

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

Seylan Bank PLC.,
No. 90,
Galle Road,
Colombo 3.
Petitioner

CA CASE NO: CA/WRIT/396/2016

Vs.

M.D.C. Amarathunga,
Commissioner General of Labour,
Labour Department,
Colombo 5.
And 3 Others
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Neomal Gunawardena for the Petitioner.
Milinda Gunathilake, Senior D.S.G., for the 1st-
3rd Respondents.

Decided on: 07.11.2019

Mahinda Samayawardhena, J.

The Petitioner Bank filed this application against the Commissioner General of Labour seeking to quash the decisions marked P18 and P19 whereby the Petitioner was directed to pay the 4th Respondent, a former employee of the Bank, an enhanced gratuity of one month's salary (instead of ½ a month's salary) for each year of service as per P7, which is an internal memorandum of the Bank.

Whilst the 4th Respondent was serving as a Senior Manager of the Bank, he was, according to pages 8-10 of P3, caught red-handed by the CID for facilitating a serious fraudulent act of forging Bank Statements *inter alia* by providing Bank Letterheads and Bank Statements for financial benefits in order to facilitate third parties to obtain Visa from the British High Commission. He was arrested and produced before the Magistrate.

The 4th Respondent's services were terminated by the Bank by P4, which reads as follows:

You have been arrested by the Criminal Investigation Department and produced before the Hon. Magistrate of Fort when you were handing over certain documents and details belonging to the Bank to a third party in order to prepare forged documents.

As a Senior Manager of the Bank, your above conduct is a gross violation of the rules and regulations of the Bank. Further, you have aided and abetted a fraud and you have

committed a serious offence by allowing a third party to use Bank documents for the said fraud.

Your said act has brought disrepute to the Bank and in the circumstances your said conduct is unbecoming of an employee of the Bank.

Therefore the Management has decided to terminate your employment with the Bank with immediate effect.

The 4th Respondent did not challenge this decision to terminate his services.

Instead, the 4th Respondent, by P5 addressed to the Chairman of the Bank, whilst admitting guilt for what he did, sought mercy to convert termination of services to resignation from service. In that letter, the 4th Respondent has *inter alia* stated that: “*I concede that it is I, and I alone who is responsible for my unfortunate fate. Looking back, even I cannot comprehend how and why that I acted with such indiscretion.*” This request of the 4th Respondent has been rejected by the Bank.

It is thereafter, the 4th Respondent has sent P6 to the Commissioner of Labour seeking several reliefs including one month’s salary (instead of ½ a month’s salary) for each year of service as gratuity.

The demand of one month’s salary for each year of service as gratuity is based on P7, which says, “*The Board of Directors (of the Bank) has approved in principle increased gratuity payments for staff who have completed 10 years of unblemished service in the Bank.*”

According to P13, the 4th Respondent has later been discharged by the Magistrate's Court from criminal proceedings on the instructions of the Attorney-General.

Let me now have a look at the reasons adduced by the Commissioner of Labour in arriving at the decision contained in P19. They are:

- a) the act of discharge of the 4th Respondent from criminal proceedings;
- b) no other evidence being presented at the inquiry to show bad service record of the 4th respondent;
- c) notwithstanding his services have been terminated on preparation of fraudulent documents using Bank material, the damage caused to the Bank has not been shown to forfeit or reduce gratuity in terms of section 13 of the Payment of Gratuity Act;
- d) other employees who left the service during the relevant period were granted enhanced gratuity.

The Commissioner of Labour has predominantly granted the relief to the 4th Respondent on the basis of the said discharge from the criminal proceedings. By looking at P13 nobody knows on what basis the Magistrate was instructed by the Attorney General to discharge the 4th Respondent.

All the officers who have completed over 10 years of service are not entitled to enhanced gratuity. According to P7, only the officers who have "10 years of unblemished service in the Bank"

are eligible to enhanced gratuity. Discharging the 4th Respondent on the Attorney General's advice does not, in my view, make him an officer having "10 years of unblemished service in the Bank". "Unblemished service" cannot be equalized to "non-conviction for a crime".

The 4th Respondent never contested the contents and the decision contained in P4, which is the Letter of Termination. By P5, he acknowledged receipt of P4 and has indirectly, if not directly, admitted the guilt. Hence there was no necessity to adduce further evidence before the Commissioner of Labour to say that he was disentitled to enhanced gratuity. There was no necessity even to have a domestic inquiry.

Section 13 of the Payment of Gratuity Act refers to gratuity payable under the Act and not payable above that limit at the discretion of the employer.

The fact that other unknown employees who left the service during the relevant period were granted enhanced gratuity is beside the point as the services of other employees were not terminated on charges of fraud as seen from P4.

Although the present matter in issue is not in relation to the dismissal from service, but in relation to the payment of enhanced gratuity, the Judgment of Chief Justice G.P.S. de Silva in *Bank of Ceylon v. Manivasagasivam [1995] 2 Sri LR 79* will throw some light on resolving the matter. Whilst setting aside the Judgment of the High Court, which reversed the order of the Labour Tribunal and directed reinstatement of a Bank officer, His Lordship at page 83 stated thus:

The High Court has failed to address its mind to a significant fact, namely, the kind of institution in which the applicant was employed. As observed by Siva Selliah, J. in Sithamparanathan v. Peoples Bank [1986] 1 Sri LR 411 at 414-415, "It is needless to emphasize that the utmost confidence is expected of any officer employed in a Bank...he owes a duty both to the Bank to preserve its fair name and integrity and to the customer whose money lies in deposit with the Bank. Integrity and confidence thus are indispensable and where an officer has forfeited such confidence has been shown up as being involved in any fraudulent or questionable transaction, both public interest and the interest of the Bank demand that he should be removed from such confidence."

It seems to be that by reason of the part played by the applicant in two transactions which, to say the least, were questionable, he has clearly forfeited the confidence reposed in him as an employee of the Bank. In these circumstances, the Bank should not and cannot continue to employ him.

That means, more than other employees, a Bank employee falls into a special category in terms of integrity and confidence, and where such an employee involves even in a questionable transaction as opposed to a *prima facie* fraudulent transaction, he is not fit to be a Bank employee.

The case at hand is not a case the employer Bank denies payment of gratuity which the 4th Respondent employee is

statutorily entitled to claim. The question relates to the entitlement of the enhanced part of gratuity in accordance with P7 whereby, if I may repeat, the staff officers “who have completed unblemished service in the Bank” are eligible to receive. I must also emphasize that this claim is made by the employee not after retirement or resignation from faithful service, but after dismissal, which was not contested by the employee as he was entitled to do. In the facts and circumstances of this case, the 4th Respondent does not have “unblemished service”.

An employee cannot, in my view, claim, as of right, that he is entitled to enhanced gratuity, or gratuity in excess of the normal gratuity payable under the Payment of Gratuity Act. That does not mean that the employee is at the mercy of the employer when it comes to enhanced gratuity, or the employer can wantonly and arbitrarily deny the fruits of the enhanced gratuity scheme put in place, of which the other employees, similarly circumstanced, are beneficiaries. The employer’s decision or rather discretion, as one might call it, can be challenged before the correct forum. In modern law the concept of absolute discretion is unacceptable. However, in the instant case, the Petitioner employer has not acted arbitrarily or unfairly when it denied enhanced gratuity to the employee.

I unhesitatingly quash the impugned orders of the Commissioner of Labour marked P18 and P19 by certiorari. However I make no order as to costs.

Application allowed.

Judge of the Court of Appeal