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

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

CA/WRIT/508/2021

Vithanage Vajira Kelum Perera
No. 720/1/1,
Kottawa South,
Pannipitiya.

PETITIONER

Vs.

1. Sudath Rohana
   Chairman
   Independent Television Network,
   Wickramasinghepura,
   Baththaramulla.

1a. Niroshan Premarathne
   Chairman
   Independent Television Network,
   Wickramasinghepura,
   Baththaramulla.

1b. Ganaka Amarasinghe
Chairman
Independent Television Network,
Wickramasinghepura,
Baththaramulla.

1c. Sudarshana Gunawardena
Chairman
Independent Television Network,
Wickramasinghepura,
Baththaramulla.

2. W.P.A.M. Wijesinghe
General Manager,
Independent Television Network,
Wickramasinghepura,
Baththaramulla.

3. A.J. Karunarathne
Inquiry Officer,
No 154/1,
Kotagedara Road,
Madapatha,
Piliyandala.

4. Independent Television Network,
Wickramasinghepura,
Baththaramulla.

5. Jagath P. Wijeweera
   Secretary to the Ministry of Mass Media,
   163, Asi Disi Medura,
   Kirulapone Mawatha,
   Polhengoda.

5a. V.P.K. Anusha Pelpita
   Secretary to the Ministry of Mass Media,
   163, Asi Disi Medura,
   Kirulapone Mawatha,
   Polhengoda.

RESPONDENTS

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Asthika Devendra with Aruna Madushanka for the Petitioner.

Manoli Jinadasa with Nilushi Dewapura for the 1st, 2nd and 4th Respondents.

Sumathi Dharmawardana, PC, ASG with Shiloma David, SC for the 5th Respondent.

Argued on : 12.05.2023

Decided on : 29.08.2023

Written submissions: Petitioners - 07.08.2023

1st, 2nd, 4th Respondents - 14.07.2023

Sobhitha Rajakaruna J.

The Petitioner was an employee of the 4th Respondent- Independent Television Network ('ITN') and he has tendered his letter of resignation dated 30.05.2022 resigning from his services at ITN. The reasons for resignation given in the said letter are confined only to alleged personal and establishment matters which are not divulged therein. Moreover, in the said letter he has taken the privilege of thanking ITN for all the support received by him during his twenty-two-year period of service. Upon receipt of the said letter of resignation, the General Manager of ITN has accepted such resignation with effect from 01.07.2022.

In the instant Application, the Petitioner challenges inter alia the following disciplinary orders reflected in the letter dated 14.07.2021 marked 'P18' which is issued against the Petitioner by ITN;

i. suspension of the increment for a period of two years from the year 2020.
ii. depriving promotions for a period of three years from the year 2021.
iii. severe warning.
iv. non-payment of the unpaid half wages for the period under suspension.

The above disciplinary orders have been imposed against the Petitioner as a result of him being found guilty of all four charges, contained in the charge sheet dated 14.09.2020 marked 'P5', after a formal disciplinary inquiry. The final report of the said formal disciplinary inquiry has been issued on 10.04.2021 and it is marked 'P16'. The Petitioner seeks mandates in the nature of writs of certiorari quashing the said a.) charge sheet b.) inquiry report and c.) disciplinary orders.

The Petitioner has been appointed as an Assistant Manager (News) by letter dated 01.08.2011 marked 'P2B' whereas he had joined the ITN in the year 2001. The letter 'P2B' clearly spells out that the service conditions stipulated in the original letter of appointment dated 30.10.2001, marked 'P2A' will continue to be applicable subject to amendments. In terms of clause 10 of the said letter of appointment 'P2A', the Petitioner is barred from engaging in full-time or part-time external matters, either paid or unpaid, without obtaining prior approval. According to the provisions of clause 9 of the said 'P2A', the Petitioner as an employee is not

entitled to engage in any type of profitable or unprofitable activity, which is considered to be harmful to the wellbeing of the ITN during his tenure of service. The allegation against the Petitioner in a nutshell is that he has served as a Commentator at the radio station named 'Rasa FM' without permission of the managing authority of the ITN.

At the outset, what needs consideration by this Court is whether the Petitioner is entitled to file an application for Judicial Review in respect of the disciplinary orders imposed against him and the disciplinary proceedings conducted by the ITN. The main contention of the 1st, 2nd, 4th and 5th Respondents is that the decisions impugned by the Petitioner are related to internal disciplinary issues arising out of the employer-employee relationship which comes within the ambit of private contractual law and thus, those matters do not warrant the exercise of the writ jurisdiction of this Court. Additionally, such Respondents assert that the Petitioner is not entitled to maintain the instant application due to his failure to pursue the several alternative remedies available to him. The 1st, 2nd and 4th Respondents rely on the judicial precedent enunciated in ***Ranjith Upali Wasantha Kumara Dissanayake v. The People's Bank and others CA/Writ/241/2018 decided on 12.11.2018, S.C. Jayawickrama v. National Savings Bank and others CA/Writ/112/2016 decided on 18.11.2020, Gawarammana v Tea Research Board and others [2003] Sri L.R. 120, U.L. Karunawathie v People's Bank and others CA/Writ/863/2010 decided on 12.05.2015*** in order to establish that all affairs and contracts of employment in statutory bodies which have a nexus to the state and is also established by an Act of Parliament are not subject to Judicial Review.

While accepting the proposition that the matters arising solely out of contracts of employment are not subject to Judicial Review, I have taken a broader approach in respect of the jurisprudence in this area of law, especially in reference to contracts entered into between the employees and public institutions, in the cases of ***W. G. Chamila v. Urban Development Authority and others CA/WRIT/215/2022 decided on 26.10.2022*** and ***Devendra Budalge Sudesh Lalitha Perera v. Janatha Estates Development Board and others, CA/WRIT/004/2022 decided on 06.10.2022***. In the said ***W. G. Chamila*** case this Court has considered judicial pronouncements in several other cases to examine whether the Court of Appeal could exercise its writ jurisdiction when the nature of the dispute described in the review application is based on a contract of employment between the employer and the employee. This Court,

considering all such judgments, including the decision in ***Devendra Budalge Sudesh Lalitha Perera*** case, has decided in the said ***W. G. Chamila*** case that the Court of Appeal has the discretionary power to exercise the writ jurisdiction even on a question arising out of a contract of employment if the disciplinary order of a public authority was in breach of statutory restrictions/provisions and also if the public authority has taken a decision assuming a jurisdiction which he does not have or exceeding his jurisdiction by violating a statutory requirement which eventually comes under any of the established grounds of judicial review.

The Petitioner contends that he is entitled to come before this Court and seek relief by way of writs of certiorari if there is a statutory flavour within the relationship between the parties and also there exists a violation of natural justice by the public authority. Hence, it is important to assess whether the 1st, 2nd and 4th Respondents have violated any statutory provisions or rules of natural justice when making the aforesaid disciplinary orders in reference to the contract of employment between the Petitioner and the ITN.

The Petitioner in order to justify his Application to this Court for Judicial Review submits five main reasons: 1) the formal disciplinary inquiry has been conducted in a biased and unfair manner, 2) the charge sheet is ex facie defective, 3) the disciplinary order dated 14.07.2021 marked 'P18' was issued by the 2nd Respondent, who is not the disciplinary authority, 4) the prosecution failed to prove at the inquiry that the Petitioner has not obtained prior approval for the disputed radio commentary, and 5) the 3rd Respondent has failed to consider the objections raised by the Petitioner at the inquiry.

The Petitioner raises the above first argument that the formal inquiry has been conducted in a biased and unfair manner due to the rejection of his application at the inquiry to summon Mr. Dhanushka Ramanayake (former Working Director of ITN) and similarly, allowing the prosecution to give evidence based on the personal documents of the Petitioner which were not listed under the list of documents in the charge sheet. Nonetheless, it appears that the Petitioner also has not duly listed the said Mr. Ramanayake as a witness. Now a question arises whether this Court should analyze the full evidence led at the said domestic inquiry to inquire about the lists of witnesses etc. filed by parties and also the circumstances that prevailed at the inquiry stage perhaps upon which the 3rd Respondent Inquiry Officer has arrived at the impugned decisions.

This Court has constantly decided that when the facts are in dispute and in order to get at the truth it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity to examine their witnesses.[1] Similarly, I must draw my attention at this stage to the following paragraph of Jayasuriya J in ***Kalamazoo Industries Ltd. and others v. Minister of Labour and Vocational Training and Others [1998] 1 Sri L.R. 235 at p. 249***

> *"...This court must keep prominently in forefront that it is exercising in this instance a very limited jurisdiction quite distinct from the exercise of appellate jurisdiction. Relief by way of certiorari in relation to an award made by an arbitrator will be forthcoming to quash such an award only if the arbitrator wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces an award which is eminently irrational or unreasonable or is guilty of an illegality. The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order and if the arbitrator's award was not set aside in whole or in part, it had to be allowed to stand unreversed...."*

The Petitioner alleges bias on the part of the 3rd Respondent emphasizing the fact that the appointment of the Inquiry Officer has been made by the Chairman. I take the view that it is incumbent upon this Court to adopt proper principles on bias when assaying such allegations of the Petitioner. A mere averment in reference to bias cannot be taken into consideration at all times without adequate evidence thereto. His Lordship Justice A.H.M.D. Nawaz P/CA (as he was then) in ***Sandresh Ravindra Karunanayake v. Hon. Attorney General and others CA/Writ/63/2020 decided on 07.07.2020 p.15*** has referred to a judgment (***Webb and Hay v The Queen (1994) 181 CLR 41, (1994) 122 ALR 41***) decided by the High Court of Australia in 1994 where Deane J in the said case has identified the following three principles relating to bias; "*First, there is the principle that no one should be in a position to decide a matter in which he has an interest whether pecuniary or otherwise. Secondly, there is the principle of avoidance of partiality or bias. Thirdly, we have the principle that justice must not only be done but must also be seen to be done*". In such a backdrop the mere statement of the Petitioner that the 3rd Respondent was appointed by the Chairman of the ITN is not sufficient to satisfy his claim on the rule against bias.

[1] See Thajudeen v. Sri Lanka Tea Board and another [1981] 2 SLR 471

Further, the Petitioner submits that allowing the prosecution to lead evidence on his personal documents without amending the list of documents would amount to a violation of Clause 14.8 of Chapter XLVIII of the Establishments Code ('E-Code'). As opposed to the said argument, 1st, 2nd and 4th Respondents contend that the Board of Directors of the ITN by way of a board resolution (see 'R5') has decided to adopt the provisions of Volume II of the E-Code only in the instances where the disciplinary orders of the ITN do not provide for certain matters and when the Board of Directors have not taken a contrary decision on such matters. I have no grounds to form a different opinion against the stand taken by those Respondents on the applicability of the E-Code. It is pertinent to note that no adequate material has been placed before this Court to distinguish between the ITN's own disciplinary orders and the E-Code provisions which were previously adopted by the Board of Directors.

Furthermore, the Petitioner claims that the impugned disciplinary order 'P18' has been issued by the General Manager of the ITN (2nd Respondent) and he is not the authorized person to issue disciplinary orders and such conduct is in violation of Clause 23 of Chapter XLVIII of the E-Code. In addition to my observations above on the applicability of the E-Code in respect of disciplinary affairs of ITN, I must draw my attention to the doctrine of ratification referred to by the 1st, 2nd and 4th Respondents. As mentioned by such Respondents, the said doctrine stems from the Latin maxim '*Omnis ratihabitio retrorahitur et mandato priori aequiparatur'*- every subsequent ratification has a retrospective effect and is equivalent to a prior command. (See- ***'Legal Maxims and Phrases'*** by Nanda Senanayake 1st Ed. April 2023 p.930). I see no reason to reject the argument of the Respondents on this point of law mainly because there is no conflict that emanates during these proceedings between the 1st Respondent, Chairman of ITN and the 2nd Respondent, General Manager upon the impugned disciplinary orders.

Another main contention of the Petitioner is that the charge sheet marked 'P5' is ex facie defective due to the following purported technical errors:

i. Omitting to mention the date and time of the offence in the charge sheet.
ii. No document has been attached to the charge sheet to establish the fact that the Petitioner had worked at the 'Rasa FM' radio station.
iii. The frequency modulation (FM) or the date and time when the alleged commentary was aired have not been mentioned.

iv. Holding a disciplinary inquiry under a defective charge sheet is illegal, irrational, unreasonable and procedurally improper.

The 1st 2nd and 4th Respondents have placed reliance on ***S.A. Nirosha Lalani v. Eastern University of Sri Lanka CA/Writ/124/2016 decided on 16.09.2019*** where His Lordship Justice Mahinda Samayawardhena has held as follows;

> *"The charge sheets and the decision to terminate the services are challenged not on merits but largely, if not solely, on the high technical ground that they did not emanate from the lawful authority.*
>
> *The Petitioner says that the charge sheet signed by the Vice Chancellor of the University is bad in law as he is not the disciplinary authority of the Petitioner. According to the Petitioner, the disciplinary authority of her is the University Council (of which the Vice Chancellor is the Chairman[2]). The Respondents do not accept that position on the premise that her appointment as the Senior Assistant Bursar is to the Swami Vipulananda Institute of Aesthetic Studies, which is a Higher Educational Institute established under the Universities Act. In the facts and circumstances of this case, however, there is no necessity for me to rule on that question as it is in my view not decisive to arrive at the final decision in this case. Therefore I assume that the Council of the University is the disciplinary authority of the Petitioner.*
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> *Then the Petitioner says that the termination of her services by the University Council (which was done mainly upon the Disciplinary Inquiry Final Report marked 2R2) is bad in law as, according to the Letter of Appointment marked P1, the appointing authority is the University Grants Commission and therefore, in terms of section 14(f) of the Interpretation Ordinance[3], person who has the power to appoint any officer shall have the power to remove him.*
>
> *However, this argument is not entitled to succeed because section 14(f) of the Interpretation Ordinance is applicable when the legislature has not provided for the ground or mode of dismissal, which is not the case here. In terms of section 45(2)(xii) of the Universities Act, the Council has that power. This has also been acknowledged by the University Grants Commission by 2R7B.*

[2] Vide section 44(2) of the Universities Act, No. 16 of 1978, as amended.
[3] No. 21 of 1901, as amended

Then the question is whether the decision to terminate the services of the Petitioner by the Council can be quashed on the basis that the charge sheet was issued under the hand of the Vice Chancellor without the proof of prior approval by the Council...

.... The high-flown technical objection that there is no documentary evidence that the University Council approved the charge sheet before it was signed by the Chairman of the University Counsel, does not, in my view, violate the audi alteram partem rule, which means, listen to both sides before a decision is taken. That also does not violate the rule against bias unless there is evidence to the contrary."

Having considered the above judicial pronouncement and the circumstances of this case I am compelled to arrive at a finding that the alleged defects in the charge sheet are more towards a cluster of objections which are technical nature. It cannot be assumed that those grounds are strong enough to persuade this court to exercise the writ jurisdiction upon such allegations.

The Petitioner raising another claim asserts that allowing the prosecution, at the inquiry, to lead evidence with a DVD (digital video disc) violates the provisions of Section 7 (1)(b) of the Evidence Ordinance (Special Provisions) Act No. 14 of 1995. In opposition to such argument, the 1st, 2nd and 4th Respondents contend that a disciplinary inquiry is not obliged to abide by the provisions of the Evidence Ordinance. I am of the view that the Petitioner's argument cannot be sustained unless he establishes an appropriate rationale to adopt the provisions of the Evidence Ordinance during the course of the subject disciplinary inquiry. The attention of Court has been drawn by the said Respondents to the decision in ***Asian Hotels and Properties PLC v. Frederick S. Benjamin and others [2013] 1 Sri L.R. 407*** where Dr. Shirani A. Bandaranayake CJ has held;

Similarly, the provisions of the Evidence Ordinance, would not be applicable in an inquiry conducted by the Labour Tribunal or by the Arbitrator. The Evidence Ordinance has clearly stipulated the degrees of proof and the ascertainment of standards that are necessary for the administration of justice. As the Labour Tribunals should dispense just and equitable relief, to arrive at their decisions, they would not require strict degrees of proof that is required in a court of law since there is no necessity to comply with the provisions of the Evidence Ordinance."

Another grievance of the Petitioner is that the formal disciplinary inquiry has not been conducted by a public officer in terms of Clause 17.6, 17.9 and 17.7 of Chapter XLVIII of the E-Code and the objection raised in that regard has not been considered by the inquiry officer. In a scenario where the Board of Directors of the ITN has not fully adopted all the provisions of the E-Code, I am not inclined to make any decision here solely on the above provisions of the E-Code. I am mindful of the fact that the E-Code, especially its' Volume II, deals with the disciplinary control of all public officers other than public officers referred to in Articles 41, 51, 54 and 114(6) of the Constitution and members of the tri forces. I do not doubt the inherent powers of this Court to consider the provisions of the E-Code in order to establish a criterion that should have been adopted during the process of decision-making at the said formal disciplinary inquiry. However, based on the circumstances of this case I am not convinced that this is a fit case for me to formulate such a criterion to arrive at any finding in relation to the proceedings of the said inquiry.

Now I must advert to inquire into the assertions of the Petitioner who claims that he has obtained prior approval for the ‘cricket commentary’. He relies on the contents found in the documents marked 'P8' to 'P10'. The dispute in the instant application revolves around the provisions of clauses 9 and 10 of the contract of employment marked 'P2A'. The issues relating to legal, ethical and business strategy can be included in any contract of service and it is not a novel concept in the law of contract. Accordingly, any employee to agree to refrain from engaging or participating in another undertaking or activity which competes with the current employment or business is a usual condition in regard to their fiduciary duty to the company. Such a clause in the contract of service is vital to any employer. An employee is certainly bound by a non-compete clause, provided such conditions are clearly stipulated in a contract of service. It is abundantly clear that clauses 9 and 10 of the contract of employment marked 'P2A' comes within the ambit of a 'non-compete agreement'. Thus, obtaining or granting approval to engage in competing activities and undertakings should be done in a responsible manner by an authorized officer. Hence, the defense taken by the Petitioner relying on the documents 'P8' to 'P10' cannot be accepted as such documents do not disclose any lawfully granted approval by an appropriate authority. No sustainable nexus is seen between the Working Director who has placed an endorsement on ‘P9’ and the absolute management authority of ITN.

In light of the above, I am of the view that the matters referred to this Court by the Petitioner for Judicial Review do not warrant this Court to exercise its' writ jurisdiction. For completeness, I need to draw my attention to the argument of the Respondents that the Petitioner has invoked the prerogative remedies of this Court whilst alternative remedies are available to him. The 1st, 2nd and 4th Respondents describe a complaint to the Commissioner of Labour under section 3(1) of the Industrial Disputes Act as one of the alternative remedies available to the Petitioner. As I have observed in the aforesaid ***W. G. Chamila*** case, the well-established principle is that Judicial Review is available if the alternative remedy is not adequate and efficacious. It is not necessary for me to expand this Judgement to discuss the alternative reliefs as I have already found that this Court should not exercise its writ jurisdiction upon the matters referred to by the Petitioner.

In these circumstances, I hold that the Petitioner is not entitled to any of the reliefs as prayed for in the prayer of his Petition. Therefore, I proceed to dismiss the instant Application.

Application is dismissed

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal