IN 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 Certiorari under and in terms of Article 140 of the Constitution of the Republic of Sri Lanka.

Seylan Bank PLC
No. 90, Galle Road,
Colombo 3

CA/Writ/Application No. 286/13
Lab Dept No. TEU/A/3/43/2012

PETITIONER

Vs.

1. Hon. Gamini Lokuge
   Minister of Labour
   Labour Secretariat,
   575, Colombo 05.

2. V. B. P. K. Weerasinghe
   Commissioner General of Labour
   Labour Secretariat,
   575, Colombo 05.

3. R. P. Iresha Udayangani
   Assistant Commissioner of Labour
   Labour Secretariat,
   575, Colombo 05.

4. S. A. R. Pushpakumara
   "Vijayapaya", Pinnawala,
   Rambukkana.

RESPONDENTS

5. Hon. W. D. J. Seneviratne
   Minister of Labour
   Labour Secretariat,
   575, Colombo 05.

6. Chandani Amaratunge
   Commissioner General of Labour
   Labour Secretariat,
   575, Colombo 05.

7. Hon. Raveendra Samaraweera
   Minister of Labour
   Labour Secretariat,
   575, Colombo 05.

8. R. P. A Wimalaweera
   Commissioner General of Labour
   Labour Secretariat,
   575, Colombo 05.

9. Hon. Nimal Siripala De Silva
   Minister of Labour
   Labour Secretariat,
   575, Colombo 05.

10. E. K. Prabath Chandrakeerthi
    Commissioner General of Labour
    Labour Secretariat,
    575, Colombo 05.

11. Hon. Manusha Nanayakkara
    Minister of Labour
    Labour Secretariat,
    575, Colombo 05.

12. Commissioner General of Labour
    Labour Secretariat,
    575, Colombo 05.

ADDED RESPONDENTS

Before:	C.P Kirtisinghe, J Mayadunne Corea, J
Counsel:	Chandimal Mendis with Shyama Gamage for the Petitioner Manohara Jayasinghe DSG for 1st – 3rd Respondents Dr. Lasantha Hettiarachchi with Himath Silva and Chanuka Abeygunasekera for the 4th Respondent.
Argued on:	27.01.2023
Written Submissions:	For the Petitioner on 22.03.2023 For the 1st – 3rd Respondents on 14.03.2023 For the 4th Respondent on 21.03.2023
Decided on:	28.06.2023

Mayadunne Corea J

The facts of the case are briefly as follows. The Petitioner is a public quoted company in Sri Lanka incorporated under the terms of Companies Act No. 17 of 1982 and duly re-registered under the terms of Companies Act No.7 of 2007 and engaged in commercial banking. The 4th Respondent was recruited by the Petitioner in the capacity of a driver by letter dated 31st January 1995 [X2(a)].

The 4th Respondent lodged a complaint dated 12.09.2012 [P1] before the 2nd Respondent under and in terms of the Termination of Employment (Special Provisions) Act No. 45 of 1971 as amended, alleging that the Petitioner unlawfully terminated his services. The Petitioner states it was summoned for an inquiry at the Labour Secretariat by way of a letter dated 26.09.2012 (P2). Following several days of inquiry and written submissions tendered by both parties, the 2nd

Respondent delivered his order dated 13.08.2013 (P4) and held that the 4th Respondent's services have been terminated and therefore be reinstated in employment together with back wages without disruption of service.

The Petitioner states that the aforesaid order is unreasonable and arbitrary as the 2nd Respondent has failed to take into consideration the retirement age of the Petitioner as per his contract of employment dated 31.01.1995. Hence this writ application.

Petitioner's Complaint to Court

The Petitioner challenges the impugned order (P4) on two main grounds. Namely, the decision to reinstate the 4th Respondent is bad in law, unfair, irrational, and arbitrary as the 4th Respondent is over 55 years of age. Additionally, the Petitioner also states that the 2nd Respondent has failed to take into consideration that since the 19th of March 2019, the retirement age for all employees in the Petitioner Bank is governed by their respective Letters of Appointment and Circular No. 2009/003 dated 19.03.2009 (P6).

The second ground the Petitioner alleges is that there has been a failure to give proper reasons, justifying and substantiating the Order directing the Petitioner to reinstate the 4th Respondent. The Petitioner submits that the 2nd Respondent does not have the power to reinstate employees who have passed the age of retirement, thus the Order is ultra vires.

The Petitioner states that it has a legitimate expectation to assume that the legal contract of employment is binding between employer and employee.

The Petitioner is thus seeking the following relief,

e) Grant a mandate in the nature of a writ of certiorari quashing P4 and the decision contained in them.

Respondents' objections

- The application of the Petitioner is bad and/or untenable in law,

- The Petitioner has deliberately suppressed and misrepresented material facts,
- The Petitioner has failed to demonstrate any grounds to maintain this application thus the application is ill-founded and without basis,
- The Petitioner has failed to demonstrate that he has any right or entitlement to have and maintain this application.

This Court will consider the said objections in due course.

It appears that the crux of the Petitioner's argument is the retirement age of the employee. The Petitioner contends that the retirement age is decided by the Petitioner unilaterally while the Respondents argue against it.

The Petitioner's case

The 4th Respondent was employed by the Petitioner as a driver in the year 1995. The Letter of Appointment of the said Respondent X2(a) among other things, stipulates the retirement age as 55 years. This is not disputed by either party. However, the Petitioner by a subsequent Circular P5 had raised the retirement age to 58 years. The said Circular is issued on 19.09.2008.

The following year, the Petitioner issued another Circular marked as P6 whereby the said retirement age was reduced back to 55. The said Circular reads as follows; **"Implement the Public Administration Circular and set the retirement age at 55 years."** The Circular makes the retirement age back to 55 which is also the age the Letter of Appointment states. At this stage, it is pertinent to note that by this Circular, the Petitioner also has given an option for the employees to apply for an extension of services if they so desire. Further, the Petitioner by this Circular has undertaken the burden to evaluate the performance and grant extensions till the age of 57 at the discretion of the Management. The said Circular also permits the Management to grant extensions till the age of 60 pertaining to highly skilled workers. The parties are not at variance that the 4th Respondent does not fall into this category.

It is also not disputed that the 4th Respondent had made a request to grant him an extension before reaching the age of 55 (X2(d)). This was replied to by the Petitioner by letter dated 21.3.12 (X2(e)) whereby they replied as follows, **"We refer to the appeal dated 01st March 2012 with regard to the above and regret to inform you that the management has not considered your appeal favorably."**

The 4th Respondent subsequently prior to reaching his retirement age, on 14.08.2012 petitioned the 2nd Respondent and sought an inquiry. This resulted in the Labour Commissioner holding an inquiry which culminated with the impugned order P4. The Petitioner is not challenging the holding of the inquiry nor the mode of holding or the procedure adopted. It is his grievance that the impugned order is palpably bad in law, unreasonable, irrational, unfair, *ultra vires*, and arbitrary, and lacks proper reasoning.

In challenging the said Order, the Petitioner argues that the reinstatement is wrong as the retirement age of the driver as per the Letter of Appointment and as well as the applicable Circular P6 is 55 years. Thus, ignoring the said provisions amounts to the decision being bad in law. The Petitioner also contends that as per the responsibilities of a driver, he should be able to work long hours and work during the weekends and should be of sound mind, memory and be physically competent and submits that the 4th Respondent in his age is unable to carry out the said responsibilities which have not been considered by the 2nd Respondent.

It is also his contention that the 2nd Respondent had failed to give proper reasons to justify the decision. This would be an opportune moment to consider the impugned order. The Commissioner General in his Order has given consideration to the main point of contest which is the retirement age of the 4th Respondent.

<u>Retirement age</u>

As per the submissions of both parties, the impugned order is challenged on the basis of the Commissioner wrongfully coming to a conclusion on the retirement age of the 4th Respondent.

The Petitioner's contention is that when the 4th Respondent was appointed as an employee of the Petitioner, he was given a Letter of Appointment where it stated that the retirement age is 55. As the Commissioner has correctly held, this offer has been accepted by the 4th Respondent when he signed and accepted the Letter of Appointment, thus making the Letter of Appointment the contract of employment.

However, subsequently in the year 2008, by Circular No. SCL 2008/043 dated 19.09.2008, the Management of the Petitioner issued the Circular marked as P5 which increased the retirement age to 58 years.

The Petitioner argues that when the decision stipulated in P5 was taken, it was purely a management decision and therefore it was a unilateral decision taken by the Management as the retirement age which is a condition in the contract of employment is decided by the Management.

The impugned order of the Commissioner.

The impugned order of the Commissioner (P4) in his reasons, has stated that as per Circular No. 2008/43 dated 19.09.2008, the retirement age of employment has been extended to 58 years thereby amending the condition in the contract of employment pertaining to the retirement age. He has further held that the said amendment as proved before him, has been done as a result of the agreement between the employer and the employee. Thus, he had held that it amounts to a valid offer and acceptance which constitutes a valid contract. Additionally, he has also held that the reduction of the retirement age from 58 to 55 has been done unilaterally. Thus, in the absence of an offer and acceptance, the said reduction does not attract the legality to constitute a valid contract. Therefore, he has concluded that in the absence of a valid contract between the employer and the employee, the said amendment will attract no legal validity.

In the Commissioner's view, only document P5 attracts legal validity which stipulates the retirement age to be 58. Therefore, the Commissioner has held that by P6, the retirement age of the 4th Respondent was reduced to 55 without the prior consent of the Commissioner of Labour.

Thereby the said decision is in violation of the provisions of the Termination of Employment of Workman's Act. Thus, it amounts to a termination.

Can the contract of employment be changed unilaterally?

This Court observes that once a Letter of Appointment is accepted, there is a binding contract between the parties as the offer by the employer has been accepted by the employee. Hence a unilateral change cannot be accepted.

In **Sascon knitting company (PVT) Ltd. Vs Commissioner General of Labour and other SC Appeal 52/2014 decided on 7.8.2020.** it was held that "***The specific terms of employment agreed to by the employee cannot and should not be varied many years after unilaterally by an employer***." The parties are not at variance that as per the original Letter of Appointment which is the contract of employment, the retirement age of an employee is 55 years. However, in this instance, the term of retirement which is a term of employment in the contract of employment has been changed subsequent to the acceptance of the said contract by the employee. We observe the retirement age has been changed not once but twice. The 4th Respondent employee has no objection pertaining to the first change but the agitation lies against the 2nd change. The first change was effected by Circular P5 which increased the retirement age, while the second change is done by Circular P6 which reduced the age back to the pre-P5 position, that is to bring down the retirement age to 55 years which is also the retirement age depicted in the Letter of Appointment. Thus, the question arises as to whether the first amendment was also made unilaterally or made with the agreement of both parties.

In response, the Respondents contended that over a period of time, the trade union to which the 4th Respondent belonged, had agitated for better facilities for the employees of the Petitioner. One of their main contentions was to increase the retirement age to 58 years. Hence, they argued that as a result of their agitation and in consultation with them, the Management had agreed to increase the age of retirement to 58 years and released the Circular increasing the age of retirement to 58.

As it was done in consultation and as a result of the agitation of the unions that represented the workers, it is their contention that the amendment pertaining to the retirement age which is a condition in the contract of employment was done with mutual consent. Thus, they argued that by this Circular (P5), the amendment pertaining to the retirement age in the contract of employment has been accepted by all parties. This position is not corroborated by the 4th Respondent's evidence.

However, it's pertinent to observe that the said Circular P5 does not refer to any consultation or negotiation of the trade union with the workers. On the contrary, the said Circular says the decision to extend the age has been done by the Founder Chairman and the Senior Management which makes it a unilateral decision by the Management. *"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. "*

At the inquiry, the 4th Respondent himself has given evidence which was marked as X1(c) in which the 4th Respondent has informed that his consent has not been obtained to enhance his retirement age to 58.

ප්‍ර - ඔය <u>වැඩි කිරීමට කැමැත්ත විමසුවේ නැතිවා</u> සේම ඒ - 3 ලෙස ලේඛය නිකුත් කළ ලේඛනය කිරීමේ දී

කිසිම කෙනෙකුගේ කැමැත්ත විසුවේ නැහැ කියලා?

පි - අපේන් විමසුවේ නැහැ.

ප්‍ර - ඒ අනුව ඔබතුමා පිළිගන්නවා බැංකුවේ අභිමතය මත චක්‍ර ලේඛනය නිකුත් හැකි බව?

පි - ඔව්. චක්‍ර ලේඛ නිකුත් කරන්න පුළුවන්.

Under cross-examination, the 4th Respondent has admitted that as per the original contract of employment, he was aware that his retirement age was 55.

ප්‍ර - ඒ ගිවිසුම අනුව මහත්තයා දැන ගෙන හිටියා ද, විශ්‍රාම වයස ඒ ගිවිසුම අනුව?

පි - 55යි

ප්‍ර - 55ක් බව දැන සිටියාද ?

පි - ඔව්

මේ අවස්ථාවේ දී ඒ - 1 ලේඛනය සාක්ෂිකරුට පෙන්වා සිටී.

ප්‍ර - එහි මහත්තයා පිළිගෙන තියෙනවා, වයස 55 දී විශ්‍රාම යෑමට සිදු වන බව දැන සිටියා ?

පි - ඔව්.

Further, under cross examination he states as follows;

ප්‍ර - ඒ - 2 වක්‍ර ලේඛනය අනුව 2008 සිට මහත්තයාගේ බලාපොරොත්තු හා අපේක්ෂාවන් නිබුණේ 58 දක්වා සේවය කරන්න පුළුවන් කියලා?

පි - ඔව්

ප්‍ර - ඒ -3 වක්‍ර ලේඛනය නිකුත් කරන්නේ කවදා ද?
පි - 2009,03.19 වන දින.

ප්‍ර - දැන් මේ වක්‍ර ලේඛනය නිකුත් කරන කාලය හා ඒ - 2 වනු ලේඛනය නිකුත් කරන කාලයේ හෝ මහත්තයාගෙන් හෝ මහත්තයාගේ වෘත්තීය සමිතියෙන් විමසීමක් කළාද?
පි - නැහැ.

Further, he had submitted that in fact, as per the terms, the 4th Respondent had the ability to terminate the employment contract before the retirement date after giving prior notice. Under cross-examination, the 4th Respondent had specifically agreed that the decisions that are taken by the Petitioner are taken without consultation of the employees and there is no evidence to show that the 4th Respondent was consulted or the consent was obtained prior to amending the condition of the Letter of Appointment extending the retirement age to 58.

The 2nd witness called on behalf of the worker was the secretary to the trade union, who submitted that they had discussions with the Management to at least extend the age of retirement to 58 and that said the extension was done as a result of agitations. However, the said witness has failed to submit any documentary evidence to substantiate this submission. Further, the secretary of the said union in his evidence stated that there is no collective agreement pertaining to the retirement age. Under cross-examination, he has specifically agreed that there is no such collective agreement.

ප්‍ර - මහත්තය ඒ අදාල නියෝජනය කරන වෘත්තීය සමිතිය බැංකුව සමග යම් කිසි සාමූහික ගිවිසුමක් අත්සන් තබා තියෙනවාද ?

පි - සාමූහික ගිවිසුමක අත්සන් තබා නැහැ.

The representative of the Petitioner who was a senior manager of HR, under cross-examination further submitted that the decision to increase the age from 55 to 58 was also taken by the Management.

ප්‍ර - සාක්ෂිකරු .. 2 කියන චක්‍රල්ඛය තමුන්ට මතකයි ද (...2 ලේඛනය පෙන්වා සිටී) ..2 චක්‍රලේඛනයෙන් සේවකයන්ගේ විශ්‍රාම ගැන්වූ වයස 58 දක්වා දීර් ඝ කරන්න කවුද තීරණය කලේ.

උ - එයත් කළමණාකාරීත්වය තමයි තීරණය කලේ.

In view of the above evidence, we observe that while the secretary of the trade union to which the 4th Respondent belongs to testified that P5 is a result of negotiations and consensus, the 4th Respondent himself has denied it. Also, the Petitioner's witness has taken up the position that the decision reflected in P5 is a management decision hence the fact that P4 is a result of consensus, becomes a disputed fact. It is also pertinent to note that the Respondents have failed to produce any documentary evidence, especially by way of correspondence between the parties pertaining to the alleged negotiations that they had toward the increase of the retirement age. In our view, the

Respondents have failed to demonstrate to this Court that Circular P5 was a result of the negotiations the trade union had with the management pertaining to the extension of the age limit. In any event, it is trite law that the Writ court will be reluctant to act when material facts are in dispute.

Accordingly, in view of the contradictory nature of the evidence given by the 4th Respondent and his witness, and in the absence of any reference to demonstrate that the extension was granted as a result of negotiation this Court finds that there is no sufficient material to establish that the Management's decision to increase the retirement age to 58 was done on a request of the trade union with the consent of the employees, which makes the said decision also a unilateral decision.

Thereafter, the parties are not at variance that the Management unilaterally took a decision to reduce the retirement age to 55. In the given circumstances, the safest conclusion to come to is that both decisions reflected in P5 and P6 have been taken unilaterally by the Management subsequent to the employee entering into his contract of employment. Hence the Commissioner erred when he held that the first amendment pertaining to the retirement age, as reflected in P5, was made at the request of the trade union with the consent of both the employer and employee and that there is an offer and acceptance which constitutes a valid agreement that is lacking in P6.

It is also pertinent to note that if the decision in P5 was taken as a result of negotiations between the trade union and the employer, it was incumbent on the trade union to secure the said decision into the contract of employment of the employees by way of an addendum or by entering into a collective agreement. However, in the absence of such and especially as per the wording of P5, the only conclusion this Court can come to is that P5 is a unilateral decision taken by the Management.

It is also pertinent to note that this Court finds as stated above in this judgment, that there is no material by way of documentary evidence to substantiate that the increase of the age of retirement

to 58 was done by obtaining the consent of the employees. In the absence of such materials, the said extensions too cannot be considered to create a legally valid contract between the parties in the absence of an offer and acceptance.

It is apposite to note that as per the 4th Respondent's original Letter of Appointment, which is a binding contract of two parties, the employee's retirement age is specifically stated as 55. The act of the Petitioner to send the 4th Respondent on retirement upon reaching the age of 55 will not violate the original terms of the contract. It is also pertinent to observe that in the absence of any documentary evidence to demonstrate that the enhancement of the retirement age was done with the agreement of the employee, the said enhancement also would not attract any legality.

Legitimate expectation to work till 58

The 4th Respondent argued that in view of P5, he had a legitimate expectation to work till 58 years. It was also contended that the said Respondent had obtained loans with that expectation.

However, the 4th Respondent has failed to demonstrate with documentary evidence that with this legitimate expectation to work beyond 55, he has obtained loans and other facilities during the said period. The said period is between the issuance of P5 and P6 which is roughly around 6 months. In fact, under cross-examination, the 4th Respondent has specifically said he has not attempted to obtain any loans during this period.

ප්‍ර - මහත්තයට බැංකුවෙ නීතී.. මහත්තයා යෝජනා කළා 58 දක්වා දීර්ඝ කළ චක්‍රෙල්කය හා 55 දක්වා නැවත අඩු කළ චක්‍රෙල්ඛය අතරතුර ණය ගන්න උත්සහ කලේ නැහැ කියලා ?

පි - ඔව්

ප්‍ර - මහත්තයා පිළිගන්නවා ද උත්සහ කළේ නැහැ කියලා ?

උ - වෙන්න ඇති

As per the above evidence, we observe that the 4th Respondent has failed to demonstrate to this Court, that he has obtained any loans with the expectation of working till 58. In the circumstances, the 4th Respondent cannot have any legitimate expectation to work beyond the retirement age that is stipulated in his Letter of Appointment in X2(a).

It is also pertinent to note that when the 4th Respondent accepted employment with the Petitioner, the only expectation that he could have had was to work till he reached the age of 55 as his contract of employment X2(a) specifically states that the has to retire at the age of 55. Subsequently, the Petitioner on their own, has extended the said retirement age to 58 by way of a Circular. The plain reading of the Circular as stated elsewhere in this judgment, only demonstrates that it is a sole Management decision. The said Management decision has definitely benefitted the employees. However, if the employer and employee had negotiated and come to the decisions contained in P5, then it was up to them to incorporate it into the most important contract of employment that bound the relationship between the employer and the employee. In the absence of such, the only conclusion this Court can come to is that it is a decision taken by the employer for the benefit of employees.

In our view, a decision unilaterally taken by the employer as reflected in P5 can always be revised as long as it does not contravene or go beyond the minimum benefits offered to the employees by their original contract of employment or provisions of any written contract in existence at the time between the parties. By bringing in P6, the Petitioner has been careful not to contravene the provision pertaining to the retirement age contained in the original employment agreement contracted between the parties. The extension of services that has been granted to the employee to work from 55 to 58 has been in operation only for a period of 6 months which thereafter has been reduced back to the same term depicted in the original contract of employment. In the absence of any collective agreement to reflect this enhancement of the retirement age, or an addendum to the contract of employment which would have depicted that the retirement age had been raised to 58, it is safe to come to the conclusion that the said enhancement was done only as a management

decision which the management had the right to revise at its will. Hence, in our view, the 4th Respondent's contention that by P4 he had a legitimate expectation to work till 58 cannot be sustained.

Has the 4th Respondent accepted P6?

The next ground contended by the Petitioner was that the Commissioner has failed to appreciate that the 4th Respondent has accepted Circular P6 and thereby has relinquished his right to object. It was their contention that the 4th Respondent, without any objection had continued to work for three more years after the Circular was issued.

The 4th Respondent contended that he had objected to P6 whereby the Management has reduced the retirement age to 55. However, the 4th Respondent failed to submit any documentary evidence to substantiate this position. The secretary to the trade union in his evidence submitted that once Circular P6 was issued, they requested the Management to give them an opportunity for discussions. However, the said opportunity has not been given. He further said that by letter dated 24.05.2011 X2(j), they have informed their objection to the unilateral action taken by the Management to reduce the retirement age and has requested to cancel the said Circular. The relevant portion of the said letter states as follows;

"However, the Public Servants retirement age has now been set as 57 years and therefore we request you to make arrangements to make the retirement age of the Bank 57 years in line with the Public Administration Circular."

The Respondent's witness in his evidence states as follows;

ප්‍ර - මේ අවස්ථාවේ 2011 මැයි 24 දින සේවක වෘත්තිය සමිති විසින් සෙලාන් බැංකුවේ සාමාන්‍යාධිකාරී වෙත යවන ලිපියේ පිටපත ඒ 10 ලෙස සලකුණු කරනවා. මහත්මයා ඒ 10 ලෙස සලකුණු කල ලේඛනය බලන්න. මේ ලේඛනයේ මහත්මයාලා වග උත්තරකාර බැංකුවට මූලිකවම කියලා තියනවා අවුරුදු 58ක් දක්වා කාලය අවුරුදු 55 තෙක් අඩු කරීම සම්බන්දයෙන් තමන්ලා විරුද්ද වෙනවා කියලද?

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ප්‍ර - ඒ අනුව සියලු කරුනු සලකා බලා 58 දක්වා සේවය කිරීමට තිබූ කාලය අවුරුදු 55 කිරීමේ තීරණය අවලංගු කරන්න කියා ඉල්ලා නිබෙනවා ?

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According to this evidence, what is established is that the trade union too has objected to Circular P6 issued in 2009, only in the year 2011 by their letter marked as X2(j). It is also pertinent to observe that even in this letter, the trade union has failed to mention that the previous Circular P5 where the retirement age was increased was made as a result of their agitation or negotiations and was done with the consent of the employer and the employee.

As stated earlier in this judgment, we find there is no documentary evidence to demonstrate either the trade unions or the 4th Respondent had objected to Circular P6 when it was issued. What is available is the evidence of the secretary to the trade union which only demonstrates that even the trade union had objected to the said P6 only after two years, hence the Petitioner's argument that the terms of the Circular were accepted and acquiesced up until the objection two years later.

It is also pertinent to note that the 4th Respondent on 2012.03.01 by X2(d), has sought an extension in view of reaching the age of 55. As per his Letter of Appointment which is the contract of employment marked as X2(a), his retirement age is specifically stipulated as 55 years. The said letter states as follows,

"Your employment if not terminated earlier, shall, ipso facto ceases upon your reaching the age of retirement which shall be 55 years."

In the said letter there is no provision to seek for an extension of services. It is not disputed that the 4th Respondent had requested an extension of services upon reaching his retirement age. In seeking an extension of services by X2(d), it appears the 4th Respondent too has acted under Circular P6 as it is only by the said Circular, provisions were made to reduce the retirement age to 55 and also granted an employee the opportunity to seek extensions until he reaches the age of 57. However, this is subject to an evaluation of his performance, and the exclusive discretion to grant an extension or not is vested with the Management. Thus, in our view, the 4th Respondent himself had submitted himself to P6 and accepted the terms and conditions of P6 when he utilized its provisions and sought an extension. This letter has been replied to on 21.03.2012, where the Management has declined to grant the said extension (X2e),

"We refer to your appeal dated 01st March 2012 with regard to the above and regret to inform you that the management has not considered your appeal favorably

Hence, your retirement date will be 11th September 2012 and you are requested to utilize accumulated Annual Leave prior to retirement"

If the 4th Respondent was objecting to the said Circular P6, he would not have acted under the same and sought to obtain the benefits offered by the said Circular, that is, seeking an extension. Considering all the evidence before this Court, it is our view that if the 4th Respondent was objecting to Circular P6 he should have challenged and contested the validity of the said Circular at the appropriate time. The said Circular has been issued in 2009. However, the 4th Respondent nor the trade union has taken any steps to challenge Circular P6 or even to object to the said Circular during that time period. The first document the trade union representative speaks of in objecting to P6 as per his own evidence is in 2011. There is no evidence to demonstrate to this Court which establishes that the trade union or the 4th Respondent has challenged P6 in any forum when it was issued. The trade union has waited for more than 2 years until the 4th Respondent reached the age of retirement to challenge the validity of P6.

The next ground urged by the Petitioner is that the 4th Respondent has requested and accepted his terminal benefits upon reaching the retirement age under P6. It is the contention of the Petitioner

that when the 4th Respondent applied for the terminal benefits, he accepted Circular P6 and the retirement. Thus, the argument that he is estopped from canvassing the retirement under P6.

Acceptance of statutory reliefs

In developing his argument on acquiescing with P6, the Petitioner further submitted that the 4th Respondent had requested to obtain his terminal benefits. Thus adhering, consenting, and acquiescing to the retirement age stated in the Letter of Appointment and P6 and therefore submitted that the 4th Respondent cannot have a legitimate expectation of his retirement age to extend up to 58 years. In support of this, the Petitioner has submitted a plethora of cases among which **Insurance Corporation of Sri Lanka V Ceylon Mercantile Union III SRISK. LR** and **Upali Management Service Ltd v Ponnambalam 2004 (1) SLR 331** were heavily relied on. This Court has considered the said judgments.

The Petitioner also brought an argument citing **Lanka Multi Moulds (PVT) Ltd v Wimalasena Commissioner of Labor and others (2003) 1 SLR 143** where he submitted that once the workman has obtained his terminal benefits, it amounts to him acceding to the fact that his services have come to an end. Therefore, they argue that the Commissioner of Labour cannot reinstate him with back wages as per P4, as he has already obtained his terminal benefits. It is also pertinent to note that the 4th Respondent has never denied not obtaining the terminal benefits. It was the contention of the Petitioner that the Commissioner has failed to appreciate the acceptance of terminal benefits by the employer and consider if he can be reinstated when he has accepted the said benefits.

It is common ground that to obtain the terminal benefits, the 4th Respondent should have requested the same and also signed the documents requesting the same. Hence the contention of the Petitioner is that the 4th Respondent has accepted that his employment has come to an end when he accepted the said benefits. The 4th Respondent has failed to answer this to the satisfaction of the Court nor has demonstrated to this Court adequate material as to how he obtained the terminal benefits.

The last paragraph of the impugned order states as follows,

සේවායෝජක ආයතනය විවෘතව පවතින බැවින් 1971 අංක 45 දරන කම්කරුවන්ගේ ර අවසන් කිරීමේ (විශේෂ විධිවිධාන) (පසුව සංශෝධිත) පනතේ 6වන වගන්තියේ විධිවිධාන ප්‍රකාශ ඉල්ලුම්කාර සේවන එස්.ඒ.ආර්. පුෂ්පකුමාර යන සේවකයා පෙර සේවා තත්ත්වයන් හා කොන්දේසි මා පසු වැටුප් සහිතව සේවය කඩවීමකින් තොරව 2013.09.11වන දින සිට සේවයේ පුනපත් කිරීම සදහා මෙම නියෝගය කරමි.

In the order, the Commissioner has reinstated the 4th Respondent without a break in service and with back wages. Thus, as per the impugned order, the 4th Respondent is entitled to his back wages and reinstated from 2013.9.11. However, by this time he has sought and accepted his terminal benefits thus creating a situation where he gets his terminal benefits and wages simultaneously. The employee cannot accept the terminal benefits and also be employed in the same institution and accept the salary while retaining the said terminal benefits. We find that the Commissioner has totally failed to address the issue or consider the fact that the 4th Respondent had obtained his terminal benefits when he ordered the 4th Respondent to be reinstated with back wages.

The Petitioner also contended that in view of the Letter of Appointment X2(a) and P6, the workmen's contract of employment has come to an end. Thus, it was their contention that the TEWA will not be applicable in this instance.

Non-applicability of Termination of Employment of Workmen (Special Provisions) Act as amended

The Petitioner also contended that under section 3 (1) (c) (II) TEWA should not have applied to the instant case. Thus, making the act of the Commissioner ultra vires. To get an understanding of this objection it is pertinent to refer to the section. The said section states as follows,

Section 3. (1) The provisions of this Act, other than this section, shall not apply –
(c) to the termination of employment of any workman who has been employed by an employer where such termination was effected by way of retirement in accordance with the provisions of –

(ii) any contract of employment wherein the age of retirement of such workman is expressly stipulated; or

Accordingly, it was the contention of the Petitioner that as per the Letter of Appointment and as per P6, the retirement age of the 4th Respondent is specified and therefore, since the 4th Respondent has reached retirement age there could not have been an inquiry under TEWA.

As per section 3 of the Act, it is clear that the provisions of the Act will not apply if it falls under any of the conditions enumerated in section 3(1). As per section 3 (1) (c) (II), the operation of the Act is excluded in circumstances where a workman's contract of employment expressly stipulates the age of retirement. The contract of employment X2(a) specifically stipulates the age of retirement to be 55. Thus, as stated elsewhere in this judgment, when Circulars P5 and P6 are unilateral Circulars, they cannot attract any legal relationship between the employer and employee. Hence what prevails is the contract of employment which is X2(a). Therefore, in the given circumstances, this Court is inclined to agree with the Petitioner's contention on the applicability of TEWA.

Suppression of material facts

Even though the Respondents raised the objection under the suppression of material facts, their main contention was that the Petitioner has failed to annex the entire proceedings. This Court observes that the Petitioner has pleaded that if the need arises, they be permitted to annex further documents. Especially in prayer (b) and paragraph 10 of the petition. This position is admitted by the Respondents as well. However, with the objections, the Respondents have submitted the entire copy of the proceedings.

In the said circumstances, the Court has been furnished with the entire copy of the proceedings. In the submission of the learned Counsel, he has failed to pursue the said objection nor has he submitted to this Court as to the other relevant material that has been suppressed for the proper adjudication of this case. Accordingly, we are not inclined to accept the said objection. The Respondents have failed to substantiate the rest of the objections to the satisfaction of this Court.

Conclusion

Considering all these facts, this Court is unable to agree with the Respondent's contention in justifying the decision of the Commissioner which is marked as P4. Especially when the Commissioner has gone on the basis of giving legality to Circular P5 and considering the same to be a valid agreement that amended the contract of appointment in X2(a), but in our view he has failed to apply the same test in coming to the conclusion pertaining to the validity of P6.

In coming to this conclusion, the Court considered the absence of any documentary evidence to prove that P5 is an outcome of negotiations between employer and employee. In our view, if we are to apply the same tests the Commissioner has applied to reject P6, we do not find any offer and acceptance when the retirement age was purportedly amended by P5.

Therefore, for the reasons stated in this judgment, we are inclined to accept the Petitioner's submission that upon reaching the age of 55, the 4th Respondent has reached the age of retirement, thus, making the order marked P4 bad in law. Accordingly, we are inclined to grant the relief prayed in prayer (e) of the Petition.

Considering all the facts of this case and especially the fact that the 4th Respondent is no longer employed from the year 2012, we do not intend to award any cost.

Judge of the Court of Appeal

C.P Kirtisinghe, J

I agree.

Judge of the Court of Appeal