

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

*In the matter of an Application under and  
in terms of Article 140 of the Constitution for  
mandates in the nature of Writs of  
Certiorari and Mandamus.*

K. A. D. T. Kulawansa  
41/2, Kumbukgahapokuna Road,  
Udahamulla, Nugegoda.

**CA/WRIT/111/2022**

**Petitioner**

Vs.

1. University of Moratuwa,  
Katubedda,  
Moratuwa.
2. Niranjan D. Gunawardena,  
Vice-Chancellor,  
University of Moratuwa,  
Katubedda,  
Moratuwa.
3. P. K. S. Mahanama
4. N. K. Wickramarachchi
5. D. P. Chandrasekara
6. B. H. Sudantha
7. Ajith de Alwis
8. S. W. S. B. Dasanayaka

9. F. R. Fernando
10. A. S. Karunananda
11. U. D. C. Jayalal
12. K. D. P. Wijesinghe
13. N. K. C. Gunaratne
14. Ashly De Vos
15. Priyath Bandu Wickrama
16. Anoma Iddamalgoda
17. Prasantha Lal De Alwis
18. Kalyani Perera
19. W. M. D. P. Hulugalla
20. K. A. D. Pushpakeerthi

All of the Council of the University  
of Moratuwa,  
Katubedda,  
Moratuwa.

**Respondents**

**Before** : Sobhitha Rajakaruna J.  
Dhammika Ganepola J.

**Counsel** : Geoffrey Alagaratnam PC with Suren Fernando for the Petitioner.  
Z. Zain, DSG for the Respondents.

**Argued on** : 20.09.2022

**Written Submissions** : Petitioner -11.10.2022

Respondents-01.11.2022

**Decided on** : 17.11.2022

**Sobhitha Rajakaruna J.**

The Petitioner was appointed to the post of Senior Lecturer Grade II in the Department of Computational Mathematics in the Faculty of Information Technology of the 1<sup>st</sup> Respondent University of Moratuwa ('University') w.e.f. 03.11.2008, by letter dated 21.10.2008, marked 'R1' ('A5'). The said Letter of Appointment contained, among others, the following clauses;

'02. This post is permanent and unless your appointment is terminated earlier, you will be on probation for a period of three (03) years (or more in the case it is considered expedient to extend the period of probation), from the date of assumption of duties by you and until you receive a letter confirming you in your appointment.'

'06. You are required to complete an Induction training course (which includes Teaching/ Learning Methodologies) within a period of one (01) year from the date of first appointment which is a pre-requisite to secure eligibility for confirmation in the post.'

The Petitioner has not been confirmed in her post up to date on the basis that the Petitioner had failed to submit proof of satisfactory completion of an Induction Training Course ('Course'). The University sent several letters informing the Petitioner that she may be confirmed in her post only upon her submission of a certificate proving satisfactory completion of the Course. Upon the failure of the Petitioner to submit such proof as required by the University, the services of the Petitioner was terminated by the Vice Chancellor of the University by letter dated 14.05.2019, marked 'X3', w.e.f. 01.06.2019.

The defence taken by the Petitioner is that she could not complete the Course as a consequence of the workload ensuing from her being entrusted with many other responsibilities after her recruitment including the commitment to author several research papers. Though the Petitioner thereafter informed the Vice Chancellor by letter dated 03.06.2019, marked 'A25', of her having completed the Course (on 01.06.2019) along with the certificate of completion (marked 'A24'), no response was received by the Petitioner.

The Petitioner seeks for an order in the nature a Writ of Certiorari quashing the decision of the 1<sup>st</sup> Respondent contained in letter, marked 'X3', to terminate the services of the Petitioner and also a Writ of Mandamus directing the Respondents to implement the recommendations contained in University Services Appeals Board ('USAB') order dated 25.05.2021, marked 'X2' ('R6').

It's a pre-requisite in terms of Clause 6 of the said Letter of Appointment ('R1') that the Petitioner should complete an Induction Training Course within the period of one year from the date of first appointment in order to secure eligibility for confirmation in the post. The plain reading of the said Clause implies that completing an Induction Training Course is not the only requirement to confirm the Petitioner in her post. The word 'eligibility' embodied in the said Clause clearly envisages that there may be other grounds as well for consideration when confirming the Petitioner in her post.

Other Clauses relating to the period of probation contained in the Letter of Appointment;

'12. If your services are unsatisfactory during the period of probation or fail to reach the requisite standard of proficiency in Sinhala/Tamil, or you fail to obtain such qualifications or pass such examination as may be specified by the Council, you are liable to be discontinued at any time during the period of probation or at the end thereof.'

'13. If your services during the period of probation have been satisfactory and pass or obtain an exemption from the prescribed proficiency test in Sinhala/Tamil, you will be confirmed in your appointment at the end thereof.'

The grounds to discontinue the services of an employee who is on probation under above Clause 12 are twofold. The services will be discontinued a.) if such services are unsatisfactory or b.) if the employee fails to reach the requisite standard of proficiency in Sinhala/Tamil or fails to obtain such qualifications or pass such examination as may be specified by the University Council. Perhaps one can presume that the said Clause 12 cannot be treated as a stand-alone section when deciding whether the services of a probationer could be terminated only on the grounds mentioned therein. However, an overall conspectus of the circumstances of this case reflects the fact that the said Clause 12 is the only provision in 'R1' which spells out discontinuation of service during the period of probation.

In terms of above Clause 13, if the services are **satisfactory** and requirements for language proficiency have been fulfilled, the employee should be confirmed in his appointment. The fundamental issue in the instant application is that the University has neither confirmed the Petitioner in her services nor extended her period on probation.

The question which arises here is whether the failure to complete a Course would be a pre-condition to terminate the services of the Petitioner.

It is a mandatory duty, according to the law set forth by this Court in regard to the period of probation, for the University to complete a formal review of the performance of the Petitioner by the end of the probationary period as stipulated in the Letter of Appointment and further, it is vital that the outcome of the review is communicated to the Petitioner. Anyhow, it appears that the University without following a proper procedure to review the performance has bestowed the Petitioner with additional responsibilities, such as appointing her to the post of Head of Department of Computational Mathematics (Vide-‘A7(b)’ and ‘A8’). The Petitioner was appointed as the Head of the said Department after serving a period of one month as the Acting Head of the same Department. Similarly, she has served as the Acting Director Undergraduate Studies (‘A9’), Curriculum Coordinator (‘A18’), Research Coordinator (‘A19’), Chairman of the Admissions Committee 2010 (‘A20’), a member of the Consultative Committee of Social Harmony (‘A21’) and an academic member for the upliftment of University games-Taekwondo (‘A22’) during the purported period of probation.

This clearly shows that the University authorities have not raised objections on Petitioner continuing her services at the University even after a lapse of one year, the period stipulated for completion of the Course.

The Respondents referring to documents, marked ‘R9’ & ‘R10’ assert that the University has assisted the Petitioner in completing the Course at the Open University by making relevant payments on behalf of the Petitioner. As per Clause 21:2 (b) of Chapter III of the University Establishments Code, the University is bound to give all facilities to the officers enabling them to gain such qualification or pass such tests etc., within the initial period of probation. However, it is vital to note that the payments reflected in ‘R9’ & ‘R10’ have been made in the year 2013 and that was after a lapse of almost 5 years from the appointment.

The Section 72(1) of the Universities Act No.16 of 1978, as amended ('the Act') declares that every appointment to a post of teacher shall, in the first instance, be for a probationary period of three years. Such probationary period can be extended by one year at a time for a further period not exceeding five years. Surprisingly, the University without giving effect to the provisions of this Section has accorded liberty to the Petitioner to serve for an uninterrupted period of almost 11 years. Besides, effect must be given to Clause 2 of the Letter of Appointment which provides to extend the period of probation when it is considered expedient. This is a clear violation of the statutory provisions by the University and it is the root cause for the alleged grievances of the Petitioner. Such conduct of the University illustrates the potential pitfalls that can affect the rights of a probationer who blindly continues to serve with a legitimate expectation.

I take the view that when an employee 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. In *State Distilleries Corporation vs. Rupasinghe (1994) 2 Sri. L.R. 395 (at p. 400)* Mark Fernando J. has observed that Probation is a period during which an employee is "tried" or "tested" and given the opportunity of "proving" himself in relation to his employment. Moonemalle J. in *Moosajees Ltd. vs. Rasiah (1986) 1 Sri. L.R. 365 (at p. 369)*. has observed that the period of probation is a period of trial during which the probationer's capacity, conduct or character is tested before he is admitted to regular employment.

The precedent enunciated in the above judgements in reference to the role of an employee who is on probation is pertinent for this Court to arrive at a conclusion whether the Petitioner's services could be terminated on the failure of non-completion of the said Course.

The Respondents heavily relying on the documents 'R2' to 'R4', 'R7', 'R8' and 'R11' implicate that the University has brought to the attention of the Petitioner several times the failure of the Petitioner to complete the Course. It is abundantly clear that none of those reminders demanded a termination of services in the event of failing to comply with the provisions of Clause 6 of 'R1'. The University is setting forth the word 'termination' for the first time in its letter dated 14.05.2019, marked 'X3', by which the services of the Petitioner

has been terminated. It needs to be stressed that there cannot be any restriction for the authorities to take a suitable action such as not granting increments etc. other than termination, in an event of failure to fulfill the requirement of completing the Course.

No charges on unsatisfactory service or on language proficiency have been levelled against the Petitioner. In other words, the Petitioner has not been charged upon an offence which demands disciplinary action against her. Termination of services after a disciplinary inquiry is considered as a major punishment in terms of Clause 4:1:2 Chapter XXII of the University Establishments Code. Attention should be drawn to the fact that there was not even an attempt to hold a disciplinary inquiry against the Petitioner on a category of offence such as 'incompetence' under Clause 2 of the said chapter or on any other ground.

Analyzing the approach taken in several related judgements<sup>1</sup> which supports the view that the employee on probation has no right to be confirmed in his service and/or the services of such employee can be terminated without assigning reasons, I have found in *Lanka Canneries (Pvt) Ltd vs. Commissioner of Labour and others, CA/WRIT/385/2021 decided on 31.08.2022* 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.”*

The general provisions in Clause 21:3:1 of Chapter III of the said Establishments Code gives the authority to terminate an employee who is on probation without assigning reasons. But the said Clause cannot be considered as a stand-alone section as such provisions should be mandatorily subject to the above judicial precedent which enhances the jurisprudence on

---

<sup>1</sup> Hettiarachchi vs. Vidyalandara 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. Rasiyah (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; Ceylon Ceramic Corporation vs. Premadasa (1986) 1 Sri. L.R. 287.

employment during probation. The scheme of the said Establishments Code demands an 'inquiry' before a decision is made on a disciplinary ground.

The University Establishments Code, in my view, is fully equipped with necessary provisions to terminate the services of an employee (who is subjected to the said Code) on probation subject to a disciplinary inquiry upon offences such as inefficiency, incompetence, negligence etc. recognized under its Clause 2:2. I may not assess the legality of those relevant clauses of the Code but need to acknowledge them on principle at this juncture. For completeness, I must mention that this Court has extensively dealt with the procedure to terminate the services of an employee on probation who is subjected to Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 ('TEWA') in *Lanka Canneries (Pvt) Ltd vs. Commissioner of Labour and others*.

The failure to take prompt action at the appropriate stage by the Human Resources Division of the University cannot lead to reprimand the Petitioner. Though the failure to fulfil the requirements of completing a Course would be a precondition for the Petitioner to be ineligible to secure confirmation in the relevant post, that certainly, based on the circumstances of this case, will not be a precondition to terminate her services. The period of probation cannot be assumed as a grace period for the employer to exercise his discretion in an unfettered manner to terminate the services of an employee arbitrarily, unreasonably and against the law.

For the forgoing reasons, I arrive at the conclusion that the decision to terminate the services of the Petitioner should be quashed. The Petitioner in addition to the relief sought to quash the said decision by way of writ of Certiorari, claims for a declaration that the Petitioner is entitled to be reinstated with back wages. Once the impugned decision to terminate the services is quashed, eventually the Petitioner should be reinstated. Anyhow, I am not inclined to make any determination on back wages as it is, in my view, within the purview of the University authorities. It is because this determination does not bestow the Petitioner explicitly with a confirmation in her services, although it can be presumed that the Petitioner has gained over the years necessary experience expected by way of an Induction Training Course. The decision to confirm the Petitioner in service or extend her probationary period



should be taken independently by the University following the criteria in Clause 12 of the Letter of Appointment.

In view of my earlier findings, this Court makes an observation that the University will be entitled, if it wishes, to take an appropriate decision upon the failure to submit proof of completion of the Course during the stipulated period. Such decision, if necessary, should be taken according to law and particularly according to the University Establishments Code and following an appropriate inquiry. This does not imply that the University should terminate the services of the Petitioner based on the same grounds after reinstatement. I have taken the above view as I cannot possibly overlook the failure on the part of the Petitioner who is very much in a better position than an ordinary employee to read and understand the provisions of the Letter of Appointment. Not complying to a mandatory requirement may lead to a breakdown in discipline. Especially in an academic institution like the 1<sup>st</sup> Respondent University, discipline is paramount and not only the students but the academic staff also ought to obey the rules.

Now, I advert to the Petitioner's other relief. The Petitioner seeks for a writ of Mandamus directing the Respondents to implement the order of the USAB dated 25.05.2021, marked 'X2'. An application has been made by the Petitioner to the USAB after her services were terminated and the USAB in its order, marked 'X2' ('R6') held that it is unable to make an Order that the University should act contrary to the provisions of the Letter of Appointment. Additionally, the USAB has made a strong recommendation that the University should reconsider the decision to terminate the Petitioner and take all necessary steps to reinstate and confirm the Petitioner as the University will not be benefited by terminating the services of an employee with such wide experience without any fault on her part. However, the Council of the University informed the Petitioner that it had considered the above order of the USAB and decided not to take action in accordance with the recommendation of the USAB as it would be contrary to the provisions of the letter of appointment.

The USAB has made such strong recommendation whilst concluding that it cannot order the University to act contrary to the provisions of the Letter of Appointment. As mentioned above, this Court has already determined that the Petitioner is entitled to get the letter of

termination quashed. In this context, I am not inclined to consider the relief prayed for by the Petitioner for a writ of Mandamus.

Based on all the circumstances of this case, a mandate in the nature of a writ of Certiorari is issued quashing the decision to terminate the services of the Petitioner reflected in the letter dated 14.05.2019, marked 'X3'. I order no costs.

**Judge of the Court of Appeal**

**Dhammika Ganepola J.**

I agree.

**Judge of the Court of Appeal**