

**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,
Mandamus and Prohibition under Article
140 of the Constitution of the Democratic
Socialist Republic of Sri Lanka.*

Ceylon Petroleum Storage Terminals
Limited,
Oil Installation,
Kolonnawa.

CA/WRIT/243/2021

Petitioner

Vs

1. Mr. B.K. Prabath Chandrakeerthi,
Commissioner General of Labour
3rd Floor, Department of Labour,
Narahenpita,
Colombo 05.
2. Lloyd Galhena,
Arbitrator,
C/o Commissioner General of
Labour,
3rd Floor, Department of Labour,
Narahenpita,
Colombo 05.
3. Hon. Nimal Siripala De Silva
Minister of Labour,
65th Floor, "Mehewera Piyasa",
Narahenpita.
4. G.A.E.L.Perera,
No. 52, Gajabapura Housing
Scheme,
Kolonnawa.
Presently at-

No.03/5. Keppetipola Mw,
Kolonnawa.

5. L.S. Hettitantirige,
No. 174, Ramanayakawaththa,
Niwaththidiya,
Bokundara, Piliyandala.
6. W.M.T.W.A.Bandara,
No. 15, Thennewalawwa,
Udabokalawela.
7. Wimal Amarasingha,
No. 34/5,
Dakshinarama road,
Mt. Laviniya.
8. M.W.A.A.D. Wijesuriya,
No. 232 A, Udugampola.
9. H.K.N.I. Jayasekara,
"Jayakotha", Hiribura Road,
Godakanda, Galle.
10. G.M.A. Bandara,
No.67/3, Watamawatha,
Nawinna, Maharagama.
11. L.L.D.W. Jayatileke,
No. 25/1, Monaraheduwila Road,
Weththawa, Matugama.
12. W.S.S.N. de Livera,
No. 554, 02nd Lane,
Kuruduwaththa,
Awariwaththa Road, Waththala.
13. S.A. Weerasiri,
No. 457/16, Nawala Road,
Rajagiriya.

14. K.P. Chandrasoma,
Official Quarters,
Kolonnawa Nimawa,
Kolonnawa.

Presently at-
No.700, Lake Drive,
Subuthipura, Battaramulla.
15. T.A. Raymond,
No. 401/B, Dematagolla,
Minuwangoda.
16. N.D. Peiris,
No. 268/4, I.D.H. Road,
Gothatuwa.
17. C.D.R. Dharmasena,
No. 1/2, Jaliyagoda, Piliyandala.
18. J.G.J.W. Dharmaprema,
No. 207/2,
Colombo Road, Pepiliyana,
Boralesgamuwa.
19. G.A.N.R. Ganepola,
No. 380/89, Bauddaloka Mawatha,
Colombo 07.

Presently at-
No.10/01, Weliweriya West,
Weliweriya.
20. D.C.H. Maramba,
No.212/60, Nelum Place,
Kalapaluwawa.
21. W.A.S.N. Kulatunga,
No. 202/4,
Sirima Bandaranayaka Mawatha,
Mahara.

Presently at-
No.163, Walawwatta,
Kaleliya.

22. J.A.A.D. Roy Perera,
No. 17/A, Samidu Mawatha,
Pamunuwila, Gonawala.
 23. J.A.B.M. Jayakody,
No. 150, Marapola,
Veyangoda.
 24. D.R.F. Dias,
No. 78/14A, Morawaththa Road,
Nagoda, Kadana.
 25. E.M.S.S. Ekanayaka,
No. 508, Malpolyaya,
Galagedara.
- Presently at-
No.55/3, Pushpa Uyana,
Baron Perera Mw,
Gothatuwa, New Town.
26. E.M.G.W.S.B. Thalagune,
No. 07, Walala,
Menikhinna.
 27. G.A.S Gajadeera,
No. 65/E/2, 05th Lane,
Jothipala Mawatha, Malabe.
 28. D.R. Kumasaru,
No.362, Nandasara Mawatha,
Hokandara (North).
 29. I.P. Kumarasinghe,
No.90/3, Nidahas Mawatha,
Thalahena, Malabe.

30. P.S.K. Senanayake,
No.281/A, Akarawita Stage,
Station Road, Homagama.
31. L.W. Gunasekara
No. 80, Uyana Road,
Moratuwa.
- Presently at-
No.341/2, Robert Gunawardena
Mw,
Malabe.
32. R. Marasinghe,
No. 48/19,
Dammika Upasikarama Mawatha,
Koswaththa Road, Nawala.
33. W.S. Hemantha Kumara,
Prajamandala Road,
Uthuru Thalpitiya, Wadduwa.
- Presently at-
Duty Officer's Quarters,
CPTSL. Oil Installation,
Kolonnawa.
34. T.V. Sarathchandra
No. 273/1, Dekatana (South),
Dekatana.
35. K.M.N.A.C. Perera,
No. 16, School Lane,
Waragoda Road, Kelaniya.
36. C.P. Samaraweera,
No. 169/1, Waththegedara Road,
Maharagama.
37. A. Martin,
No. 02, Official Quarters,
CPTSL, Kolonnawa.

Presently at-
No.140, Srinanda Jothikarama
Mw,
Thalawathugoda.

38. J.K.Y. Bandara,
No. 93/65, Vihara Mawatha,
Suduhumpola, Kandy.
39. H.N.B.U. Jayawardena,
No. 38/A, Rathnayaka Mawatha,
Pelawaththa, Battaramulla.
40. M.D.K. Gunatilleke,
No. L.125/24, "Geheta",
Ganemulla, Kendaliyaddapaluwa,
Mahawaththa.
41. R.M.A. Kapurubanda,
No. 49/79, Wiliyam Silva Garden,
Kurunegala Road, Chillaw.
42. H.M.S.K. Wickremarachchi,
No. 1/100, I.D.H. Road,
Gothatuwa.
43. S.R. Gunaratne,
No. 388/5, Araliya Gardens,
Nawala Road, Rajagiriya.
44. P.D.P. Dharmawansa,
No. 37/9, 1st Lane,
Bodhiya Road, Embuldeniya.
45. E.A.R.D. Bandara,
No. 282/4/1, Sethsiri Pedesa,
Sudharshana Mawatha, Malambe.
46. M.G.D.D. Premathilaka,
No. 132/A/1, Fantasy Garden,
Kahanthota Road, Malambe.

Respondents

Before: Priyantha Fernando J. (P/CA).
Sobhitha Rajakaruna J.

Counsel: Sanjeewa Jayawardena PC with Charitha Rupesinghe and Lakmini Warusawithana instructed by Anuradha Jayawardena for the Petitioner

Madhubashini Sri Meththa, SC for the 1st and 3rd Respondents

Suren Fernando with Sanjith Dias, instructed by Vidanapathirana Associates for the 4th, 6th, 7th, 8th, 10th to 30th, 33rd, 34th, 36th to 39th, 41st to 43rd Respondents

Argued on : 17.11.2021 and 24.11.2021

Written submissions: tendered on behalf of the Petitioner: 10.12.2021

tendered on behalf of the 1st and 3rd Respondents: 14.12.2021

tendered on behalf of the 4th, 6th, 7th, 8th, 10th to 30th, 33rd, 34th, 36th to 39th, 41st to 43rd Respondents: 07.12.2021

Decided on : 10.02.2022

Sobhitha Rajakaruna J.

A vacancy in the Petitioner Company for an Accountant of the Grade A-5 was advertised in a newspaper and Mr. M.G.D.D. Premathilaka ('Mr. Premathilaka') was selected from among the applicants and appointed as the Grade A-5 Finance Manager. Though the basic monthly salary for the said position was Rs. 37,660.00, the Petitioner Company took steps to add an additional amount equivalent to 12 increments to Mr. Premathilaka's salary, thus awarding him a monthly salary of Rs. 45,500.00 with effect from 01.07.2007. This addition of 12 increments to Mr. Premathilaka's salary created a discrepancy in the salaries of executive officers of the same grades as well as the higher grades.

Mr. W.A.N.A. Fernando ('Mr. Fernando'), who has been placed at a higher position than Mr. Premathilaka, upon learning of the said increased salary awarded to Mr. Premathilaka challenged the awarding of such 12 increments at once. Mr. Fernando, who belongs to Grade A-4 drawing a monthly salary of Rs.41,010.00, was also consequently awarded an increased monthly salary of Rs.48,390.00 by adding an amount equivalent to 10

increments. This worsened the discrepancy in the salaries of executive officers who were in Grades A-5, A-4, A-3, A-2 and A-1.

Therefore, 43 executive officers of the Petitioner Company sought a salary hike to keep them in line with the additional increments paid to Mr. Premathilaka and Mr. Fernando with effect from 01.07.2007 in view of the discrimination and unfairness caused to them. Instead of taking steps to eliminate the discrimination and unfairness caused, the Petitioner Company continued to pay the increased amounts as special allowances to Mr. Premathilaka and Mr. Fernando from July 2007.

Subsequently those executive officers made a complaint to the Commissioner of Labour as the Petitioner failed to adhere to their request. The Minister of Labour exercising his powers conferred by Section 4(1) of the Industrial Disputes Act, referred this dispute to an Arbitrator on 12.08.2009. The relevant reference to Arbitration is as follows;

"Whether any injustice was caused to the forty three (43) employees of the Ceylon Petroleum Storage Terminals Limited who belong to its executive Grades A5 to A1 and whose names are referred to in the attached schedule, in consequence of the payment of special allowance, in addition to the basic salary as applicable only in respect of two other executive officers in the similar grades and any injustice was caused, what relief should be granted to each of them by the company."

The Arbitrator limited his inquiry only in respect of the 40 officers who submitted their affidavits out of the above 43 employees who complained to the Petitioner Company. The main issue identified by the Arbitrator was to determine whether injustice has been caused to those 40 officers belonging to Grades A-5 to A-1 due to the additional payments made only to Mr. Premathilaka and Mr. Fernando, and if so, what relief should be awarded to each of them by the Petitioner Company.

Three witnesses gave evidence on behalf of the applicant party at the arbitration and the only witness who gave evidence on behalf of the Petitioner Company was its Deputy General Manager (Human Resources Management), Mr. P.D.P. Dharmawansa. Based on the evidence, the Arbitrator accepts that the awarding of a salary with 12 increments to Mr. Premathilaka and a salary with 10 increments to Mr. Fernando created a salary

discrepancy among the 40 officers whose names are mentioned in the letter dated 30.01.2019 annexed to the Award of the Arbitrator.

Finally, the Arbitrator concluded that each of the 40 applicants are to be awarded Rs.6,000.00 each for a period of 3 years and 3 months, amounting to a total of Rs.234,000.00 each. This period of 3 years and 3 months commences from 01.07.2007 and ends on 01.12.2010. The Arbitrator has limited this period until 01.12.2010 due to the fact that the Human Resources Manager of the Company had issued a letter to discontinue the payment of the special allowances with effect from 01.12.2010 to Mr. Premathilaka and Mr. Fernando based on a decision of the Board of Directors of the Petitioner Company.

The Petitioner claiming that the award dated 30.01.2019 ('Award') and the Gazette Extraordinary No.2133/44 dated 25.07.2019 by which the said Award was published, marked 'P3' and 'P4' respectively, are inter alia ex facie illegal, irrational, unlawful, arbitrary and accordingly, seek inter alia for a mandate in the nature of Writ of Certiorari quashing the said Award. The Respondents raised several preliminary objections and submitted that this Court cannot grant the reliefs sought by the Petitioner.

The contention of the learned Counsel for the 4th, 6th – 8th, 10th – 30th, 33rd, 34th, 36th – 39th & 41st - 43rd Respondents ('Respondents') is that the Award has been communicated to the Petitioner along with the covering letter dated 08.08.2019 by the Commissioner of Labour and however, the Petitioner has filed its application only on 27.04.2021 and that is 20 months after acknowledging the said notice of the Award. The Respondents have cited several judgements and have submitted that an application for a Writ of Certiorari should be filed within a reasonable time from the date of the order, which the applicant seeks to have quashed.

The Respondents have cited the case of *Jayaweera vs. Assistant Commissioner of Agrarian Services Ratnapura and Another (1996) 2 SLR 70*, in which F.N.D. Jayasuriya J. held;

"A Petitioner who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has a discretion to deny him having regard to his conduct,

delay, laches, waiver, submission to jurisdiction- are all valid impediments which stand against the grant of relief"

I have drawn my attention to the following paragraph in the case of ***Biso Menika vs. Cyril de Alwis and Others (1982) 1 SLR 368 (p. 379,380)*** a Judgement which was among those referred to by the learned Counsel for the Respondents. Sharvananda J. has observed in that case as follows;

"...When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection..."

*...Unlike in English Law or in our Law there is no statutory time limit within which a petition for the issue of a Writ must be filed. But a rule of practice, has grown which insists upon such petition being made without undue delay. When no time limit is specified for seeking such remedy, the Court has ample power to condone delays, where denial of Writ to the petitioner is likely to cause great injustice. **The Court may therefore in its discretion entertain the application in spite of the fact that a petitioner comes to Court late, especially where the Order challenged is a nullity for absolute want of jurisdiction in the authority making the order...**" (Emphasis added)*

The other preliminary objection raised by the Respondents is based on 'suppression' and 'fraudulent misrepresentation of material facts'. The Respondents referring to the letter marked 'P7' assert that the Petitioner has sought time to consider taking action upon the impugned order and accordingly, the Petitioner had absolutely not made any inclination to challenge the Award. The Respondents further submit that the nature of the letter marked 'P7' amounts to a gross misrepresentation and it demonstrates the fraudulent conduct of the Petitioner.

However, on perusal of the said letter 'P7', I observe that the said letter has been signed by the Legal Officer on behalf of the Chief Legal Officer of the Petitioner Company, who has only authority in this regard, in my view, to make recommendations to the Board of Directors based on the legal consequences in taking such decisions. The said Legal Officer

has categorically indicated by 'P7' that a Board Paper has to be submitted in respect of the said Award.

Further, the following contents of paragraph 42 (iii) of the Petition has been drawn to the attention of this Court by the learned Counsel for the Respondents;

"...the composition of the Board of Directors of the Petitioner company finally crystallized only after the conclusion of the General Elections held in August 2020, and there was confirmation in respect of the continuation of the Board of the Petitioner, and furthermore, the regular functioning of the New Board commenced only thereafter;"

The said learned Counsel making forceful submissions contended that the explanations as given above by the Petitioner are a fraudulent attempt to mislead Court and the Petitioner being a limited liability company duly incorporated under the Companies Act has a separate and continuing corporate personality. Accordingly, he argued that the Petitioner cannot allege that its Board of Directors cease to function with approach of Elections and the Petitioner's excuses in this regard are nothing short of laughable and amount to a blatant attempt to mislead court and make a mockery of these proceedings. The Respondents rely upon the judgement in ***Namunukula Plantations Limited vs. Minister of Lands (2019) 1 SLR 365 (p. 378)*** where Marsoof PC, J. held as follows:

"If any party invoking the discretionary jurisdiction of a Court of Law is found wanting in discharge of its duty to disclose all material facts, or is shown to have attempted to pollute the pure stream of justice, the Court not only has the right but a duty to deny relief to such person"

In opposition to the preliminary objections raised by the Respondents, the learned Counsel for the Petitioner argued that the Arbitrator has erred by failing to take cognisance of the fact that the disputed higher salary steps were discontinued with effect from 01.12.2010 as a consequence to the complaints made by the applicants. This decision has been taken by a subsequent Board of Directors of the Petitioner Company and as a consequence Mr. Premathilaka and Mr. Fernando were given a reduced salary which was on par with their peers in Grade A-5 and A-4. The Petitioner argued that the Arbitrator could not grant the 4th to 43rd Respondents, the said special allowance that was paid erroneously to Mr. Premathilaka and Mr. Fernando.

It is observed that the impugned discrepancy has been subsequently accepted as causing issues and the said allowance was discontinued in an alleged bona fide endeavour by a subsequent Board of the Petitioner Company. By letter dated 17.12.2010 (marked 'H' at the arbitration proceedings) the Human Resources Manager of the Petitioner Company has informed the Finance Manager that the Board of Directors at the board meeting held on 28.10.2010 had decided to withdraw the payment of special allowance of Rs.7,840.00 (per month) paid to Mr. Premathilaka and the payment of special allowance of Rs.7,380.00 (per month) paid to Mr. Fernando. It should be noted that the said Board decision to discontinue the payment of special allowance was taken subsequent to the reference to arbitration and whilst the arbitration proceedings were pending. The Arbitrator in paragraph 21 of his Award has taken cognisance of discontinuing the payment of the said special allowance and however, has decided that the salary anomaly created continued to be existed and such dispute has not come to an end.

In view of the foregoing, a reasonable question arises as to whether there is a serious question on illegality or irrationality to be decided in respect of the Arbitrator's Award which outweighs the strength of the preliminary objections on laches and on misrepresentation.

The following passage in *Kalamazoo Industries Ltd vs. Minister of Labour and Vocational Training and Others (1998) 1 SLR 235* is apt here. F.N.D. Jayasuriya J. in that case has held;

*"Relief by way of certiorari in relation to an award made by an arbitrator will be forthcoming to quash such an award **only if the arbitrator wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces an award which is eminently irrational or unreasonable or is guilty of an illegality.**" (Emphasis added)*

Now, I advert to examine as to whether the Arbitrator has pronounced an Award which is irrational or unreasonable or is guilty of illegality.

'In an important ex cathedra statement of the grounds for judicial review Lord Diplock preferred the term 'irrationality', explaining it as 'what can by now be succinctly referred

to as *Wednesbury* unreasonableness¹.’ But it is questionable whether ‘irrationality’ is a better word². Virtually all administrative decisions are rational in the sense that they are made for intelligible reasons, but the question then is whether they measure up to the legal standard of reasonableness. ‘Irrational’ most naturally means ‘devoid of reasons’ whereas ‘unreasonable’ means ‘devoid of satisfactory reasons’³ (*Vide - H.W.R. Wade & C.F. Forsyth, Administrative Law, 11th edition, chapter 11, p.295*)

It is an undisputed fact during the proceedings before the Arbitrator that the payments made to Mr. Premathilaka and Mr. Fernando has created an anomaly in respect of the salaries of the relevant executive officers of the Petitioner Company. Accordingly, I have no option other than referring to such payment of special allowance as an erroneous act done by the authorities of the Petitioner Company, by which Mr. Premathilaka & Mr. Fernando have become unjustly enriched.

The learned Counsel for the Petitioner making extensive submissions contended that the Arbitrator has effectively attempted to cure an irregularity by causing another and accordingly, two wrongs cannot make a right in law and further, the Arbitrator has strayed beyond his mandate. It is extremely important to highlight here the averments in paragraph 4 of the Petition of the Petitioner and the submissions made by the learned Counsel for the Petitioner based on those averments. The Petitioner pleads that the Award, inter alia, offends the principles of proportionality, reasonableness, fairness and rationality in as much as;

- i. ‘the Arbitrator has erroneously embarked on a voyage of discovery, by straying well beyond the scope of the reference to Arbitration, and furthermore, has been demonstrably guided by irrelevant considerations;’
- ii. ‘the Arbitrator has erred in holding that there was discrepancy in salaries in Grades A-3 to A-1, which could not have been the case, and indeed, could not have arisen, in as much as the allowance in issue, did not take the salaries of the said two employees (who were in the lower Grade A-5 and A-4) over and

¹ Council of Civil Service Unions vs. Minister for the Civil Service (1985) AC 374 at 410

² For Lord Donaldson MR’s dislike of it see R vs Devon CC ex p G (1989) AC 573 at 577

³ R vs. Secretary of State for the Environment ex p Nottinghamshire CC (1986) AC 240 at 249, R vs. Home Secretary ex p Brind (1991) 1 AC 696, Minister of Immigration and Citizenship vs. Li (2013) HCA 18, (2013) 87 ALJR 618 at para. 30 (recognizing distinction between rational and reasonable)

- above the salaries of those employees in the said superior grades, and there was in any event, no evidence adduced by the Applicants to demonstrate the same;'
- iii. 'the Arbitrator erred in fact and in law in purporting to determine that even with the cancellations of the special allowance, with effect from 01.12.2010 (by the letter dated 17.12.2010), the salary discrepancy in the executive Grades of the Petitioner company did not cease and still continued, whereas, the said finding/ determination cannot withstand objective scrutiny and indeed cannot be reconciled by any parity of reasoning, the same is patently erroneous, and is accordingly, vitiated in law;'
 - iv. 'the Arbitrator erroneously purported to determine *inter alia*, that in making the impugned award, he has taken into consideration the financial impact on the Petitioner company, and that the impugned award is fair by the Petitioner company, whereas, the impugned Award indicates to the contrary, and cannot be reconciled, in as much as the total Award amounts to as much as Rs.9,360,000.00;'
 - v. 'the Arbitrator erred by failing to appreciate that the sums awarded by him are not commensurate with the relevant starting salaries of the 4th to 43rd Respondents, and in any event, subsequent to the reference to Arbitration, the same was discontinued, and thereby, the purported grievance/ cause of action ceased to exist, and now, by the impugned Award, the Petitioner company is effectively being compelled to retrospectively grant a discontinued special allowance to the 4th to 43rd Respondents;'
 - vi. 'the Arbitrator erred by failing to take cognizance of the fact that, in any event, no seniority of any employee was violated, and nor was there any continuation of the payment in issue, warranting the impugned Arbitration Award;'
 - vii. 'the Arbitrator erred by failing to take cognizance of the fact that in as much as the purported discrepancy was subsequently accepted as causing issues, and the allowance was discontinued in a bona fide endeavour by the subsequent Board of the Petitioner Company, the Applicants thereafter, had no remaining purported cause of action, nor grievance in terms of the law, nor most significantly, any legitimate expectation, and the only matter outstanding if at all, was the recovery of the additional payment from the said employees, which in any event, the Arbitrator conceded, was beyond the scope of his mandate;'

- viii. 'the Arbitrator erred by failing to take cognizance of the fact that the two employees concerned, who received the special allowance, was in the Finance Function/division, and they bore wholly different and unique qualifications, and were in positions with a completely distinct and separate class and character from the rest of the Applicants who were serving in other functions/divisions, which will be dully elucidated;'
- ix. 'in as much as the said dispute was in respect of two employees in Grades A-5 and A-4 receiving a special allowance, the other employees in superior grades, ranging from Grade A-3 to A-1, could not have been affected under any circumstances whatsoever, by any parity of reasoning, and indeed they were not affected at all, in as much as they were of completely different grade, drawing a higher salary, and having unique and distinguished qualifications, and being in a completely different class of persons i.e. they fall within a class that has an intelligible differentia;'
- x. 'the Arbitrator erred by failing to take cognizance of the fact that merely because the gap between the salaries of employees in two different Grade was reduced (during the period in issue), the same does not warrant the awarding of a higher salary to those in said higher Grades i.e. A-3 to A-1. The impugned Award and its logic or more correctly, its lack of logic, is patently flawed by any parity of reasoning, and is vitiated in law.'

(Vide - paragraph 4, pages 7-11 of the Petition of the Petitioner)

The learned Counsel for the Respondents rejecting the above arguments of the Petitioner contended that the relevant point in time to determine when the arbitration commenced is the date of reference to arbitration and what should be considered is whether in civil law terms, there was a cause of action as at that date. Therefore, he supports the finding of the Arbitrator, elaborated in paragraph 21 of the Award by which emphasis has been made that the salary anomaly existed or continued even after the stoppage of the payment of the special allowance to Mr. Premathilaka and Mr. Fernando.

It is now necessary to ascertain the powers of an Industrial Arbitrator. The duties and powers of the Arbitrator are prescribed in Section 17 of the Industrial Disputes Act. The said Section 17(1) stipulates the following;

“...he shall make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him ***just and equitable***. A labour tribunal shall give priority to the proceedings for the settlement of any industrial dispute that is referred to it for settlement by arbitration.” (Emphasis added)

It is apparent that in terms of the said section, the Arbitrator exercises the ‘just and equitable’ jurisdiction. Therefore, the Arbitrator is empowered to hear and resolve industrial disputes based on the law of equity.

“The main dispute resolution mechanism set out under the Act, apart from conciliation and entering into collective agreements which relate to mutual agreement, are Labour Tribunals and Arbitrations. Both these mechanisms enable an Arbitrator or Labour Tribunal to grant just and equitable relief to a workman. At present many employers have raised the issue that this concept of “equity” has been stretched to the maximum and sometimes even amounts to ‘sympathy’.⁴

Where an Industrial Arbitrator appears to have misunderstood the meaning of “just and equitable” in s. 17(1) of the Industrial Disputes Act and has proceeded to make an award which is tainted by a misapprehension of his own function, there is error of law and the award will be quashed by *certiorari*.⁵ (***See - Sunil F.A. Cooray, Principles of Administrative Law in Sri Lanka, 4th edition, Vol. II, chapter 16, p.963***)

Therefore, I am of the view that an Industrial Arbitrator is not empowered to exercise ‘just and equitable’ jurisdiction or to expand the ambit of the law of equity without a proper legal basis. Doing justice is not discretionary but it is mandatory. In analysing the conclusion arrived at by the Arbitrator in his Award, it emanates that the Arbitrator has unduly used the umbrella of just and equitable jurisdiction. I take that view as the Arbitrator has enabled a larger group of employees to be benefited by a drawback of paying an erroneous allowance only to two employees. To my mind the just and equitable jurisdiction should not be used as a conduit to pacify a set of protestors who claim for an

⁴Also see - my article on ‘Taking Labour Laws of Sri Lanka to a New Realm: Achieving Flexibility with Equity’ published in Attorney General’s Law Journal (2015) Vol. I (Sri Lanka) p. 313.

⁵Stratheden Tea Co. Ltd. vs. Selvadurai (1963) 66 NLR 6, Colombo Commercial Company Ltd. vs. Shanmugalingum (1964) 66 NLR 26, Municipal Council of Colombo vs. Munasinghe (1968) 71 NLR 223

advantage upon an unjust enrichment created as a result of the mismanagement by the authorities.

Whilst it was an admitted fact among all parties that the special allowance paid to two employees created an anomaly and also in the backdrop that the Petitioner at any stage during the arbitration proceedings had not attempted to justify such anomaly, it is pertinent to find the legal basis upon which the Arbitrator has given life to a suspended payment that was made erroneously? I see no valid reason for making an award in favour of the Respondents based on an unjust enrichment of two employees of the Petitioner Company. Hence, it is nothing other than a blatant error made by the Arbitrator by not taking relevant material in to consideration or taking in to consideration irrelevant material. In the circumstances, there are sufficient grounds for me to accept the aforesaid arguments advanced by the Petitioner which established that the Arbitrator has erred by not giving due effect to the fact of withdrawing the special allowance during the pendency of the arbitration. Further, I take the view that the Arbitrator has granted relief to employees in the superior grades ranging from Grade A-3 to A-1 without taking in to consideration any viable evidence when actual dispute was in respect of two employees in Grades A-5 and A-4 receiving a special allowance.

In the circumstances I hold that the Arbitrator has exceeded his jurisdiction paving way for this Court to issue a writ against the Award in spite of the preliminary objections raised by the Respondents. Moreover, I hold that the Arbitrator has not made a lawful Award that can be duly enforced and that the said Award is eminently irrational and unreasonable. Therefore, I proceed to issue a mandate in the nature of a writ of Certiorari as prayed for in the paragraph (b) of the prayer of the Petition of the Petitioner.

Although, I have taken the view to issue a writ of Certiorari as mentioned above, I cannot possibly overlook the possible hardship faced by the above Respondents during the long period of time engaged in litigation. The Minister referred the relevant dispute to the Arbitrator on 12.08.2009 and in furtherance to an inquiry the Award has been delivered only on 30.01.2019. The relevant gazette notification was published on 25.07.2019. Hence it is obvious that the arbitration proceedings have taken almost 10 years which cannot be considered as a due process in tendering justice in an industrial dispute. Eventually those Respondents have been dragged in to this Arbitration and also in to the instant judicial

review process in an unceremonious or fruitless manner due to a wrong decision made by the Petitioner Company creating a salary anomaly.

It is observed that the Petitioner has not taken a single step to recover the special allowance paid to the respective two employees. I consider such action by the Petitioner, being a Government owned business undertaking converted to a public company, is a, prima facie, violation of the public trust doctrine in reference to the financial management of the said Company. No action has been taken against the officers who are responsible for creating a salary anomaly and, as a consequence, the unrest and the dissonance among the Respondents. The said salary anomaly was created almost 14 years ago and the Petitioner has failed to resolve the impugned issues for a period over 14 years. As a result, it can be assumed that a reasonable expectation has been created within the Respondents due to the gross ignorance and/or perversity of the Petitioner Company who crafted a salary anomaly.

Enid Campbell, Sir Isaac Isaacs Professor of Law, Monash University, who has done an extensive survey on awarding of costs in Judicial Review applications has stated in her article *“Award of Costs on Application for Judicial Review”* published in Sydney Law Review [1983] SydLawRw 3; (1983) 10(1) page 20 that;

“Costs maybe awarded in applications for supervisory Judicial Review whether they be applications for prerogative writs or like orders or for injunctions or declarations. In civil litigation the judicial discretion to award costs as between party and party⁶ is normally exercised in favour of the successful party. The discretion should not, it has been said, be exercised against the victor “except for some reason connected with the case.”⁷”

Although, the general rule in relation to the award of costs in Judicial Review is that the successful party would be awarded costs, the Courts exercising the discretion has taken in to account the ‘conduct of parties’ to award costs even against the successful party. In *Taylor vs. Honiton Town Council & Another (2017) EWHC 101* (England and Wales

⁶ The discretion is conferred by Judiciary Act 1903 (Cth.). ss 26 and 27 (High Court); Federal Court of Australia Act 1976 (Cth.). s. 43; Supreme Court Act. 1970 (N.S.W.). s. 76; Supreme Court Act, 1867 (Qld.), s. 58; Supreme Court Act, 1935-1975 (S.A.). s. 40; Supreme Court Civil Procedure Act, 1932 (Tas.), ss. 12 and 13; Supreme Court Act. 1958 (Vic.). s 32 (I); Supreme Court Act, 1975-1979 (W.A.). s. 37.

⁷ Donald Campbell & Co. Ltd. vs. Pollak (1927) A.C. 732 at 812

High Court-Administrative Court), the Court has quashed the Town Council's decision to impose sanctions on the Claimant. So, the Claimant was the successful party in that application. The Court departing from the general rule on costs, the conduct of the parties in dealing with the dispute once it had arisen has been taken in to consideration and been evaluated for the interest of justice. Finally, the Court in that case has made an order that the said Council should pay the Claimant's costs up to and including the 19th March 2016 and further, that the Claimant is liable for the costs that the Council incurred on and after 20th March 2016.

On an overall conceptus of the circumstances of this case and also based on the submission made by all learned Counsel, I hold that this is a fit and proper case to consider the conduct of the Petitioner and to award costs for the Respondents payable by the Petitioner Company. Hence, I order the Petitioner Company to pay each Respondent namely the 4th, 6th – 8th, 10th – 30th, 33rd, 34th, 36th – 39th & 41st- 43rd Respondents in a sum of Rs. 125,000.00 each. I do not consider awarding costs against the other applicants who were before the Arbitrator due to the reason that some of the applicants have abandoned the protest against the impugned decisions of the Petitioner. Further, I have noticed some of the Respondents (5th, 9th, 31st, 32nd, 35th, 40th) were not responsive to the notice issued by this Court. I have come to the above conclusion on the quantum of the costs by reason of the special circumstances of this case, already enumerated by me, and also by exercising my discretion for the interest of justice.

Judge of the Court of Appeal

Priyantha Fernando J. (P/CA).

I agree.

President of the Court of Appeal