THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA

In the matter of an application for a mandate in the nature of Writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Seylan Bank PLC,
Seylan Towers,
No.90, Galle Road,
Colombo 03.

Petitioner

Case No. CA (Writ) 459/2020
A/73/2018

1. Hon. Nimal Siripala De Silva,
   Minister of Labour,
   Ministry of Labour,
   Labour Secretariat,
   Narahenpita,
   Colombo 05.

2. B.K. Prabhath Chandrakeerthi,
   Commissioner General of Labour,
   Labour Secretariat,
   3rd Floor,
   Narahenpita,
   Colombo 05.

3. W.P.M.P. Wijayawardhana,
   Assistant Commissioner of Labour,
   Labour Office – Colombo East,
   Department of Labour,
   Colombo 05.

4. Obadage Leelaratne,
   (Arbitrator)
   No.242, Sri Sobhitha Mawatha,
   Nagoda,
   Kaluthara.

5. M.L.M. Rizvi,
   163, Keels Housing Complex,
   Enderamulla, Wattala.

6. H.C. Chandrasiri,
   Kopiwatta, Kapugama, Devinuwara.

7. A.A.M. Hemika Fonseka,
   No.278C, Arawwala Road, Pannipitiya.

8. T.A. Cassim
   8, Keels Housing Complex,
   Enderamulla, Wattala.

9. D.L.C. Gunasekara,
   Jennet Valley Estate, Atabage, Gampola.

10. A.U.A.E.M. Abeysekera,
    398/41, Pragathi Mawatha, Wedage,
    Magammana, Homagama.

11. T.M.M. Rodrigo,
    269/4, Old Kandy Road, Daligama,
    Kelaniya.

12. A.R.M. Hannan,
    64, Shoe Road, Colombo 13.

13. N.A.M.E.S. Kurera,
    28/3, Sudarshana Mawatha, Rilaulla,
    Kadana.

14. P.M. Ponweera,
    45A, Ranmal Abesekara Road, Colombo 8.

15. N. Samarasekara,
    A 101/1, Manning Town Housing
    Scheme, Mangala Road, Colombo 8.

16. Dulip C Ranasinghe,
    30/31, Deveni Rajasinghe Road, Kandy.

17. Thusil De Silva Edirisooriya,
    443/1, Malwatta Mawatha, Nawala Road,
    Colombo 15.

18. M.H.M. Iqbal,
    65/342, Beach Park, Colombo 15.

19. R.P.K. Liyanarachchi,
    "Champa", Galanda Road, Nittabuwa.

20. H.S.R. Samarasinghe,
    14A, 1st Baptist Road, Beddagama Road,

Pita Kotte.

21. T. Subamuralitharan,
    76, St. Benedicts Street, Colombo 13.

22. R.L.M.W. Dissanayake,
    23/1A, Church Road, Kandana.

23. M.K. Prematthilleke,
    159/38, Temple Road, Maharagama.

24. D.G. Anura Senasinghe,
    154, Dikwella, Kegalle.

25. W.L.G. Hakmanaarachchi,
    34/5, Neelammahara Road,
    Maharagama.

26. B.T.J. Fernando,
    12, Gamini Place, Dehiwala.

27. Ranjith P. Halwala,
    229/2, Thalawathigoda, Mirihana.

28. C.A.P.G. Fernando,
    47, St. Anthony's Road, Kadalana,
    Moratuwa.

29. J.A.A.R. Perera,
    136/16, Mahabodhi Mawatha, Pahala
    Karagahamuna,Kadawatha.

30. Neil C. Fernando,
    456/1, Rawathawaththa, Moratuwa.

31. D.Ivan Jayasuriya,
    "Claver", Katuneriya.

32. M.I.G. Gamini Sooriyabandara,
    No.04,02nd Lane, Aruppola Kandy.

33. K. Nihal De Silva,
    328/1/F Gorakana, Moratuwa.

34. K.A.J.C. Bandara,
    No.207/12, Wattegedara Road,
    Maharagama.

35. Rohan I Martin,
    103, Ashoka Mawatha, Sirimal Uyana,
    Ratmalana.

36. M.W. Dain,
    94, Hospital Road, Kiribathgoda.

37. V. Kayilainathan,
    1B, Pattaiyagedaragama, Pattiyagedara,
    Bandarawela.

38. W.M.V. Perera,
    158, Allen Avenue, Dehiwala.

39. E.R.M.M. Weerasooriya,
    36/12, Aweriwatta Road, Wattala.

40. E.K.S.D. Ariyadasa,
    25A, Rawathawaththa Road, Moratuwa.

41. Kanthi Wickramathilaka,
    817/3, Henawatta Road, Kottawa,
    Pannipitiya.

42. Kamani Jayasinghe,
    "Madhura", Bellanthuduwa,
    Bandaragama.

43. J.M.D.C.L. Jayasinghe,
    153, Ihala Yagoda, Gampaha.

44. S.S.W.M.M.I.W.G. Kobbewala,
    21, Dharmapala Mawatha, Galewela.

45. M. Sanath Rupasinhge
    51, Halena, Pothupitiya, Wadduwa.

46. D.M. Kumararatne,
    "Jayasiri Niwasa", Warakapola.

47. Neomal A. Suraweera,
    36/15, Chakindarama Road, Rathmalna.

48. W.G. Chandra Karunarathne,
    48, "Udeyasiri", National Housing
    Scheme, Kiribathgoda, Kelaniya.

49. C.J.D. Abeygunawardena,

195, Thalpawila Road, Devinuwara.

50. H.S.M. Fernando,
320, Batagama North, Ja-ela

51. Premalal Narangoda,
65, Hospital Road, Mulleriyawa New Town.

52. Anjela Pullenayagam,
393, Ferguson Road, Mattakkuliya,
Colombo 15.

Respondent

Before : **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel : Uditha Egalahewa PC for the Petitioner
Madubashini Sri Meththa SC for the 1st-3rd Respondents
Geoffrey Alagaratnam PC with R. Molligoda for 5th-51st Respondents

Written Submissions On 26.05.2022 (by the Appellant)
26.05.2022 (by the 1st,2nd and3rd Respondents)
26.05.2022 (by the 5th-52nd Respondents)

Argued On : 15.03.2022

Decided On : 27.07.2022

B. Sasi Mahendran, J.

The Petitioner, Seylan Bank PLC, by Petition dated 14th December 2020, seeking the intervention of this Court in terms of Article 140 of the Constitution prays, inter alia, for the following reliefs:

1. A Writ of Certiorari to quash and set aside the award (published in Government Gazette 2191/42 dated 04.09.2020 – marked "P2") pronounced by the 4th Respondent, Arbitrator.
2. A Writ of Certiorari to quash the notice dated 08.10.2020 (marked "P3") issued by the 3rd Respondent, Assistant Commissioner of Labour, demanding the Petitioner Bank to deposit the awarded sum of money.

The 4th Respondent Arbitrator was appointed by the 1st Respondent, the Minister of Labour, in terms of Section 4(1) of the Industrial Disputes Act No. 43 of 1950, as amended. The mandate for settlement by arbitration is as follows:

"සෙලාන් බැන්ක් පීඑල්සී හි සේවය කරන ලද එම්.අයි.එම්.රිස්වි මහතා ඇතුළු ඇමුණුමමේ නම් සඳහන් සේවකයින් 51 දෙනෙකු, වයස අවරුදු 58 සම්පුණර් වීමට ප්‍රථම විශ්‍රාම ගන්වමින් සේවය අවසන් කිරීම යුක්ති සහගත වන්නේද යන්න සහ යුක්ති සහගත නොවන්නේ නම්, ඔවින් එකිනෙකාව ලැබිය යුතු සහන මොනවාද යන්න පිළිබඳව වේ."

The Arbitrator is thus tasked with determining whether the retirement of the 52 employees of Seylan Bank PLC prior to reaching the age of 58 years is fair or just and if the retirement is found to be unfair or unjust what relief the said employees would be entitled to. Having concluded the proceedings, following the leading of evidence, the Arbitrator found in favour of the 5th to 52nd Respondents holding that the Bank's unilateral decision to reduce the age of retirement was unjust as the said employees had a legitimate expectation to be employed until they reached the age of 58 years (in terms of Circular No. SCL 2008/043 dated 19th September 2008) and that there was no evidence to show that the Bank had genuinely exercised its discretion when deciding whether to refuse the extension of services. Consequently, a sum of Rs. 165, 214, 950/- was awarded to the employees, based on the aggregate sums of money they would have drawn as a salary had they continued employment till the age of 58 years.

The gravamen of the Petitioner Bank's complaint is that the Arbitrator has not duly considered the situation of the Bank at the time of the dispute.

Before considering the merits of the instant application, for the purpose of clarity, it is pertinent to set out the role of an Arbitrator.

An Arbitrator's role, as clearly set out in Section 17 of the Industrial Disputes Act, is to 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**.

S.R. De Silva in his seminal text 'The Legal Framework of Industrial Relations in Ceylon' analysed the case law interpreting the term "just and equitable", which he notes "does not yield to a precise definition", and set out certain principles that the term does not embrace. Among such principles, it is noted that "[Arbitrators] have no power to act arbitrarily or make arbitrary orders and their discretion must be exercised judicially and reasonably; they are required to consider and decide every material question involved in the dispute and cannot ignore facts on grounds of justice and equity."

This was affirmed by his Lordship Bandaranayake J. in State Bank of India v. N. Edirisinghe (1987) 1 CALR 100, in holding that, "*an Arbitrator appointed in terms of Section 17(1) of the Industrial Disputes Act is under a duty to act judicially. Nevertheless, the functions of an Arbitrator do not involve the exercise of judicial power in the sense in which that power is exercised in the Courts. The dominant duty of an Arbitrator is to make an award which appears to him just and equitable…*"

In making an award that is "just and equitable" it must also be borne in mind that the Legislature did not intend to confer on an Arbitrator the freedom of a wild horse. The Arbitrator is obliged to act within, and not exceed, its mandate. As held by his Lordship H.N.G. Fernando C.J. in Municipal Council of Colombo v. Munasinghe, 71 NLR 223,

"*The mandate which the Arbitrator in an industrial dispute holds under the law requires him to make an award which is just and equitable, and not necessarily an award which favours an employee. An Arbitrator holds no licence from the Legislature to make any such award as he may please, for nothing is just and equitable which is decided by whim or caprice or by the toss of a double-headed coin."*

A similar view is espoused in Singer Industries v. Ceylon Mercantile Industrial & General Workers Union [2010] 1 SLR 66. Her Ladyship Chandra Ekanayake J. held,

"It is a cardinal principle of law that in making an award by an arbitrator there must be a judicial and objective approach and more importantly the perspectives both of

employer as well as the employee should be considered in a balanced manner and undoubtedly just and equity must apply to both these parties."

The award must not be detrimental to the public interest as well. In The Manager, Nakiyaddeniya Group v. The Lanka Estate Workers' Union (1969) 77 CLW 52, his Lordship de Kretser J. held,

"In the making of a just and equitable order one must consider not only the interest of the employees but also the interest of the employers and the wider interest of the country for the object of social legislation is to have not only contended employees but also contended employers".

With the above principles in mind, this Court must now determine, in view of the allegations made by the Petitioner Bank, whether the Arbitrator has arrived at the right finding which is just and equitable in the circumstances of this case, having taken into account all the material considerations. If the Arbitrator has not acted like such a Writ of Certiorari will lie to quash the award.

In the instant case Seylan Bank PLC, a duly licensed Private Commercial Bank incorporated under the Banking Act No. 30 of 1988, employed the 5th to 52nd Respondents. As per Clause 13 of their Letters of Appointment the **retirement age was 55 years**. This Clause was amended by Circular No. SCL 2001/10 dated 13th March 2001 (marked "X1"). In terms of the said Circular, the retirement age continued to be 55 years of age. However, employees were entitled to apply for extensions annually until they reached the age of 60 years. It was made explicit that the granting of extensions was entirely at the Bank's discretion.

In the year 2008, by Circular No. SCL 2008/043 dated 19th September 2008 (marked "X2") the age of retirement for all categories of employees was extended to 58 years. This Circular titled "Retirement Age Limit" reads,

"We are pleased to inform that the Founder Chairman and the Senior Management has decided to extend the retirement age limit upto fifty eight (58) years for all categories of staff.

This will come into effect immediately."

During the month of December 2008, the Central Bank of Sri Lanka exercising its regulatory powers intervened in the management of Seylan Bank by dissolving the existing Board of Directors and appointing a new Board. The Board of Directors of the

Bank of Ceylon oversaw the management of Seylan Bank. These steps were taken to address a crisis of confidence and a possible collapse that Seylan Bank was faced with in the wake of the infamous collapse of Golden Key Credit Card Company, a company within the Ceylinco Group. Ceylinco was a major shareholder in Seylan Bank. The new Board was tasked with re-establishing financial stability. (This was not disputed by the 5th to 52nd Respondents)

The evidence of Jayakody Arachchige Ajith Rohana Perera, led on behalf of the Respondents states as follows:

(Page 103 of the Brief – proceedings dated 30.05.2019)

ප්‍ර : දැන් සාක්ෂිකරු එම කාලයේදී බැංකුවේ තැන්පත්කරුවන් තමන්ගේ මුදල් සීඝ්‍ර වශයෙන් බැංකුවෙන් ලබා ගත්තාද?

උ : ලබා ගත්ත ස්වාමීනි.

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ප්‍ර : නමුත් තමන් පිලිගන්නවා බැංකුවේ ගැනුම්කරුවන් සීඝ්‍ර ලෙස මුදල් නැවත ලබා ගත්ත කියල තැන්පත් මුදල් පිළිගන්නවාද?

උ : පිලිගන්නවා.

(Page 104 of the Brief)

ප්‍ර : තමන් කියන්නේ කිසිම ගැටළුවකට බැංකුව මුහුණ පෑවේ නැහැ කියලද මූල්‍යමය වශයෙන්?

උ : ගැටළුවක් ඇති වුනා තැන්පත්කරුවන් මුදල් ඉල්ලා සිටින විට. මූල්‍යමය වශයෙන් ගැටළුවක් ඇති වුනේ නැහැ බැංකුවට.

(Page 106 of the Brief)

ප්‍ර : දැන් සාක්ෂිකරු ඊස්මන් නාරංගොඩ මහත්තයා හැරෙන්න වෙනත් අධ්‍යක්ෂතුමන්ලා පත්කරනු ලැබුවා කියලා සාක්ෂිකරු දන්නවාද?

උ : අධ්‍යක්ෂවරුන් පත් කළා කියලා මට මතකයි. නමුත් නම් වශයෙන් මට මේ අවස්ථාවේදී මට ප්‍රකාශ කල නොහැකි.

ප්‍ර : සාක්ෂිකරු පිලිගන්නවා සභාපතිතුමා හා අනෙක් අධ්‍යක්ෂ මණ්ඩලයන් පත් කරනු ලැබුවා කියලා සාක්ෂිකරු පිලිගන්නවා?

උ: පිළිගන්නවා.

(Page 133,134 of the Brief – proceedings dated 12.07.2019)

ප්‍ර : මේ වාර්ෂික වාර්තාව අනුව 2008 හා 2009 වර්ෂ වලදී මුල්‍යමය ගැටළුවක් තිබුණු බව මේ වාර්තාවේ සඳහන් වෙනවා කියලා තමා දන්නවාද?

උ : මෙම වාර්තාවේ සඳහන් වෙන්නේ මුල්‍යමය අපහසුතාවයට පත් වුනා කියලා .

ප්‍ර : මොකද්ද ඒ අපහසුතාවය කියලා තමාට කියන්න පුලුවන්ද?

උ : මුල්‍යමය අර්බුදූ පැවතුනේ Golden Key සමූහ ආයතනයේ. සෙලාන් බැංකුවේ නෙමේ. සෙලාන් බැංකුව හා අනිකුත් අනුබද්ධ ආයතන Golden Key සමූහ ආයතනය සමග කොතලාවල මහතා යටතේ පැවති නිසා ගනුදෙනුකරුවන් විශාල වශයෙන් මුදල් ලබා ගැනීමට සැරසුණා. සාමාන්‍යයෙන් ස්වාමීනි මම කළමනාකරු හැටියට වැඩ කල එක් අවස්ථාවකදී ගනුදෙනුකරුවන් විශාල මුදල් ප්‍රමාණයක් ඉල්ලූ විට අපිට දීමට අපහසුතාවයට පත් වෙනවා. සෙලාන් බැංකුවත් එම අවස්ථාවේදී එවැනි අපහසුතාවයට පත් වුනා. ඒ බව අජිත් නිවාඩ් කබ්‌රාල් එවකට හිටපු මහා බැංකු අධිපති ප්‍රකාශ කළා බැංකුව අපහසුතාවයට පත් වුනා කියලා නමුත් මුල්‍ය අර්බුදයක් නෙමේ.

As part of the steps taken to return the Bank to normalcy (illustrated further in the Case Study marked "X5") Circular No. SCL 2009/003 dated 19th March 2009 (marked "X3") was issued, six months after Circular No. SCL 2008/043 was issued. This Circular titled "Retirement Age" reads,

"We refer to an extract of the minutes of the Board of Directors Meeting held on 9th March, 2009 and wish to inform you that the Board has decided to adopt the following with immediate effect:

a) Implement the Public Administration Circular and set the retirement age at 55 years.
b) If any staff member applies for an extension, the Management to evaluate his/her performance and grant extensions annually until he/she reaches the age of 57 years at the discretion of the Management.
c) Only in an event where the Management decides that the services of a highly skilled employee who could not be easily replaced and who will contribute to the bottom line directly, such an employee could be exceptionally granted an extension annually until he/she reaches the age of 60 years. However, this practice is not to be encouraged.

Please treat our Circular No. SCL 2008/043 dated 19th September, 2008 as rescinded."

Accordingly, it is seen that the retirement age is reverted to 55 years. However, employees have the option of applying for annual extensions until they reach the age of 57 years, and additionally, highly skilled employees who are not easily replaceable could apply for annual extensions until they reach the age of 60 years. By this, the new management has considered the necessity of retaining skilled employees in this manner. This was not provided for in Circular No. SCL 2008/043 in which all employees, irrespective of whether highly skilled or not, had to retire at the age of 58 years.

The 5th to 52nd Respondents, some of whom were denied extensions and some of whom were granted a one-year extension but denied a second time, complained to the Commissioner of Labour against their unjustifiable termination, sometime after their extensions were denied. As no settlement was forthcoming the Minister of Labour acting under Section 4(1) of the Industrial Disputes Act referred the dispute for mandatory arbitration.

As alluded to above, the Arbitrator found in favour of the 5th to 52nd Respondents holding that the Bank's unilateral decision to reduce the age of retirement was unjust as it frustrated the employees' legitimate expectation to work until they reach 58 years of age and that there was no evidence to show that the Bank had genuinely exercised its discretion when deciding whether to refuse the extension of services. The employees were awarded a sum of Rs. 165, 214, 950/-.

This award (marked "P2") was challenged by the Petitioner Bank primarily on the ground that the Arbitrator had acted outside the scope of his mandate by inquiring into the question of whether the Bank properly exercised its discretion to grant/refuse extensions and that the Arbitrator's finding that there was no financial crisis was erroneous. Additionally, it is argued that the employees could not have formed a legitimate expectation to continue in service till they reach the age of 58 years and the employees were belated in making their complaint to the Commissioner of Labour.

As noted above, the role of the Arbitrator is circumscribed by law and his mandate. His mandate is reproduced again for the purpose of convenience:

"සෙලාන් බැන්ක් පීඑල්සී හි සේවය කරන ලද එම්.අයි.එම්.රිස්වි මහතා ඇතුළු ඇමුණුමමේ නම් සඳහන් සේවකයින් 51 දෙනෙකු, වයස අවුරුදු 58 සම්පූර්ණ වීමට ප්‍රථම විශ්‍රාම ගන්වමින් සේවය අවසන් කිරීම යුක්ති

සහගත වන්නේද යන්න සහ යුක්ති සහගත නොවන්නේ නම්, ඔවින් එකිනෙකාව ලැබිය යුතු සහන මොනවාද යන්න පිළිබඳව වේ."

If an Arbitrator has given his decision in bad faith, if he has made a decision which he had no power to make, if he failed in the course of his inquiry to comply with the requirements of natural justice, if he has misconstrued the provisions giving him the power to act or his mandate so that he failed to deal with the question remitted to him and decided some question which was not remitted to him, if he has refused to take into account something which he was required to take into account or if he has based his decision on some matter which he had no right to take into account his award will be quashed.

Thus, a question arises as to what considerations are relevant or material, which ought to have been considered by the Arbitrator, and those which are irrelevant and thus ought not to have been considered by the Arbitrator. This question in regard to the relevancy of considerations in reaching a decision is normally whether that consideration is relevant to the statutory purpose, or in the instant case, whether it is relevant to the mandate.

If the ground of challenge is that relevant considerations have not been taken into account a Court must assess the actual or potential importance of the factor that was overlooked.

In the instant case, the Arbitrator failed completely to take into account the severity of the financial crisis that Seylan Bank was faced with during the year 2008/2009, which compelled them to issue Circular 2009/003. The relevant part of the Arbitrator's reasons reads as follows:

"මෙසේ පළමු පාශර්වයේ ඉල්ලුම්කරුවන් විශ්‍රාම ගැන්වීමේදී පදනම් කරගෙන ඇත්තේ ඔවුන්ගේ පත්වීම් ලිපියෙයි 13 වැනි ඡේදය හා 2009/003 චක්‍රලේඛය වන අතර, ඉහතින් සඳහන් කර ඇති චක්‍රලේඛ මගින් එම 13 වන ඡේදය අවස්ථා තුනකදී සංශෝධනය වී ඇති බව නොසලකා හරිමින් කටයුතු කර ඇති බවද පැහැදිලි වන කරුණකි. මෙහිදී දෙවනී පාශර්වය වන බැංකුව විසින් 2009/003 දරන චක්‍රලේඛය සංශෝධනයට හේතු වූ කරුණු ලෙස බැංකුව එවකට මුහුණ පෑ මුල්‍ය අබර්දුය හේතු වූ බවට කරුණු ගෙනහැර දක්වමින් "X5"ලෙසට බැංකුව විසින් නිකුත් කර තිබූ සිද්ධි අධ්‍යයන වාතර්ාව ඉදිරිපත් කර ඇත. මේ සම්බන්ධයෙන් පළමු පාශර්වය විසින් තම ස්ථාවරය දක්වමින් එම සිද්ධි අධ්‍යයන වාතර්ාවේ 163 පිටුව "ඉ 18" ලෙසද, 197 පිටුව "ඉ 19" ලෙසද, 57 පිටුව "ඉ 20" ලෙසද, 165 පිටුව "ඉ 21" ලෙසද, "X5" සම්බන්ධයෙන් එවකට මහා බැංකු අධිපති අජිත් නිවාඩ් කබ්‍රාල් මහතා විසින් දිවයින පුවත්පතට ලබා දී ඇති ප්‍රකාශයක් සම්බන්ධ වාතර්ාවද අමුණා ඉදිරිපත් කර ඇත. **මෙහිදී පළමු පාශර්වය විසින් ඉදිරිපත් කර ඇති ලේඛන හා ලබා දී ඇති සාක්ෂි අනුව දෙවැනි**

පාශර්වය වන බැංකුව දැඩි මුල්‍ය අබර්‍දයකට ලක්වී නොමැති බව තහවුරු කර ඇත. තවද පවතී තත්ත්වය 2010 වන විට සමනය වී ඇති බවටත් කරුණු ඉදිරිපත් කර ඇත." [emphasis added]

It is thus seen that the Arbitrator has relied on some facts and figures presented by the employees and newspaper articles of a statement made by the Governor of the Central Bank of Sri Lanka at the time assuring depositors that the financial crisis has been resolved. The Arbitrator further notes that the situation was resolved by the year 2010.

While it is true that the financial situation was resolved by 2010 and any catastrophic consequences that could have ensued from the crisis were mitigated, the Arbitrator has failed to address his mind to how the crisis was brought under control. There is no dispute whatsoever that the Central Bank did have to intervene. It is a common sensical proposition that the Central Bank would have to make such a dramatic intervention only if a Bank was facing a severe financial crisis. The repercussions of a collapse of a Bank will lead to disastrous consequences not only to the employees that would have to be made redundant after its bankruptcy but also to depositors who have entrusted their monies to the Bank in confidence. Not to mention the ripple effect on the entire economy of the country. This was executed in terms of Section 30(1) of the Monetary Law Act.

This Crisis of confidence that Seylan Bank faced was following the collapse of the Golden Key Credit Card Company, as mentioned above. Queues of depositors formed outside branches of Seylan Bank to withdraw their deposits. These fears were amplified by the collapse of Pramuka Savings & Development Bank Limited which led to thousands of depositors being rendered helpless not long before this. The entire sordid tale is set out in the "Case Study" (marked "X5") presented by Seylan Bank. The Case Study sets out the steps taken by the new management, one of which was to reduce the high staffing ratio by lowering the age of retirement to 55 years (p. 42 of the Case Study). Thus, the Circular No. SCL 2009/003 dated 19th March 2009 does not arise in a vacuum.

The 5th to 52nd Respondents do not deny that there was a crisis. In Paragraph 44 of their written submissions, it is noted that the aforementioned Case Study "clearly established" that "the financial crisis was caused by a misunderstanding subsequent to the collapse of the Golden Key company, which had triggered a run-on deposits of the Petitioner Bank." It is their contention that, as per the Case Study, the Crisis was only short-lived since customer and investor support was restored without a need for a

government bail-out. It was perhaps owing to mismanagement or malpractice that the crisis arose, but there is no denying that it did arise. To paraphrase the words of his Lordship Sirimanne J. in Heath & Co v. Kariyawasam 71 NLR 382, no reasonable man could have, in my opinion, reached any other conclusion on the evidence placed before him.

Yet, it must be reiterated that what has to be understood is that it would not have been resolved if not for the complete restructuring the Bank had to undergo, one step of which was, unfortunately, the lowering of the retirement age. It is not prudent to now look at the situation in retrospect as these were steps that the management thought were best at the time. To use the words of the Bombay High Court in B.J. Shetty & Others v. Air India Limited 2000 (1) BomCR 743, "the Court is not best Judge of a business decision, for the wearer knows where the shoe pinches" or as his Lordship Alles J. in Ceylon Transport Board v. Thungadasa, 73 NLR 211, held, "One cannot under the guise of making "just and equitable orders" make orders which in effect dictate to the management how a Department or Corporation should be run."

It must also be noted that the Arbitrator is empowered by Section 36 of the Industrial Disputes Act to, inter alia, require any person to furnish, in writing, such particulars he may consider necessary; to require any person to give evidence on oath or otherwise before him; require any person to produce such documents as he considers necessary for the purposes of settling the dispute. An expert may have been summoned to clarify the financial situation if the Arbitrator needed further material to grasp the severity of the crisis faced at the time the circular was issued.

Further, an institution such as a Bank which expects the utmost trust and confidence of its employees may hope to retain employees, especially skilled employees, who are experienced in running the business of the bank instead of hiring new employees who need to be trained. Time would be spent cultivating that relationship of trust. Nonetheless, despite the perceived advantages of retaining trusted staff, who had an unblemished record, a tough call had to be made to restore the age of retirement to 55 years of age and allow them to work until 57 years or 60 years, on extension, depending on which category they belonged to. This was because of the austerity measures the new management had to undertake to mitigate a crisis.

Therefore, we are of the view that the Arbitrator has erred by not considering this material consideration. That is, the Circular lowering of the age of retirement was a

necessary step the Bank had to take as part of a total restructuring to alleviate a crisis; it was not an arbitrary decision taken at the whim and fancy of the Bank.

The Arbitrator must arrive at a finding which is just and equitable for both parties, and the public interest. In this case, the public interest was an important consideration more so than in other industrial disputes given that the employer is a Bank, which is entrusted with the savings/investments of others.

It is notable that the Bank, upon its restructuring, has not plainly asked all employees who had already surpassed the age of 55 years to leave outright. A Memorandum dated 23rd April 2009 (marked "X6") was issued by the General Manager clarifying the application of Circular No. SCL 2009/003 (which reduced the retirement age to 55 years) for those employees reaching the ages of 56 to 58 during the year 2009. In the said Memorandum, it is stated that employees going on 55 years and reaching 56 years will be permitted to work till they reach 56 years of age and retire with effect from their 56th birthday: such employees could apply for an extension to continue until they reach 57 years of age (the Management would decide whether to grant an extension). The Memorandum also permits those going on 56 years and 57 years to work until they reach 57 and 58 years of age respectively. This evinces the fact that the Bank acting equitably had allowed those employees who had reached the ages of 56 to 58 years to continue until their next birthday without applying for an extension (although in plain terms of Circular No. SCL 2009/003 their services ought to have terminated on the date that Circular was issued). This was misconstrued by the Arbitrator as a violation of their own Circular. The relevant part of the Arbitrator's reasons read as follows:

"මෙම සේවකයන්ගෙන් බොහොමයකගේ සේවය අවසන් කර ඇත්තේ ඔවුන්ගේ පත්වීමේ ලිපියෙහි 13 වේදය අනුව බවත් සමහර සේවකයන්ගේ සේවය අවසන් කර ඇත්තේ 2009/003 දරන චක්‍රලේඛය පදනම් කරගෙන බවත් මෙම ලිපි පිළිබඳව පරීක්ෂා කිරීමේදී පැහැදිලි වන කරුණකි"

It must also be noted that although the Arbitrator has made the following observation with regard to Circular No. SCL 2009/003,

"එහෙත් **අත්තනෝමතිකව හා නීති විරෝධිව ඒකපාර්ශවිකව** වග උත්තරකාර ආයතනය විසින් නිකුත් කරන ලද චක්‍රලේඛ අංක SCL 2009/003 හා 2009 මාතර්ු මස 19 දිනැති චක්‍රලේඛය පදනම් කරගනිමින් අයුක්ති සහගත සහ අසාධාරණ ලෙස තමන්ට වයස අවුරුදු 58 තෙක් සේවය කිරීමට අවස්ථාව ලබා නොදී ඇමුණුම "A"හි 3 වන තීරුවේ සඳහන් කාලවලදී තම සේවය අවසන් කරන ලද බවත්, එබැවින් එකී ඇමුණුමහි 7 වන තීරුවේ සඳහන් මුදල තමන්ට ලබාදෙන ලෙසට නියම කරන ලෙසටත් ඉල්ලා සිටි." [emphasis added]

this Court observes that Circular No. SCL 2009/003 is rather similar to Circular No. SCL 2001/10. No evidence was forthcoming as to whether Circular No. SCL 2001/10 was issued following consultation of employees. On the other hand, as mentioned below, it transpires that Circular No. SCL 2009/003 was issued following consultation. The relevant portion of these two Circulars will be juxtaposed for the purpose of clarity.

SCL2001/10	SCL2009/003
"Your employment if not terminated earlier, shall ipso facto cease upon your reaching the **age of retirement which shall be 55 years**. However, on your reaching the age of 55 years you will be entitled to apply for extensions annually until you reach the age of 60 years. Granting of such annual extensions shall be entirely at the discretion of the Bank."	"a) Implement the Public Administration Circular and set the **retirement age at 55 years**. b) If any staff member applies for an extension, the Management to evaluate his/her performance and grant extensions annually until he/she reaches the age of 57 years at the discretion of the Management. c) Only in an event where the Management decides that the services of a highly skilled employee who could not be easily replaced and who will contribute to the bottom line directly, such an employee could be exceptionally granted an extension annually until he/she reaches the age of 60 years. However, this practice is not to be encouraged."

When both Circulars are compared, the retirement age is set at 55 years of age, similar to Clause 13 of the Letters of Appointment under which the 5th to 52nd Respondents were employed, with a provision to apply for annual extensions until an employee reaches 60 years of age. The difference being, in Circular No. SCL 2009/003 the annual extensions are based on two categories. Those employees that are highly skilled

and not easily replaceable are permitted to apply for annual extensions up to 60 years of age, whereas other employees can only apply until they reach the age of 57 years. Further evincing the fact that the Bank (the management of which was run by the State-owned Bank of Ceylon) has not merely adopted a Public Administration Circular and called for the retirement of all employees at 55 years but that it has considered the policy of the Bank with regard to the retirement of employees that existed prior to the Circular of 2008.

The Petitioner Bank also contends that the Arbitrator acted beyond his scope by inquiring into whether Seylan Bank had properly exercised its discretion to grant or refuse extensions to the employees (relying on the judgment of Amerasinghe v. Board of Directors [1998] 1 SLR 367) and finding that the Bank had not duly and fairly considered the applications for an extension made by the employees.

The relevant part of the Arbitrator's reasons states:

"...සේවකයන්ගේ සේවය දීසර් කිරීමේදී "X4" චක්‍රලේඛයේ "b" කොටසේ දැක්වෙන පරිදි ඔවුන්ගේ හැකියාවන් දක්ෂතාවයන් පිලිබඳ ඇගයීමක් සිදු කර එම සේවා දිගුව ලබාදෙනවාය යන්න ද දෙවැනි පාශර්වය විසින්ම බිඳ හෙලා ඇත. **කිසිදු අවස්තාවක එසේ ඇගයීමක් සිදු කරන ලද බවට සාක්ෂි ඉදිරිපත් කිරීමට දෙවැනි පාශර්වය අපොහොසත් වී ඇත. ඒ අනුව පෙනී යන්නේ දෙවැනි පාශර්වය විසින්ම නිකුත් කරන ලද චක්‍රලේඛ විවිධ අවස්තාවලදී ඔවුන් විසින්ම ඊට පටහැනිව කටයුතු කිරීමෙන් සේවකයන්ගේ අපේක්ෂාවන් බිඳ හෙලීමට දෙවැනි පාශර්වය කටයුතු කර ඇති බවයි**." [emphasis added]

The mandate of the Arbitrator is to determine whether the retirement of the 5th to 52nd Respondents prior to the age of 58 years was fair or just. The Arbitrator was not called upon to determine whether the Bank had exercised its discretion to not extend the services of the employees correctly. Although much ink was spilled on this point, it is plainly irrelevant to the present dispute.

The Bank has granted extensions to certain Respondents, yet not to others. It is impossible to make a common determination whether all of them were or were not entitled to be extended further as that has to be judged on an individual basis. The Arbitrator erred by stepping outside the bounds of his mandate and making a broad finding that since there was no evidence before him whether the application for extension was considered duly and fairly by the Bank, the discretion had not been exercised in such a manner.

Even if it is presumed that inquiring into whether the applications for extensions were considered duly and fairly fell within his mandate the burden is on the employees, in terms of Sections 101 and 102 of the Evidence Ordinance, to lead evidence to establish

that it was not done so. A mere statement that their applications were not duly and fairly considered is insufficient.

This Court agrees with the Petitioner Bank's contention and holds that the Arbitrator has acted beyond his mandate.

Our case law abounds with instances in which an Arbitrator's award has been quashed on the basis that the Arbitrator has not taken into account material considerations or that he has acted beyond his mandate. A few of these are as follows:

In Virakesari v. Fernando 66 NLR 145, his Lordship Weerasooriya J. held:

"The omission of the 1st Respondent to take into consideration the evidence touching the charge of having instigated a go-slow is, in my opinion, a misdirection amounting to an error of law."

In Gunasekera v W P L De Mel, Commissioner of Labour 79 NLR 409, his Lordship Tittawella J. held:

"A lack of jurisdiction may arise in different ways. While engaged on a proper inquiry the tribunal may depart from the rules of natural justice ***or it may ask itself the wrong questions or may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction****. A tribunal which has made findings of fact wholly unsupported by evidence or which it has drawn inferences wholly unsupported by any of the facts found by it will be held to have erred in point of law. The concept of error of law includes the giving of reasons that are bad in law or inconsistent, unintelligible or it would seem substantially inadequate.* ***It includes also the application of a wrong legal test to the facts found taking irrelevant considerations into account*** *and arriving at a conclusion without any supporting evidence. If reasons are given and these disclose that an erroneous legal approach has been followed the superior Court can set the decision aside by certiorari for error of law…. If the grounds or reasons stated disclose a clearly erroneous legal approach the decision will be quashed. An error of law may also be held to be apparent… if the inferences and decisions reached by the tribunal in any given case are such as no reasonable body of persons properly instructed in the law applicable to the case could have made. The above is a summary of some of the grounds for awarding certiorari as set down in S. A. de Smith's work-Judicial Review of Administrative Action"* [emphasis added]

In Collettes v. Bank of Ceylon [1984] 2 SLR 253, his Lordship Sharvananda J. (as he then was) held:

"*This Court undoubtedly has the jurisdiction to revise the concurrent findings of fact reached by the lower court in appropriate cases. However, ordinarily, it will not interfere with findings of fact based upon relevant evidence except in special circumstances, such as, for instance, where* ***the judgment of the lower court shows that the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or that the conclusion rests mainly on erroneous considerations or is not supported by sufficient evidence****. When the judgment of the lower court exhibits such shortcomings, this court not only may, but is under a duty to examine the supporting evidence and reverse the findings."* [emphasis added]

The five-judge bench of the Supreme Court held in the same case that the question of whether the Tribunal has failed to take into account the relevant considerations is a question of law. This was also referred to in Fonseka v. Candappa [1988] 2 SLR 11 and Sithamparanathan v. People's Bank [1989] 1 SLR 124.

Wade & Forsyth's, 'Administrative Law' (11th Edition) at p. 325 notes:

"The decision maker must take the obligatory relevant considerations into account and if he fails to do so the judicial review court will set him right."

In the instant case, the Arbitrator has not taken into account material considerations and, it is manifest that the Arbitrator has overstepped the limits of his mandate and has sought to deal with a dispute not contemplated by or not falling within the terms of reference.

The Arbitrator has made a finding that it was unfair for the 5th to 52nd Respondents to retire prior to the age of 58 years as they had a legitimate expectation to serve until they reach that age.

The relevant part of his reasons states:

"තවද මෙම ඉල්ලුම්කරුවන් තමන්ට අවුරුදු 58 දක්වා සේවය කිරීමට ඉඩ ඇති බවට අපේක්ෂාවෙන් සිටි බවත්, අවසාන වශයෙන් නිකුත් කරන ලද චක්‍රලේඛය මගින් ද අවුරුදු 57 දක්වා වත් සේවය කිරීමට හැකියාව ඇතිවෙය යන අපේක්ෂාව හා බලාපොරොත්තුව තිබූ බවද ඉදිරිපත් වූ සාක්ෂි හා ලේඛන මගින් තහවුරු වී ඇති බවද සැලකිල්ලට ගනිමි."

The doctrine of legitimate expectations as per Wade & Forsyth stems from fairness, the need to protect against the abuse of power, legal certainty, and protection of the citizens' trust in the system. As Wade & Forsyth observe (at p. 450), "Where some boon or benefit has been promised by an official that boon or benefit may be legitimately expected by those who have placed their trust in the promises of the official. It would be unfair to dash those expectations without at least granting the person affected an opportunity to show the official why his discretion should be exercised in a way that fulfils his expectation."

Lord Diplock in the landmark judgment of Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 noted that it is preferable to refer to such expectations as "legitimate" instead of "reasonable" so as to indicate that the former has consequences to which effect will be given in public law. His Lordship observed legitimate expectations arise when decisions affect a person:

"by depriving him of some benefit or advantage which either

(i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or

(ii)he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

His Lordship Prasanna Jayawardena J. in Ariyarathne & Others v. Illangakoon & Others SC FR Application No. 444/2012 decided on 30.07.2019, provided a comprehensive exposition of the doctrine of legitimate expectations in our legal system. His Lordship observed that in cases of a substantive legitimate expectation, as in the instant case, the Courts must adopt the following twofold approach:

"*First, to examine whether the constituent elements of the claimed substantive legitimate expectation are in line with the principles referred to earlier which describe the usual characteristics of a substantive legitimate expectation that a court may be inclined to protect and enforce."*

If those constituent elements are present,

"*the court should weigh the character and substance of the expectation and the prejudice caused to the petitioner by its frustration, on the one hand; against the importance of the public interest which led to the public authority's change of heart, on the other hand; and then decide whether that exercise of weighing the competing interests leads to the conclusion that the petitioner's expectation is of such weight and the consequences of its frustration are so prejudicial to him when compared to the public interest relied on by the public authority, that the public authority's decision to change its policy and negate the expectation was disproportionate or unfair or unjust and amounted to an abuse of power which should be quashed; or whether the decision to change the policy should stand because the public authority has acted proportionately, fairly and justly when it decided that the petitioner's substantive legitimate expectation could not be granted since public interest demanded a change of policy*."

It is also noteworthy that in the written submissions of the 5th to 52nd Respondents, in Paragraph 27 it is stated that "a significant number of the Respondent Employees were not due for retirement even under the terms of this Circular [SCL 2009/003] and therefore was not affected by it until several years had passed". This statement seems disingenuous.

In the instant case, even if the 5th to 52nd Respondents are successful in establishing that they possessed a substantive legitimate expectation to be employed until they reached the age of 58 years, they will be unsuccessful in enforcing it as on a weighing of competing interests the consequences of frustration of the expectation are minute when compared to the interest of the Bank, its employees, depositors, investors, and the economy as a whole which would have been in jeopardy.

The Arbitrator also notes that the reduction of the age limit has taken place unilaterally:

"එමෙන්ම දෙවැනි පාපර්ශ්වය වන බැංකුව විසින් මුලින් සේවකයන්ගේ විශ්‍රාම වයස අවුරුදු 58 දක්වා වැඩිකර පසුව හිතුවක්කාරී ලෙස ඒකපාශ්‍රීකව විශ්‍රාම යාමේ වයස අවුරුදු 55 කිරීම නීති විරෝධී සහ නිත්‍යානුකූල නොවන අතර රජයේ සේවකයන්ට බලපාන චක්‍රලේඛයක් පදනම් කර ගනිමින් එය සිදු කිරීම පදනම් විරහිත අසාධාරණ සහ අයුක්ති සහගත එකක් බව තීරණය කරමි."

As per the evidence of the witness, one Angelo Bosco, Executive Officer Human Resources for the Petitioner Bank, consultation had taken place with the Bank of Ceylon Employees Union. This is set out as follows:

(Page 189/190 of the Brief - proceedings dated 12.09.2019)

ප්‍ර : සාක්ෂිකරු මෙම X3,X4 වක්‍රලේඛ නිකුත් කරන අවස්ථාවේදී බැංකුවේ සේවක සංගම් තිබුනාද?

උ : එහෙමයි.

ප්‍ර : කුමක්ද ඒ සේවාව සංගම්?

උ : සෙලාන් බැංකු සේවක සංගමය සහ ලංකා බැංකු සේවක සංගමය කියා සංගම් 2ක් තිබුනා.

(Page 192 of the Brief)

ප්‍ර : 35 හෝ 40 යන සේවකයන්ගෙන් කී දෙනෙක් ලංකා බැංකු සේවක සංගමයේ සාමාජිකත්වය දැරුවාද කියන්න පුලුවන්ද?

උ : බහුතරයක් ම ලංකා බැංකු සේවක සංගමයේ සාමාජිකත්වය දැරුවා.

ප්‍ර : බහුතරයක් තමුන්ගේ අංශයේ අය ලංකා බැංකු සේවක සංගමයේ සාමාජිකයන් දැරුවා කියලා කියන්නේ?

උ : එහෙමයි.

However, the 5th to 52nd Respondents deny that such consultation took place. This is a factual dispute that this Court cannot determine.

For the aforesaid reasons, a Writ of Certiorari will lie to quash the award of the Arbitrator. By virtue of this determination, the notice issued by the 3rd Respondent dated 08th October 2020 demanding the Petitioner Bank to deposit the awarded sum of money is quashed as well.

JUDGE OF THE COURT OF APPEAL

D.N.SAMARAKOON,J.

I AGREE

JUDGE OF THE COURT OF APPEAL