

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

In the matter of an Appeal under and in terms of Section 37 of the University of Vocational Technology Act No.31 of 2008, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

B.M.T.D. Jayasekera,

No.1067/49A, Pothuarawa Road, Malabe.

APPELLANT

CA. Appeal No. CA/MISC/05/2019

University Appeals Board No.

UNIVOTEC/UAM 01/2018/02

Vs.

1. The University of Vocational Technology,
No.100, Kandawala, Ratmalana.

2. Prof. G.L.D. Wickramasinghe,
Vice-Chancellor,
The University of Vocational Technology,
No.100, Kandawala, Ratmalana.

3. Dr D.D.D. Suraweera,
Dean Faculty of Industrial and Vocational Technology,
The University of Vocational Technology,
No.100, Kandawala, Ratmalana.

4. Mr L.W.S. Kularatne, Dean, Faculty of Training Technology, University of Vocational Technology, No.100, Kandawala, Ratmalana.
5. Ms T.K. Malwatta, University of Vocational Technology, No.100, Kandawala, Ratmalana.
6. Mr. S.P.A.R.S. Jayanthilaka, University of Vocational Technology, No.100, Kandawala, Ratmalana.
7. Mr P. Ranepura, Secretary, Ministry of Skills Development and Vocational Training, “Nipunatha Piyasa”, No.354/2, Narahenpita.
8. Mr C. Jayasooriya,
Additional Director General,
Department of Trade and investment policy of the
Ministry of Finance and Mass Media, the Secretariat,
Colombo 01.
9. Mr D.C. Dissanayake,
Secretary,
Ministry of Higher Education and Highways,
No. 18, Ward Place, Colombo 07.
10. Ms P.N.K. Malalasekera, Director General,
Department of Technical Education and Training,
Olcott Mawatha, Colombo 10.
11. Eng. Lionel Pinto,
Chairman,

Vocational Training Authority of Sri Lanka,
No.354/2, “Nipuna Piyasa”, Narahenpita.

12. Mr Shehan Seneviratne, Chairman,
National and Industrial Training Authority.
13. Representative of Board of Investment of Sri Lanka
14. Eng. W.A.U. Gunawardena,
Institution of Engineers, Sri Lanka.
15. Eng. Javilal Meegoda,
Institute of Engineers Sri Lanka,
Wijerama Mawatha, Colombo 07.
16. Mr Chandrarajme Vithanage,
Senior Assistant Secretary-General,
Ceylon Chamber of Commerce.
17. Mr Rahula Senanayake,
No.186/2C, Lumbini Lane, Wewalduwa, Kelaniya
18. Mr. S. Kulasinghe, Epitahawatta, Hiyare, Galle.
19. Ms Rifha Musthafa,
No.23/2, Tower “A”, Royal Park Condominium,
Rajagiriya.
20. Mr L.R.V. Vidyarthne,
No.76, Dharmapala Mawatha, Colombo 07.

RESPONDENTS

AND NOW BETWEEN

1. University of Vocational Technology of No.100,
Kandawala, Ratmalana.
2. Prof. G.L.D. Wickramasinghe, Vice-Chancellor,
University of Vocational Technology,
No.100, Kandawala, Ratmalana.
3. Dr D.D.D. Suraweera,
Dean Faculty of Industrial and Vocational Technology,
University of Vocational Technology,
No.100, Kandawala, Ratmalana.
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Dean, Faculty of Training Technology,
University of Vocational Technology, No.100,
Kandawala, Ratmalana.
5. Ms T.K. Malwatta,
The University of Vocational Technology,
No.100, Kandawala, Ratmalana.
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The University of Vocational Technology,
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20. Mr L.R.V. Vidyarthne,
No.76, Dharmapala Mawatha, Colombo 07.

RESPONDENT-APPELLANTS

Vs.

B.M.T.D. Jayasekera,
No.1067/49A, Pothuarawa Road, Malabe.

APPELLANT-RESPONDENT

Before:

**HON. PRESANTHA DE SILVA J. &
HON. K.K.A.V. SWARNADHIPATHI, J.**

Counsel:

Shaheeda Borrie (D.S.G) with Amasara Gajadeera (S.C)
For the Respondent-Appellants

Saliya Edirisinghe
For the Appellant-Respondent.

Argued on: 22.11.2021

Decided on: 03.03.2022

K.K.A.V. SWARNADHIPATHI, J.

JUDGMENT

This Appeal is against the decision of the University Appeals Board [U.A.B.] dated 28.06.2019. The Appellant-Respondent had appealed to the University Appeals Board that she was holding a position as an Assistant Lecturer (Probation) at the National Institute of Technical Education of Sri Lanka established under Act No.59 of 1998 prior to the repeal of the said Act by the University of Vocational Technology Act No.31 of 2008.

At the transition, she informed the 1st Appellant University that she would accept employment in the new University if employment were offered. The interim committee appointed under the Act No.31 of 2008 had offered to employ her as a “Teaching Assistant in Management studies” in the first Appellant University she had accepted. At the time of her being absorbed by the 1st Appellant, she had qualifications to be appointed as “Lecturer”. Therefore, the decision to appoint her as a teaching Assistant in Management studies was *ultra vires*.

She had further claimed that she was entitled to be appointed to the post of Lecturer with effect from 12.10.2009 and senior Lecturer Grade II with effect from 01.06.2012. After entertaining the Appellant and the Respondent, the Interim Committee delivered a split decision. Two members held that the appeal should be allowed with back wages allowances and other promotional prospects. One member, the Chairman of the Interim Committee, delivered a separate decision refusing to grant the reliefs claimed by the Appellant. This decision was made on 28.06.2019. The Respondent-Appellant pleads that the majority decision on 28.06.2019 to be set aside.

The University of Vocational Technology was established by an Act of Parliament, namely Act No.31 of 2008. According to Section 68 (1) of the Officers and servants of the National Institute of Technical Education of Sri Lanka (N.I.T.E.S.L.) who were in service were given time to express their decision regarding whether or not they were agreeable to accept the employment in the new University. The Appellant-Respondent had joined the National Institute of Technical Education of Sri Lanka [N.I.T.E.S.L.] on 01.12.2005 as an academic Assistant subject to a three-year probation period. By letter dated 28.01.2009, the Director-General of National Institute of Technical Education of Sri Lanka [N.I.T.E.S.L.] had informed the Appellant-Respondent that she had completed her probation period and will be absorbed to the permanent carder from 01.12.2005. It further states that she should be absorbed to the same post she served during the probation period, namely the position of Educational Assistant.

On 07.04.2008, she was appointed as an Assistant Lecturer (Probation) by a letter signed by the Director-General of the National Institute of Technical Education of Sri Lanka [N.I.T.E.S.L.]. In perusing the said letter, conditions are to be fulfilled one year as the probation period. Paragraph 4 of the said letter reads: “Your post may be made permanent”. When one uses the word “ may’ there is no finality that even if you fulfil all the requested requirements, there is no assurance that you will get absorbed into the permanent carder.

In *Gibson v Manchester City Council [1979] 1 All ER 972*, the Council sent Gibson a document which asked him to make a formal invitation to buy and stated that the Council ‘may be prepared to sell’ the house to him. Gibson signed the document and returned it. The House of Lords held that a contract had not been concluded because the Council had not made an offer capable of being accepted. Lord Diplock stated that the words ‘may be prepared to sell’ are fatal ... so is the invitation, not, be it noted, to accept the offer, but ‘to make formal application to buy’. It is very important to realise from the outset that not all communications will be offers. They will lack the requisite intention to be bound upon acceptance.

Even though the same letter refers to a probation period of one year and “extension of the probation period only on justifiable reason” in the 2nd paragraph, nowhere in the letter refers to an absorbing into permanent carder as of a right. What it refers to that they may or may not absorb. Therefore, even though one concludes the one year until the Board of Directors confirms by a letter, the Appellant-Respondent will not be a permanent staff member.

According to the Appellant-Respondent six months, after the probation period was completed again, she was employed as a Teaching Assistant on 12.10.2009. She was given a probation period as an Assistant lecturer during that period. The University of Vocational Technology Act No. 31 of 2008 came into operation. By that Act National Institute of Technical Education of Sri Lanka [N.I.T.E.S.L.] transformed into a university. The Act had stipulated how the staff absorption would take place. The operation date was 15.10.2008, which was within the one year of probation of the Respondent-Appellant.

Therefore, she concludes her one year after the transition of the institute by which she was employed, subject to a probation period. Her confirmation as a permanent member must be communicated to the new organisation. She has no right to believe that she will be absorbed automatically. With the word “May” in paragraph 4 of the letter of appointment, even though the probation period was extended verbally until she is served with a letter of appointment as a permanent member, she remains subject to the probation period. The National Institute of Technical Education of Sri Lanka (N.I.T.E.S.L.) had kept its discretion to employ or not to employ as a permanent member when using the word “May” instead of “shall”.

The National Institute of Technical Education of Sri Lanka (N.I.T.E.S.L.) was never a university. When it became a university offering degrees, it had to upgrade the standard of the University tutorial staff to be compatible with University Grants Committee (U.G.C.) requirements. Therefore, the qualifications to be a lecturer were for more than before. To be appointed as an Assistant Lecturer, one should have postgraduate qualifications of at least two academic years with a research component. The Appellant-Respondent had not shown that she had acquired this qualification.

Once again, in perusing Section 68 (2) of Act No. 31 of 2008, it gave directions on absorbing employees and servants to the University. The Appellant-Respondent had pointed out a statutory direction given to the Interim Committee to employ on terms not favourable than the terms of employment in the National Institute of Technical Education of Sri Lanka (N.I.T.E.S.L.).

As she was an Assistant Lecturer attached to the National Institute of Technical Education of Sri Lanka (N.I.T.E.S.L.), she should be appointed to a similar position and not a non-academic staff member. To prove that she was an Assistant Lecturer (Probation) (Management/Business studies)

document marked as [X] was produced. As discussed earlier, that letter itself had said, “your post may be made permanent on a date decided by the management by the institute.....” The salary is spoken in paragraph 3, which says that salary will be paid during the probation period. Paragraph five of the letter has kept the right to terminate the service without giving reasons, notification or compensation. Even though that paragraph spoke of reason such as service, conduct and attendance, which they will look for in the decision to terminate the probation period, the very fact which says reasons will not be given or a chance to explain means that such termination cannot be questioned.

It further affirms that she remains a person serving a probation period until she was served with a letter of appointment as a permanent member. Therefore, at the time of absorbing the staff of the National Institute of Technical Education of Sri Lanka (N.I.T.E.S.L. her position was of a person serving a probation period and not of a permanent member.

Therefore, Section 68 (2) of Act No. 31 of 2008 does not apply to her as a permanent member, which reads as “..... shall be employed on terms not less favourable than their terms of employment in the institute”.

Therefore, she was offered a position as a Teaching Assistant in Management Studies on 01.10.2009, which was accepted on 29.10.2009. The moment she accepts the appointment, she is estopped from challenging the appointment. She was free to decide and question or seek legal remedies that would not stand in her favour now.

The next question the Appellant-Respondent had stressed is regarding the salary structure, which she says prove that she was a permanent member of the National Institute of Technical Education of Sri Lanka (N.I.T.E.S.L.).

This need not be gone into as she was not a permanent employee. What a probation period means and/or how it terminates are not questions to be argued or decided in the present case. Those matters could have been considered had she not accepted the letter of appointment dated 01.10.2009 appointing her as a Teaching Assistant.

For reasons discussed above, I allow the Appeal of the Respondent-Appellant-Petitioner. I make no order for costs.

Judge of the Court of Appeal

PRESANTHA DE SILVA, J.

I agree.

Judge of the Court of Appeal