structure he would be assigned the new salary group of M3. He further states that although his earlier designation was "Assistant Manager Sales", his new designation would be "Senior Marketing Representative". It is his view that the object of this re-structuring is not for the attainment of permissible corporate objectivity but for the sole purpose of effectively invalidating some of the appointments made in the Marketing group.

He states V. Niles, Nateunam and P.M.W. Kumara had already been assigned a new salary scale of A6 as of 30th September 1999. He states these two officers were selected along with the rest in the list including the complainant consequent on the internal advertisement and therefore he says he belonged to the same case. The complainant states that assigning him to an inferior post i.e "Senior Marketing Representative" in the reorganised structure constitutes and frustrates his legitimate expectation of holding the post of Assistant Manager Sales as per the internal advertisement to which post he was appointed unconditionally. He says the respondent has violated his fundamental right to equality guaranteed in Article 12(1) of the Constitution. According to the complainant, the respondent had indicated to the Commission that some of the persons who had been appointed as "Assistant Sales Manager" were in the process of being assigned to salary group A6 but the eligibility criteria for such assignment were not disclosed.

The complainant states such action on the part of the respondent constitutes an imminent infringement of his fundamental rights. He states the selection of persons to salary group A6 from among holders of the post of Assistant Manager on undisclosed criteria violates his right to equality guaranteed by Article 12(1) of the Constitution.

The complainant feels that he can no longer work under his employer with the confidence that he would be treated fairly and justly.

Having considered the submissions made by both parties I am of the view that the complainant's fundamental rights guaranteed under Article 12(1) have been violated by the respondent. I suggest that the complainant be granted the salary scale of A6 from 22.06.1999 and placed at a point with all allowances and other payments which are not less than that of his colleagues V. Niles, Neteunam and P.M.W. Kumara.

Since he does not wish to work under the respondent anymore I suggest that he be paid compensation for full loss of career which the Commission thinks is appropriate."

The Inquiry Officer has sought to make a determination on the permissibility of the restructuring process of the Petitioner without addressing the complaint of the 8th Respondent that his transfer and what followed thereafter was bad in law. It is therefore clear that the Inquiry Officer who prepared 'P16', and on which the recommendation that is now sought to be quashed is based, has gone on a voyage of his own and considered irrelevant matters while failing to

consider relevant matters contained in 'P3'. In these circumstances, is it safe for this Court to uphold 'G'? This Court thinks not, and takes the view that the decision of the 1st Respondent is liable to be quashed by a Writ of Certiorari in view of the fact that the first Inquiry Officer has taken into consideration, irrelevant material when arriving at the conclusion contained in 'P16' which has been blindly followed by the second Inquiry Officer.

The third ground urged by the learned President's Counsel for the Petitioner is that in any event, the relief recommended by the 1st Respondent is vague and cannot be given effect to. As observed earlier, the Petitioner has been directed to pay a 'reasonable compensation' for the full loss of career. What is 'reasonable' is subjective and any payment made by the Petitioner can give rise to further complaints and litigation. Furthermore, the payment of compensation for the full loss of career is inconsistent with the first recommendation to place the 8th Respondent on the same salary scale as that of his colleagues, which in effect contemplates reinstatement. A recommendation must be specific and must be capable of being given effect to, which unfortunately is not the case in this application. This Court is in agreement with the submission of the learned President's Counsel for the Petitioner that the two recommendations made by the 1st Respondent are incompatible and irreconcilable and that they are in fact mutually exclusive and collectively exhaustive.

Even though this application is liable to be dismissed in view of the above findings of this Court, for the sake of completeness, this Court would now proceed to consider the final argument of the learned President's Counsel for the Petitioner.

As observed earlier, by an order dated 3rd March 2005, annexed to the petition marked 'P29', the Labour Tribunal had held that the services of the 8th Respondent had not been constructively terminated by the Petitioner and that the 8th Respondent had vacated his post. The Order of the Labour Tribunal was pronounced prior to both recommendations of the 1st Respondent, namely, the initial Recommendation 'P15' dated 3rd April 2006, and the subsequent Recommendation 'G' dated 3rd March 2008. This Court observes that there has been no appeal from the Order of the Labour Tribunal, marked 'P29'. The Petitioner states that as no appeal was lodged against 'P29', the Labour Tribunal Order is final and conclusive vis-à-vis the rights of the 8th Respondent arising from the transfer. It is the contention of the learned President's Counsel for the Petitioner that as the judicial process on the grievance of the 8th Respondent has therefore been completed, the 1st Respondent is *estopped* from considering the issue of the transfer of the 8th Respondent.

A consideration of this issue requires this Court to examine the complaint of the 8th Respondent to the Labour Tribunal as well as the 1st Respondent, in order to ascertain if the complaints are identical. In order to understand the nature of the complaint to the Labour Tribunal, this Court examined the Order of the Labour Tribunal marked 'P29'. The following sections of 'P29' reflect, in the view of this Court, the nature of the complaint:

"ඉල්ලුම්කරු කියන්නේ අසාධාරණ ලෙස තමන්ගේ සේවය අනුමිත ලෙස අවසන් කර ඇති බවයි.¹⁹

¹⁹ Page 1 of 'P29'.

ඉල්ලුම්කරු කියන්නේ කිසිදු පරීක්ෂණයකින් තොරව සාධාරණ හේතුවක් රහිතව තමා මාරු කිරීම අසාධාරණ බවයි. මාරු කිරීමේ ලිපිය ඒ 6 වයසෙන් ඉල්ලුම්කර පක්ෂය විසින් ලකුණු කර ඇත. 1999.11.04 දිනැති එම ලිපියේ සඳහන් වන්නේ ඉල්ලුම්කරු වහාම ක්‍රියාත්මක වන පරිදි වානිජ අංශයට ලිපිකරුවෙකු ලෙස මාරු කළ බවයි. ඉන් පසුව ඔහුට ඒ 11 දරණ 1999.11.25 දිනැති චෝදනා පත්‍රයක් ඉදිරිපත් කර තිබේ. ඒ අනුව ඔහුට චෝදනා 2 ක් ඉදිරිපත් කර ඇත.

1. එස්. එම්. එන්. ඊසාන් නමැති පාරිභෝගිකයාගෙන් දුරකථන 5 ක් ලබා දීම සඳහා අල්ලස් ලබා ගැනීමට උත්සාහ කිරීම.

2. ඒ මගින් ශ්‍රී ලංකා ටෙලිකොම් ආයතනය මහජන අප්‍රසාදයට පත් කිරීම.²⁰

1999.11.09 දිනැති ඒ 10 මගින් ඉල්ලුම්කරු තමාට දුන් මාරුව සේවය පහත හෙළිමක් බැවින් එය පිළිගත නොහැකි බව දන්වා ඇත. සේවය පහත හෙළිම නිසා එය භාරගත නොහැකි බව ද දන්වා ඇත. ඒ 7 දරණ ලිපිය මගින්ද ඉල්ලුම්කරු එයට විරුද්ධත්වය පල කර ඇත. කෙසේ වෙතත් ඉල්ලුම්කරුට දුන් මාරුව වෙනස් කර නැති බව වගඋත්තරකරු විසින් ඉල්ලුම්කරුට එවා ඇති 1999.11.18 දිනැති ලිපියෙන් පෙනේ. ඉල්ලුම්කරු සඳහන් කර ඇත්තේ තමන්ට ස්ථාන මාරුව භාරගත නොහැක්කේ අලෙවි සහකාර කළමනාකරු වයසෙන් පත් වී ඇති තමාගේ සේවය පහත හෙළිමක් සිදු කර ඇති නිසා බවය. එබැවින් එම මාරුව අවලංගු කරන ලෙස ඔහු මෙම ලිපි මගින් ඉල්ලා තිබුණි. එහෙත් වගඋත්තරකරු සඳහන් කර ඇත්තේ ඉල්ලුම්කරු විසින් එම ස්ථාන මාරුව පිළිගත යුතු බවත්, එකී ඇති උපදෙස් අනුව ක්‍රියා කළ යුතු බවත්ය.²¹

ඉල්ලුම්කරු එහි ඉල්ලුම්පත්‍රයේ සඳහන්කර ඇත්තේ තමන්ගේ සේවය අනුමිතික ලෙස පහ කර ඇති බවයි. එහෙත් අනුමිතික ලෙස පහ කිරීමක් සිදු වූයේද යන්න පිළිබඳව තීරණය කළ හැක්කේ වගඋත්තරකරු මෙහිදී කටයුතු කළ අන්දම සලකා බැලීමෙනි.

ඉල්ලුම්කරු සඳහන් කරන පරිදි තමන් අලෙවි සහකාර කළමනාකරු ලෙස පත් කල පසු නැවත ලිපිකරුවෙකු ලෙස මාරු කිරීම අසාධාරණය. වගඋත්තරකරු කියන්නේ

²⁰ Page 2 of 3 of 'P29'.

²¹ Page 3 of 'P29'.

ඉල්ලුම්කරුට දී තිබුණේ ලිපිකරු පත්වීමක් බවය. කෙසේ වෙතත් ඔහුගේ මාරු කිරීම සාධාරණ ද නැද්ද යන්න පිළිබඳව තීරණයක් ගැනීමේ අයිතිය ඉල්ලුම්කරුට නැත. ඔහු ඒ සම්බන්ධයෙන් සැනීමකට පත් නොවන්නේ නම් කළ යුතුව තිබුණේ ස්ථාන මාරුව භාර ගෙන ඉන් පසු පැමිණිලි කිරීමය. වගඋත්තරකරු කියන්නේ ස්ථාන මාරුව පිළිනොගැනීම මගින් ඔහු වරදක් කර ඇති බවය. වගඋත්තරකරුගේ නියෝග පිළිගැනීම ඉල්ලුම්කරු බැඳී සිටින බව සැලකිය යුතු වේ. වගඋත්තරකරුගේ තර්කය පරිදි ඔහුට දී ඇති පත්වීම වෙනත් තනතුරක්ද නැද්ද යන්න පිළිබඳ තීරණය කළ හැක්කේ ඒ සම්බන්ධයෙන් පැවැත්වෙන පරීක්ෂණයේදීය. ඒ පිළිබඳ තීරණයක් ගැනීම සඳහා ඉල්ලුම්කරු බලධාරියකු වෙත පැමිණිල්ලක් ඉදිරිපත් කළයුතුවේ. වගඋත්තරකරුගේ නියෝග පිළිගැනීමට ඔහු බැඳී සිටින බව සැලකිය යුතුවේ.²²

අනුමිතික ලෙස සේවය අවසන් කළ බව කිව හැක්කේ වගඋත්තරකරු අසාධාරණ ලෙස ක්‍රියා කර ඇත්නම් පමණකි. ඔහුට චෝදනා පත්‍රයක් නිකුත් කර විභාගයක් පවත්වා තීරණයක් දීමට වගඋත්තරකරු කටයුතු කර තිබුණු බැවින් අනුමිතික ලෙස සේවය අවසන් කිරීමක් කළ බව චෝදනා කළ නොහැක.²³

ඉල්ලුම්කරු කියන පරිදි ඔහුගේ මාරුව අසාධාරණ යැයි තර්ක කිරීමට ඉඩ ඇත. ඉල්ලුම්කරු කියන පරිදි ඔහුට දුන් තනතුර නොතකා පහල ශ්‍රේණියකට ඔහු පත් කිරීම සාධාරණ නොවන බව බැලූ බැල්මට පෙනේ. එහෙත් එය පහළ තනතුරක් නොවන බවට වගඋත්තරකරු තර්ක කරන බවද අමතක කළ නොහැක.²⁴

වගඋත්තරකරු ඔහුට ගෞරවය පරීක්ෂණයට සහභාගිවන ලෙස අර් 12 මගින් 2002.02.21 දිනද දන්වා ඇති බවත්, එහෙත් ඉල්ලුම්කරු එයද නොතකා ඊට සහභාගි නොවීම මගින් හා ස්ථාන මාරු නියෝගය අනුව වාර්ථා නොකිරීම මගින්ද ඔහු නිත්‍යමතව සේවය අතහැර ගොස් ඇති බව ඉදිරිපත් වී ඇති සත්‍ය අනුව තීරණය කරයි.²⁵

ඉහත දැක්වූ සියලු කරුණු අනුව පැහැදිලි වන්නේ ඉල්ලුම්කරුගේ සේවය වගඋත්තරකරු විසින් අනුමිතික ලෙස හෝ අවසන් කර නැති අතර ඉල්ලුම්කරුගේ ක්‍රියාකලාපය අනුව ඔහු සේවය අතහැර ගොස් ඇති බවය. වගඋත්තරකරුගේ නීතිඥ

²² Page 6 of 'P29'.

²³ Page 7 of 'P29'.

²⁴ Page 8 of 'P29'.

²⁵ Page 9 of 'P29'.

මහතා දන්වන පරිදි කම්කරු විනිශ්චය සභාවෙන් සහනයක් ලබාගැනීම සඳහා ප්‍රධාන සුදුසුකම වන්නේ වගඋත්තරකරු විසින් ඉල්ලුම්කරුගේ සේවය අවසන් කිරීමය. මෙහිදී ඉල්ලුම්කරුගේ සේවය කිසිදු අන්දමකින් අවසන් කර නැති බව සියලුම සාක්ෂි අනුව තහවුරු වී ඇත. ඉල්ලුම්කරුගේ ඉල්ලුම්පත්‍රය ඉදිරිපත් කළ පනවාරි 5 දින වන විට ඔහුගේ සේවය අවසන් කර නොතිබුණු බව පනවාරි 17 දින ඉල්ලුම්කරු ගෞතස්ථ පරීක්ෂණයට පෙනී සිටීමෙන් තහවුරු වේ. එබැවින් විනිශ්චය සභාවෙන් සහනයක් ලබා ගැනීමට ඉල්ලුම්කරුට අයිතියක් නැතිබව තීරණය කරමි. ඒ අනුව ඉල්ලුම් පත්‍රය නිශ්ප්‍රභා කරමි.”²⁶

As borne out by the above, the complaint of the 8th Respondent to the Labour Tribunal was one of demotion, transfer and the consequences thereof, which is identical to the complaint of the 8th Respondent to the 1st Respondent, as contained in ‘P3’. It is therefore clear to this Court that the complaint made to the 1st Respondent and the application made to the Labour Tribunal arises from the same issue; that the complaints are identical; and that the relief sought from the Labour Tribunal and the 1st Respondent – i.e. ‘reinstatement’ in the same post held prior to the transfer – is identical.

With regard to the said objection, the 1st Respondent, in its recommendation marked ‘G’ states as follows:

“With regard to the complainant filing the case before the Labour Tribunal and the LT dismissing the same. It can be stated that the same set of facts and the circumstances can give rise to a breach of contract and a breach of fundamental rights. Assertion of one right does not extinguish the other.”

²⁶ Page 10 of ‘P29’.

This Court does not disagree with the above observation of the 1st Respondent. However, the preliminary objection that was raised by the Petitioner was not that the 8th Respondent cannot seek relief from different fora. That is a right available to the 8th Respondent and this Court will not interfere with that right. However, a litigant who chooses to seek the identical relief from different fora arising from the same incident, whether it is framed in the form of a violation of fundamental rights or a violation of the contract of employment, must understand that once one of his preferred forums grants or refuses relief, he cannot pursue his cause in the rest of the fora to which he has complained. That is a risk that a litigant must take.

In any event, the Petitioner's argument was that the 1st Respondent is *estopped* from ruling on the identical issue since the Labour Tribunal has already determined that the transfer and what followed thereafter did not tantamount to constructive termination and that the 8th Respondent had vacated his post. Even though the 1st Respondent misdirected itself and did not determine the issue complained of in 'P3', the issue that arises from the said objection of the Petitioner is that the 1st Respondent ought to have terminated proceedings before it, once it was informed that the Labour Tribunal has determined the said issue.

This Court is of the view that once the Labour Tribunal pronounced its Order, the 8th Respondent is *estopped* from continuing to agitate the same issue before the 1st Respondent, and the 1st Respondent is *estopped* from considering the same issue. "*Issue estoppel*" is a principle of law which prevents re-litigation of disputes before Courts. It applies to facts directly decided by Courts, and those matters which form part of the decision which

were necessary to making the finding of fact or law. When a judgment of a Court is final and conclusive, it decides the issues in dispute before it once and for all, and cannot be disputed by the same parties again. These principles of law exist as a matter of public policy so that disputing parties are prevented from re-agitating the same disputes and to ensure that finality is brought to disputes between the parties.

In New Brunswick Railway Company v British and French Trust Corporation Ltd²⁷ the House of Lords set out the rationale for the above in the following manner:

"The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them."

The learned President's Counsel for the Petitioner has drawn the attention of this Court to the judgment of the Supreme Court in Wijenaike v Air Lanka Limited and Other.²⁸ In that case, the petitioner had been informed by his employer that he had vacated his post. The petitioner had challenged the termination of his services by way of an application to the Labour Tribunal under Section 31B of the Industrial Disputes Act. The petitioner had also filed an application under Article 126(1) of the Constitution. On the question of whether the petitioner could have invoked the fundamental rights jurisdiction

²⁷ 1939 AC 1 at pages 19-20.

²⁸ (1990) 1 Sri LR 293.

and whether the petitioner should have pursued the application before the Labour Tribunal, Kulatunga, J held as follows:

"This is a question which must be decided in each case having regard to the conditions of employment and the intention of the relevant statute. If the remedy sought arises purely from the contract based on the consent of parties Articles 12 (1) and 126 have no application, in which event the dispute must be resolved by an ordinary suit provided by private law, even if the dispute involves an allegation of discrimination.

Even though it may be a government agency, Air Lanka is a company duly incorporated under the Companies Ordinance. Our attention has not been drawn to any provision of that Ordinance or of any other statutory provision which govern the petitioner's contract of employment with Air Lanka; nor have I been able to discover any such provision. I am, therefore, of the view that the petitioner's grievance has to be resolved by a private law remedy such as the application he has already made to the Labour Tribunal. An inquiry by the Labour Tribunal is also beneficial to both parties who are entitled to the rights of an ordinary suit, of calling witnesses and of confrontation and cross-examination of testimony at such inquiry on all the points in dispute. I am also of the view that this would promote the due and orderly administration of justice by Courts and Tribunals established by law. Any other view would encourage the proliferation of applications before the Supreme Court which are not within its jurisdiction merely because the aggrieved parties or Counsel advising them may feel that the remedy under Article 126 is convenient or expeditious." (emphasis added)

Although the complaint of the 8th Respondent to the 1st Respondent was one of transfer, this Court is of the view that the above passage would be applicable in order to demonstrate why the 1st Respondent should not have proceeded once the order of the Labour Tribunal had been delivered.

This Court therefore takes the view that the 1st Respondent could not have proceeded with the inquiry arising from the complaint 'P3' after it was brought to its attention that the Labour Tribunal has determined the identical issue. This Court therefore upholds the final argument of the learned President's Counsel for the Petitioner and takes the view that the recommendation of the 1st Respondent marked 'G' is liable to be quashed by a Writ of Certiorari, on this ground too.

In the above circumstances, this Court proceeds to issue the Writ of Certiorari prayed for in paragraph (b) of the prayer to the petition. This Court does not make any order with regard to costs.

Judge of the Court of Appeal