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

In the matter of an application for Orders in the nature of Writs of Certiorari and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/614/2021

W. Deepthi De Silva
No. 12/5A, 6th Lane,
Rawathawatta,
Moratuwa.

Petitioner

Vs.

1. Justice N. E. Dissanayake
Chairman,
Administrative Appeals Tribunal.

1A. Justice Anil Gunaratne
The Chairman,
Administrative Appeals Tribunal.

2. A. Gnanathasan, P.C.
Member,
Administrative Appeals Tribunal.

3. G. P. Abeykeerthi
Member,
Administrative Appeals Tribunal.

1st to 3rd Respondents at:
No. 36, Silva Lane,
Dharmapala Place,
Rajagiriya.

4. The Zonal Director of Education
Zonal Education Office,
School Lane,
Piliyandala.

5. The Provincial Director of Education,
   Western Provincial Department of Education,
   No. 89, "Ranmagapaya",
   Kaduwela Road,
   Battaramulla.

6. The Secretary,
   Ministry of Education,
   "Isurupaya"
   Battaramulla.

7. The Secretary
   Public Service Commission,
   No. 1200/9, Rajamalwatta Road,
   Battaramulla.

8. Hon. Attorney General
   The Attorney General's Department,
   No. 159, Hulftsdorp,
   Colombo 12.

<u>Respondents</u>

Before **:**Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel **:**Dharshana Weraduwage with Ushani Attapattu for the Petitioner.

Hashini Opatha, SC for all the Respondents.

Supported on : 09.05.2022

Decided on **:** 26.05.2022

Sobhitha Rajakaruna J.

The Petitioner has served as an Assistant Teacher and has retired from public service on 18.05.2021. The Petitioner states that on or around 26.09.2005 she has contracted viral

hepatitis while serving at the Princess of Wales' College, Moratuwa, and that during the same time she was bitten by a serpent upon which she had undergone ayurvedic treatment until December 2006. The Petitioner submits that she had even undergone a depression condition which needed treatment for a long period. During the period of her absence in service, the Petitioner has been served with a letter of vacation of post. As a consequence to an appeal made by the Petitioner, the Public Service Commission ('PSC') by its letter dated 30.10.2012 ('X11') has vacated the said order on vacation of post and she has been reinstated subject to certain conditions.

The PSC, by virtue of the said order marked 'X11', has decided to defer two salary increments of the Petitioner and also to consider the period that she was not in service as a period of no-pay leave. After such reinstatement in service, the Petitioner has complained that she was not receiving due salary increments. The Petitioner alleges that her period of absence from work (27.09.2005 to 29.11.2012) has been considered as a period of no-pay leave by the 4th Respondent. The Petitioner has submitted another appeal to the PSC based on the said complaint and the PSC has rejected her appeal by its letter dated 14.09.2017 ('X19') based on the grounds that no increment could be earned during a period of no-pay leave. Subsequently, the Petitioner has made an appeal to the Administrative Appeals Tribunal ('AAT') against the said order of the PSC.

The AAT by its order dated 11.02.2019, marked 'X20a', has dismissed the Petitioner's said appeal. The Petitioner in the instant application seeks for a writ of Certiorari to quash the said order of the AAT, marked 'X20a'.

In terms of Article 59(2) of the Constitution of the Republic, the AAT shall have the power to alter, vary or rescind any order or decision made by the PSC. The Article 61A of the Constitution stipulates *inter alia* that subject to the provisions of Article 59 and Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the PSC, a Committee (a committee appointed by the PSC), or any public officer. In view of those Constitutional provisions, this Court has already decided that the Court of Appeal shall have no jurisdiction to inquire into or pronounce or in any manner call in question any order or decision made by the PSC in pursuance of any power or duty conferred or imposed on PSC. However, the Writ jurisdiction could be sought against PSC, under circumstances where the person who made the impugned decision did not have any legal authority to

make such decision (***Katugampola vs. Commissioner General of Excise and others (2003) 3 Sri. L.R. 207***).

The AAT was established in terms of Article 59(1) of the Constitution and its powers and procedures have been further elaborated in the Administrative Appeals Tribunal Act No. 4 of 2002. The Section 8(2) of the said Act stipulates that a decision made by the Tribunal shall be final and conclusive and shall not be called in question in any suit or proceedings in a court of law.

However, it is now settled law that a decision of the AAT on a PSC decision can be impugned under Article 140 of the Constitution as the AAT is an Appellate Tribunal constituted in terms of Article 59(1) of the Constitution having the power where appropriate to alter, vary or rescind any order or decision of the PSC. (*See*-***Ratnayake vs. Administrative Appeals Tribunal and others (2013) 1 Sri. L.R. 331, Delapolage Lakmini Delapola vs. Justice Imam and others CA/Writ/263/2013 decided on 26.07.2019***).

Having considered the jurisdiction of the AAT, now, it is important to take into consideration the parameters of the jurisdiction of this Court in regard to an order of AAT. In ***Kalamazoo Industries Limited vs. Ministry of Labour and Vocational Training (1998) 1 Sri. L.R. 235,*** which was an application for judicial review against an award made by an Industrial Arbitrator. Although, the instant application deals with an order made by the AAT, I am of the view that the findings of the said judgement which distinguishes an "Appeal" and "Judicial Review" should be followed here as the present task of this Court is to review an order of AAT. F.N.D. Jayasuriya J. in the said judgement has held that at p.249;

> ***"This court must keep prominently in forefront that it is exercising in this instance a very limited jurisdiction quite distinct from the exercise of appellate jurisdiction. 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. The remedy by way of certiorari cannot be made use of to correct errors or to***

substitute a correct order for a wrong order and if the arbitrator's award was not set aside in whole or in part, it had to be allowed to stand unreversed."

"It is pertinent to refer to the principles laid down by Prof. H. W. R. Wade on "Administrative Law" 12th edition[1] *at pages 34 to 35 wherein the learned author states: "Judicial review is radically different from the system of appeals. When hearing an appeal, the court is concerned with the merits of the decision under appeal. But in judicial review, the court is concerned with its legality. On appeal, the question is right or wrong. On review, the question is lawful or unlawful . . . judicial review is a fundamentally different operation. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, a court, on review, is concerned only with whether the act or order under attack should be allowed to stand or not". In the circumstances the objective of this court upon judicial review in this application is to strictly consider whether the whole or part of the award of the arbitrator is lawful or unlawful. This court ought not to exercise its appellate powers and jurisdiction when engaged in the exercise of supervisory jurisdiction and judicial review of an award of an arbitrator."* (Emphasis added)

In ***Reg. vs. Lord Chancellor, Ex p. Maxwell (D.C) (1997) 1 W.L.R. 104 at 109***, the Court has observed that those Courts (which exercise the jurisdiction of judicial review) are not concerned with the merits of such decisions, but only with the legality of them. The judgement of ***Reg. vs. Ministry of Defence, Ex parte Smith (1996) Q.B. 517, 554*** has been referred to in the said case in order to emphasize the test in irrationality by quoting the below mentioned passage of Sir Thomas Bingham M.R.;

"The Court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the discretion is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

In the circumstances, in an application for judicial review against a decision of the AAT, this Court exercises a limited jurisdiction and it is distinct from the exercise of Appellate

[1] I have observed that it is a typographical error. However, the same contents are there in the 6th Edition at pages 36 to 38.

jurisdiction. This Court will review the decision of the AAT under the circumstances (a) where the members of the AAT who made the impugned decision did not have legal authority to make such decision or (b) if the AAT has acted contrary to principles of natural justice or (c) issue an order which is eminently irrational or unreasonable or tainted with illegality. As I have observed earlier, the jurisdiction of the Court of Appeal under Article 140 would be limited to a review of a decision of the AAT and would not extend to quash the decisions of the PSC or of a Committee or public official to whom the powers of the PSC have been delegated.

Now, I advert to the order made by the AAT in which the Petitioner's appeal has been duly examined. The AAT has categorically decided that it would not be possible to draw increments for the period during which the Petitioner has not been in service and such conclusion was based on the provisions of Section 10:1 and 10:2 of Chapter VIII of the Establishment Code (E-Code). The said Sections 10:1 & 10:2 reads;

> Section 10:1 – '**An officer is not entitled to draw an increment as of right.** He is required to earn it by the efficient and diligent discharge of his duties and by serving the incremental period in full (see subsection 10:9). A certificate to that effect should be signed by the appropriate authority before an increment is paid.' (Emphasis added)
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> Section 10:2 – 'If such a certificate cannot be granted in respect of any officer, his increment is disallowed. The disallowance may take one of the following forms; "Suspension", "Reduction", "Stoppage", "Deferment" of that increment.'

The literal sense of the said section 10:1 is that no increment can be earned unless (i) the officer concerned has efficiently and diligently discharged of his duties and (ii) by serving the incremental period in full.

In addition to the provisions of the above Sections 10:1 and 10:2, the AAT has taken into consideration the provisions of Section 37:2 of Chapter XLVIII of the E-Code which deals with Appeals against notice of vacation of post. In view of the said Section 37:2, the Disciplinary Authority may order the reinstatement of the relevant officer based on acceptable reasons after imposing punishment for not reporting to duty without permission.

The Petitioner's main contention is that the relevant authority without giving due effect to the provisions of Section 10:9:1 of the E-Code has overlooked the reason for granting no-pay leave. In other words, the Petitioner's argument is that she had been granted no-pay leave due to her illness and that aspect has not been taken into consideration by the relevant authority when denying her increments for the period of 'no-pay leave'. The said Section 10:9:1 reads;

> Section 10:9:1- 'If an officer is on no-pay for over a period of 6 months, that period of leave in excess of 6 months will not be reckoned as service for increments <u>unless such leave is granted for reasons outside the officer's control</u> (e.g. illness) or has been granted at the instance of the Government. His increment would thereby be deferred by a period equal to the period by which the no-pay leaves exceeds 6 months.' (Emphasis added)

In my view, according to the said Section 10:9:1, there should be reasonable evidence which are acceptable in law to justify that even a portion of the no-pay leave granted to the Petitioner was due to her illness. The AAT has observed that the Petitioner had failed to submit any documentary proof to establish her medical depression condition (during the years 2005 to 2011) until the submission of medical certificate marked 'X5i' issued by a Consultant Psychiatrist of the District Hospital Unawatuna on 22.08.2011. Accordingly, the AAT has concluded that it would be difficult to accept the said medical certificate submitted by the Petitioner to cover a period of more than three years. The Petitioner has failed to substantiate her illness by producing medical proof even for the period after 2008, the year from which she claims that the treatment for medical condition of depression has commenced. It is also pertinent to observe that the Petitioner has reported back to work after a long no-pay leave on 30.11.2012.

In the circumstances, I am of the view that no increments can be drawn by an officer for the period he/she was on no-pay leave. However, the relevant authorities should be duly satisfied, with adequate evidence, that the no-pay leave is granted for reasons outside the relevant officer's control, such as an occurrence of an illness, for the purpose of reckoning such no-pay leave period as service of increments, in terms of the said Section 10:9:1. It is to be noted that the PSC has observed in its order 'X19' that the granting of no-pay leave to the Petitioner was not due to the reasons outside the control of the Petitioner whereas the AAT has observed that the Petitioner has failed to submit adequate supporting documents to establish her alleged illness.

In light of the foregoing, I take the view that the order of the AAT is not eminently irrational or unreasonable or guilty of illegality. Hence, I arrive at the conclusion, based on the arguability principles that should be adopted in respect of matters relating to issuance of notice in a judicial review application, that there is no arguable case or a prima facie case for this Court to issue formal notice on the Respondents in this application. Therefore, I proceed to refuse this application.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal