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 Prohibition under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/385/2021

Lanka Canneries (Pvt) Ltd
No. 45/75, Narahenpita Road,
Colombo 05.

Petitioner

Vs.

1. Commissioner of Labour
   Labour Secretariat,
   Department of Labour,
   No. 41, Kirula Road,
   Colombo 05,
   Sri Lanka.

2. D. P. Dhammika Saddhasena
   Assistant Commissioner of Labour,
   Department of Labour,
   Termination of Employment Branch,
   11th Floor, Mehewara Piyasa,
   Colombo 05.

3. Hewa Waththage Don Srimal
   Nishantha
   No. 127/49,
   Suriyapaluwa,
   Kadwatha.

Respondents

Before **:** Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Neville Abeyratne, PC with K. Abeyratne and Sumudu Samaranayake for the Petitioner.

Madhubhashini Sri Meththa, SC for the 1st and 2nd Respondents.

Ashiq Hassim with S. Fernando for the 3rd Respondent.

Written Submissions: Petitioner -19.07.2022

1st and 2nd Respondents -19.07.2022

3rd Respondent -21.07.2022

Decided on : 31.08.2022

Sobhitha Rajakaruna J.

The Court on 22.02.2022 decided to formally issue notice of this application on the Respondents and thereafter fixed the dates for filling of Statements of objections and counter affidavit. All the parties agreed that the instant application may be dealt with and determined solely on the basis of written submissions.

The 3rd Respondent joined the Petitioner Company as a Manager-Supply Chain on 08.01.2018. As per the Letter of Appointment, marked 'P4', the 3rd Respondent should serve on probation for a period of 12 months. The Petitioner by letter dated 21.10.2020 (marked 'P2'), terminated the services of the 3rd Respondent. The reasons given in the said letter marked 'P2' are as follows;

> *"We refer to your contract of employment dated 8th January 2018 and regret to inform you that we are unable to confirm your appointment as Manager-Supply Chain of our company.*
>
> *As you are fully aware, you have continued to be on probation as per Clause No. 4(a) of your contract of employment as we have neither confirmed your appointment in writing nor given you a salary increment since 8th January 2018."*

Being aggrieved by the said decision to terminate the services, the 3rd Respondent made a complaint, marked 'P7', to the Commissioner General of Labour ('Commissioner') under

the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 ('TEWA'). The Commissioner after an inquiry issued an order dated 07.07.2021, marked 'P3', directing the Petitioner to reinstate the 3rd Respondent with back wages.

The Petitioner is seeking in this application for a mandate in the nature of a writ of Certiorari to quash the said order of the Commissioner and also for a mandate in the nature of a writ of Prohibition to prohibit the 1st and 2nd Respondents from taking any legal actions for recovery of the sum awarded pursuant to the said order 'P3'.

The Petitioner's main contention is that a 'probationer' does not have a right to be confirmed in his post and the employer is not required to show good cause if he terminates the services of a probationer. The probationary period of the 3rd Respondent has not been formerly extended by the Petitioner after the expiration of the stipulated period of 12 months. However, the Petitioner argues in view of the provisions of the letter of appointment (Clause 4(i) of 'P4') that the 3rd Respondent will be regarded as continuing in probation if no confirmation letter is issued.

The services of a probationer can be terminated on non-disciplinary grounds, provided that the employer follows a specific procedure and also subject to Section 2(1) of TEWA.

The Petitioner relies on the following judgements in order to substantiate his argument that the employer has a right to terminate the services of the 3rd Respondent without assigning any reason and also that the said Respondent has no right to be confirmed in his service; ***Hettiarachchi vs. Vidyalankara University 76 NLR 47, Ceylon Cement Corporation vs. Fernando (1990) 1 Sri. L.R. 361, Priyadarshana and two others vs. Lanka Ports Authority (2008) 2 Sri. L.R. 208, Moosajees Limited vs. Rasiah (1986) 1 Sri. L.R. 365, Brown & Company Limited vs. Samarasekara (1996) 1 Sri. L.R. 334, 335, Liyanagamage vs. Road Construction and Development Private Limited (1994) 2 Sri. L.R. 230, State Distilleries Corporation vs. Rupasinghe (1994) 2 Sri. L.R. 395.*** Similar views, but subject to certain conditions, have been expressed by the Court of Appeal in ***Ceylon Ceramic Corporation vs. Premadasa (1986) 1 Sri. L.R. 287.***

In the backdrop of the Petitioner's above arguments, following two questions arise;

i. Can an employer terminate the services of a probationer without giving reasons?

ii. Can an employer terminate the employment of a probationer merely on the basis that his probationary period has come to an end?

In order to examine the above two questions, it is important to understand the rationale behind probationary employment. There is no law in our country determining the length of a probationary period. However, it should be governed under the principles of equality of all citizens before the law. In my view, the probationary period is for the employer to objectively assess whether the workman would be suitable to carry out the duties and the responsibilities assigned to the respective post. According to the Collins Dictionary[1], 'probation' is a period of time during which someone is judging your character and ability while you work, in order to see if you are suitable for that type of work.

Therefore, my view is that when a workman (workman or an employee who comes within the scheduled employment in TEWA) is serving during the probationary period, the employer's duty is not only to assess the employee but also to provide necessary training, guidance and supervisory support to the employee. More than anything, it is the mandatory duty of the employer to complete a formal review of the performance of the employee by the end of the probationary period stipulated in the letter of appointment. It is vital that the outcome of the review be communicated to the employee.

Furthermore, it is my considered view that in order to terminate the services of an employee during the probationary period or to extend such probationary period, any employer should adopt a reasonable procedure according to law. Although the Establishment Code of Sri Lanka is not applicable to the Petitioner Company, I need to draw my attention to the rationale adopted in Clause 11 of Chapter II of the said Code which deals with the probationary period of an officer. Those provisions in the Establishment Code require the Head of the Department to make a report on every officer appointed on probation after the 1st year of probation and after considering such reports carefully, the employees should be warned, when necessary, of any shortcomings. Before the expiry of the period of probation, three reports should be taken into consideration by the appointing authority in view of confirming or extending the probationary period. When an officer fails to qualify for confirmation during the initial period of probation for

[1] https://www.collinsdictionary.com/dictionary/english/probation

reasons beyond his control, his period of probation may be extended by a reasonable period of time to enable him to qualify.

In Clause 11:4 of the said Establishment Code, the appointing authority will have the power to terminate the officer's appointment during the period of probation without assigning any reason. However, in my view, the appointing authority is empowered to do so, inescapably subject to the effective procedure laid down in the relevant Chapter of the Establishment Code.

Hence, I take the view that when an employer takes a decision to extend the probationary period or to terminate the services, he should follow a procedure, according to law, where such decision-making power may not infringe the Rule of Law and the principles of Natural Justice. In light of the above, I hold that any employer should mandatorily follow an effective procedure right throughout the period of probation if an employer needs to enjoy the benefit of not confirming probationers as per the propositions in the aforesaid judgements cited by the Petitioner. Further, it is abundantly clear that no employee can escape without giving reasons under section 2(5) of TEWA.

It cannot be assumed that the Superior Courts in those judgements have bestowed an absolute discretion to the employer in respect of an employee who is on probation, although the dicta of those judgements enumerate that the probationer has no right to be confirmed in the post. Similar view has been taken by Mark Fernando J. in ***State Distilleries Corporation vs. Rupasinghe (1994) 2 Sri. L.R.* 395**. As I have observed above, every employee serving on probation must be treated according to a proper review procedure and such employee should have a right to know his shortcomings in advance. Therefore, the present position of the law should be that the services of an employee who is on probation can be terminated if his services are unsatisfactory and he is not suitable to carry out the work assigned to him, provided that (a). the employer has treated the employee with a helping hand to overcome his shortcomings, (b). a proper review procedure has been adopted (c). and most importantly such decision to terminate has been taken subject to the provisions of the section 2 (particularly2(1) & 2(4)) of TEWA.

I have arrived at the above conclusions after carefully perusing all the judgements cited by the Petitioner & Respondents and also by taking into consideration the scheme of TEWA and the Industrial Disputes Act. It will be unfair to the employee and may be in another

instance to the employer, if the labour law is going to be established only by reading certain sentences or small passages of a judgement without giving a realistic view in the guise of the relevant statutory law. I take the view that misconceptions in law should be avoided with proper understanding the real characteristics of 'ratio decidendi' and 'obiter dictum' of a judgement and also by reading the entire judgement. Furthermore, it is important to note that no employer has a right to override the statutory provisions stipulated in Section 2 of TEWA. The employer is bound to follow Section 2 of TEWA by which it is mandatory to get prior written approval of the Commissioner (when prior consent of the employee is not there) to terminate the scheduled employment of any workman on non-disciplinary grounds.

In the circumstances, I proceed to answer the above two questions raised by me in the negative. In light of my above findings, it is not lawful for the Petitioner to abruptly terminate the employment of the 3rd Respondent based on the completion date of the probationary period. It is highly irrational for the Petitioner to consider the date ending the probationary period as the last date of employment of the 3rd Respondent. The 3rd Respondent has served in the respective post for two years and nine months and that is well beyond the stipulated period of probation. After completing the period of 12 months, the Petitioner has been accorded with medical facilities (as per Clause 10 of 'P4'') which are entitled to a confirmed officer. The letter of appointment in its Clause 6 provides in particular that the retirement age of the 3rd Respondent is 55 years and thus the said 'P4' cannot be considered as a contract letter valid only for the period of probation. Whether the 3rd Respondent has been considered as a confirmed officer by the conduct of the Petitioner is also highly questionable in this case. Thus, I hold that the Petitioner has not followed any reasonable procedure or adopted any effective review programme in respect of the 3rd Respondent who was on probation.

The services of a probationer can be terminated on disciplinary grounds, provided that the employer gives reasons under Section 2(5) of TEWA and also subject to an inquiry.

Similarly, if the termination of a probationer is on disciplinary grounds, my view is that, the employer is obliged to conduct a proper inquiry before the termination of services. The Petitioner referring to the case of ***Piyasena Silva vs. Ceylon Fisheries Corporation (1994) 2 Sri. L.R. 292*** asserts that our law does not require to hold a 'domestic inquiry' prior to

terminating an employee who is a probationer. In my view, before the services of an employee on probation is terminated on disciplinary grounds (as mentioned in Section 2(5) of TEWA), a proper inquiry should be held. I do not intend to brand such an inquiry as a 'preliminary inquiry'/ 'domestic inquiry/ or 'any other'; but what is essential is to conduct an inquiry upholding the rule of natural justice, a principal which cannot be hindered under any circumstances according to the well-established related law.

Moreover, if the termination during the period of probation is on disciplinary grounds, then the employer is bound to give reasons under section 2(5) of the TEWA.

The duty of the Commissioner at the threshold stage of an inquiry under TEWA is to ascertain from the employer whether the termination is based on disciplinary or non-disciplinary grounds.

Now, I advert to examine the other facet of the Petitioner's arguments in this case which are based on the purported reasons submitted at the inquiry before the Commissioner, for termination of services of the 3rd Respondent. The Petitioner contends that the 3rd Respondent's inefficiency, misconduct and insubordination caused the Petitioner to serve the purported letter of termination and accordingly, the Commissioner has no jurisdiction to entertain a complaint on termination based on inefficiency and misconduct as per the provisions of Section 2(4) of TEWA.

The Section 2(4) of the TEWA;

> *For the purposes of this Act, the scheduled employment of any workman shall be deemed to be terminated by his employer if for any reason whatsoever, otherwise than by reason of a punishment imposed by way of disciplinary action, the services of such workman in such employment are terminated by his employer, and such termination shall be deemed to include –*
>
> *a) non-employment of the workman in such employment by his employer, whether temporarily or permanently, or*
> *b) non-employment of the workman in such employment in consequence of the closure by his employer of any trade, industry or business.*

The termination of services of a workman on the ground of inefficiency or incompetence has been discussed by Court of Appeal in ***St. Anthony's Hardware Stores Limited vs. Ranjit Kumar and another (1978-79) 2 Sri. L.R. 6.*** In the said case it was held as follows;

"Termination of the services of a workman on the ground of inefficiency or incompetence is not termination "by reason of punishment imposed by way of disciplinary action" within the meaning of section 2 of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971. Accordingly the Commissioner of Labour has jurisdiction to inquire into and make order under this Statute in such a case."

The above judgement has been delivered in the year 1979. The TEWA has been amended several times[2] thereafter. By virtue of Termination of Employment of Workmen (Special Provisions) Amendment Act No. 51 of 1988, the Section 2 of the Principal Enactment has been amended by the insertion of the following new subsection immediately after subsection (4) of that section;

" (5) Where any employer terminates the scheduled employment of any workman by reason of punishment imposed by way of disciplinary action the employer shall notify such workman in writing the reasons for the termination of employment before the expiry of the second working day after the date of such termination."

In view of the above amendment there is no necessity for the Commissioner to hold a separate inquiry to inquire as to whether the termination has taken place by reason of a punishment imposed by way of disciplinary action or otherwise. The Supreme Court in ***Hiddelarachi vs. United Motors Lanka Ltd and others (2006) 3 Sri. L.R. 411*** referring to the said amendment has observed that **'***until the aforesaid amendment came into effect, the Commissioner to whom an application under the aforesaid Act was referred to, had to go on a voyage of discovery to ascertain whether the termination in issue came within his jurisdiction in terms of section 2(1) read with section 5 and 6 of the said Act.*'

In the instant application, the Petitioner has failed to mention in the said letter of termination, marked 'P2', whether the termination has been effected by reason of a punishment imposed by way of a disciplinary action or not and also to give any actual reason for termination. The said letter 'P2' refers to the Clause 4(a) of the letter of appointment ('P4') which is spelt out as below;

[2] Termination of Employment of Workmen (Special Provisions) Amendment Act No. 51 of 1988
Termination of Employment of Workmen (Special Provisions) Amendment Act No. 12 of 2003
Termination of Employment of Workmen (Special Provisions) Amendment Act No. 20 of 2008
Termination of Employment of Workmen (Special Provisions) Amendment Act No. 29 of 2021

"You will be on probation for a period of twelve (12) months from the date of your appointment. The company also reserves the right to expressly extend your period of probation if necessary. If you are in service after the said period of twelve months probation period without confirmation of your appointment, you will still be regarded as continuing in probation. If however, you are confirmed in your appointment such confirmation will be effect from the date fixed by the Board of Management."

What is emphasized in the said letter 'P2' is that the 3rd Respondent will not be confirmed in his post and hence his last date of employment is 21.10.2020. The Petitioner has very carefully not selected the word 'termination' to be included in the said letter and instead decided therein the last date of the 3rd Respondent's employment/probationary period.

The 3rd Respondent asserts that the Petitioner has willfully misrepresented facts by not divulging that the termination was on disciplinary grounds. The 3rd Respondent referring to various averments of the Petition and the documents submitted to the Commissioner by the Petitioner argues that the termination, ex-facie, was not on disciplinary grounds. It is observed that the Petitioner has intermittently used words such as 'misconduct', 'unsatisfactory', 'inefficiency', 'disobedience', 'negligence', 'irresponsible', 'loss of confidence' and 'incompetency' in various documents which were submitted to this Court as well as to the Commissioner as purported reasons for the termination of the services of the 3rd Respondent. In the written submissions tendered to the Commissioner on behalf of the Petitioner, it is stated, inter alia, that the 3rd respondent did not have capacity and/or suitability to hold the position of Manager-Supply Chain.

However, neither in the written submissions nor in the statement of objections tendered by the Petitioner to Commissioner, it is stated that the services of the 3rd Respondent have been terminated by reason of a punishment imposed by way of disciplinary action which would eventually oust the jurisdiction of the Commissioner under TEWA. The inference of the Petitioner in the instant application is that the services have been terminated on a 'disciplinary ground'.

Even if it is assumed that the services have been terminated based on disciplinary grounds, at least the fundamental requirement of issuing a notification or a warning should have been adhered by the Petitioner. The endorsements alone, made by the superior officers on the documents exchanged between such superior officers and the 3rd Respondent in the

ordinary course of business, in my view, cannot be accepted as a warning to an employee who is on probation.

The 1st to 3rd Respondents referring to the judgements of ***St. Anthony's Hardware Stores Limited vs. Ranjit Kumar and another (1978-79) 2 Sri. L.R. 6*** and ***Packwell Lanka (Private) Limited vs. M. D. Chandrani Amarathunga and others CA/Writ/328/2016, (decided on 13.06.2019)*** submit that inefficiency and incompetence denote a person's inability to perform the work allotted to him and they could not be equated to misconduct for which punishment by way of disciplinary action may be imposed within the meaning of TEWA.

In a nutshell, what is important to assess at the outset at an inquiry before the Commissioner under TEWA is whether the termination was under disciplinary grounds or not, as enunciated in Section 2(4) and Section 2(5) of TEWA. If the employer categorically classifies the termination is not based on a reason of punishment imposed by way of a disciplinary action, then the Commissioner should exercise his jurisdiction, subject to the provisions of TEWA, to decide whether the scheduled employment of any workman has been terminated without; (a) the prior consent in writing of the workman or (b) the prior written approval of the Commissioner[3]. Undoubtedly, if an employee needs to terminate the scheduled employment of an employee (on probation or otherwise) without the consent of the employee, based merely on the reasons such as inefficiency, incompetence etc., (without classifying them as disciplinary grounds by the employer) then the employer is bound to get prior permission from the Commissioner under section 2 of TEWA.

In the instant application, the Petitioner as mentioned above, has failed to disclose at the threshold stage of the inquiry before the Commissioner that the termination of the services of the 3rd Respondent is based on a reason of a punishment imposed by way of disciplinary action. In such a situation, the Commissioner will be compelled to entertain the application of the 3rd Respondent. For the foregoing reasons, I reject the argument of the Petitioner that the Commissioner had no jurisdiction to entertain the application of the 3rd Respondent.

[3] See - Section 2 of TEWA

Commissioner has not violated the rules of natural justice.

In addition to above, the Petitioner asserts that no proper legal procedure had been followed by the Commissioner in holding the respective inquiry. As opposed to such assertions of the Petitioner, the 3rd Respondent contended that the Commissioner is empowered to conduct the inquiry in any manner, not inconsistent with the principles of Natural Justice, which to the Commissioner may seem best adapted to elicit proof or information concerning matters that arise at such inquiry. The 3rd Respondent, in this regard, relies on provisions of Section 17 of TEWA and on several decided judgements[4]. On perusal of the proceedings before the Commissioner and in the light of my above findings on the jurisdiction of the Commissioner, I do not see any instance where the Commissioner has violated the principles of Natural Justice.

Generally, the Commissioner exercises his powers under TEWA mainly in respect of terminations which come under 'lay-off', 'retrenchment' and 'closure of industry'. It is noted that the legislature, for some reason or other has not restricted TEWA only to lay-off, retrenchment and closure of industry. In such a situation, the Commissioner will be compelled to exercise his jurisdiction under TEWA in respect of an application upon a termination which has not been identified as a result of a disciplinary action. Therefore, I am of the view that the burden & the duty of the Commissioner in respect of such applications should be almost similar to such burden in applications of 'lay-off', 'retrenchment' and 'closure of industry'.

There should be a proper forum to which a probationer can recourse against his termination of services on non-disciplinary grounds.

Finally, for the fuller and proper adjudication in respect of the law relating to employees serving on probation, I need to address the particular assumption that the probationers are not covered by the jurisdiction of the Commissioner under TEWA. I am aware that when the word 'workman' in TEWA is interpreted in literal sense, an opinion may be formed that the probationers are not covered under TEWA. In that event, the simple question comes to my mind is; what is the forum a probationer can recourse to against his termination of services on non-disciplinary grounds. Certainly, the Labour Tribunal is

[4] Yaseen Omar vs. Pakistan International Airlines Corporation and others (1999) 2 Sri. L.R. 375, Samalanka Limited vs. Weerakoon, Commissioner of Labour and others (1994) 1 Sri. L.R. 405, Lanka Multi Moulds Private Limited vs. Wimalasena, Commissioner of Labour and others (2003) 1 Sri. L.R. 143.

always the option for an employee whose services have been terminated on disciplinary grounds. The judicial control over public power has been expanded tremendously over the years by judicial activism. In that sense, an employee whose services have been terminated on non-disciplinary grounds should have a proper *locus* to get his grievances adjudicated.

Therefore, I am of the view that an employee in a scheduled employment who is on probation, at least should have the privilege of making an application under TEWA in an instance of termination of his services on non-disciplinary grounds.

Petitioner is not entitled to reliefs.

In light of the foregoing, I am not inclined to grant any reliefs as prayed for in the prayer of the Petition. Hence, I proceed to dismiss the application of the Petitioner. However, I take the view that this determination should not be an impediment for the Petitioner to take disciplinary action, if any, according to law, against the 3rd Respondent without prejudice to all the rights of the Petitioner in reference to Commissioner's order, marked 'P3'.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal