

**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 and Mandamus
under and in terms of Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.*

Jayasinghe Arachchige Ranjith
Jayasinghe
Bodhirukkarama Road,
Pamunugama,
Alubomulla,
Panadura.

CA/WRIT/42/2021

PETITIONER

Vs.

1. The University Grants Commission
20, Ward Place,
Colombo 07.
2. Professor Sampath Amaratunge
Chairman
3. Professor Janitha A. Liyanage
Vice-Chairman
- 3A. Professor Chandana R. Udawaththa
Vice- Chairman
4. Professor Kollupitiye Mahinda
Sangharakkitha Thero
- 4A. Professor Kotapitiye Rahula Thero
5. Professor A.K.W. Jayawardane

6. Professor Vasanthi Arasaratnam
7. Professor Premakumara de Silva
8. Palitha Kumarasinghe

All Members of the
University Grants Commission,
20, Ward Place,
Colombo 07.

9. University of Visual & Performing
Arts
21, Albert Crescent,
Colombo 07.
10. Professor Rohana P.
Mahaliyanaarachchi
Vice-Chancellor and Chairman of the
Council
University of Visual & Performing
Arts,
21, Albert Crescent,
Colombo 07.
11. Professor S.P.D. Liyanage
Dean – Faculty of Graduates
- 11A. Professor W.A. Kolitha Banu
Dissanayake
Dean-Faculty of Graduate Studies
12. Dr. Indika Ferdinando
Dean- Faculty of Dance & Drama
13. Chiltus Dayawansa
Dean-Faculty of Music
- 13A. Dr.P.K.S.P. Rathnakumara
Dean- Faculty of Music
14. M.Jagath Raveendra
Dean- Faculty of Visual Arts
15. Professor Kusuma Karunaratne

16. Professor Rohana Lakshman Piyadasa
17. Gunasena Thenabadu
18. C.Maliyadda
19. T.Dharmaraja
20. Ranjith Liyanage
21. Lakshman Abeysekara
22. J.A.S.P Aravinda
- 22A.Professor Nimal Keerthi Dangalla
23. B.M. Dayawansha
- 24.M. Iranga Samindani Weerakkody
- 24A.Dr. Tharanga Dandeniya

All Members of the Council of the
University of Visual & Performing
Arts
21, Albert Crescent,
Colombo 07.

- 25.University Services Appeals Board
94,10,
Ananda Rajakaruna Mawatha,
Colombo 10.
26. Palitha Fernando
Chairman
University Services Appeals Board
94,10
Ananda Rajakaruna Mawatha,
Colombo 10.
- 26A.Maithree Wickramasinghe
Chairman
University Services Appeals Board,
94,10,
Ananda Rajakaruna Mawatha,

Colombo 10.

27. Neville Abeyrane
Vice-Chairman
University Services Appeals Board,
No. 94,10,
Ananda Rajakaruna Mawatha,
Colombo 10.

27A. Professor W.G.D. Darmarathna
Vice- Chairman
University Services Appeals Board,
94,10,
Ananda Rajakaruna Mawatha,
Colombo 10.

28. Dr. (Mrs) Neela Goonesekara
Member,
University Services Appeals Board,
94,10,
Ananda Rajakaruna Mawatha,
Colombo 10.

28A. Sugath Kaldera
Member
University Services Appeals Board,
94,10,
Ananda Rajakaruna Mawatha,
Colombo 10.

RESPONDENTS

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : Chamantha Weerakoon Unamboowe with Tersha Nanayakkara for the
Petitioner.

Vikum de Abrew, PC ASG with Amasara Gajadheera, SC for the
Respondents.

Argued on: 11.05.2023

Written submissions: Petitioners - 09.08.2023
Respondents - 01.09.2023

Decided on: 05.09.2023

Sobhitha Rajakaruna J.

The Petitioner filed the instant Application alleging that his appointment to the post of Lecturer (Probationary) at the University of Visual & Performing Arts ('University') was, wrongfully and devoid of any justification, delayed by six years from the date of his initial selection to the said post in 2013. He contends that he has a legitimate expectation to have the date of his appointment to the said post be antedated to the date of his initial selection.

In focus of the factual matrix of this case, the Petitioner possesses a Degree in Fine Arts and a Master of Arts in Dance. Subsequent to being promoted to the position of an Instructor (Grade II) with effect from 25.10.2011 he was placed on a U-AS 1 (Grade II) salary scale at the said University. While serving as an Instructor the Petitioner applied for the post of Lecturer (Probationary), advertised by the said University in the *Lankadeepa* Newspaper dated 15.08.2013 marked "P23". The advertisement called for applications under the respective 1st, 2nd, 3rd and 4th categories of the Scheme of Recruitment marked ("9R2") and the Petitioner submits that he applied for the post of Lecturer (Probationary) under the 3rd category. It is admitted by both the Petitioner and the 9th to 24th Respondents ('Council' of the University) that a total of ten candidates applied for the said post; 07 candidates qualifying under the 1st Category; 02 candidates qualifying under the 2nd category and only the Petitioner qualifying as a candidate under the said 3rd category.

The said advertisement "P23" indicates that special preference would be given to candidates who possess theoretical knowledge and practical skills in *Kadawara Kankariya* and *Shanthikarmaya*. The Petitioner proceeds to emphasize that he possessed the requisite skills in the concept of *Kadawara* dancing which was a key component in his dissertation submitted for his Master of Arts in Dance.

The Petitioner was interviewed on 19.05.2014 and the respective mark sheet is annexed as "9R3(c)". It is alleged by the Petitioner that he was examined at the said interview on the

Kadawara concept of dancing for which he claims to have successfully displayed a sufficient amount of practical and theoretical knowledge. The Petitioner further states that he secured the highest marks at the practical examination among all the candidates and thereby he was the most suitable candidate for the post of Lecturer (Probationary).

The Petitioner was thereafter informed by a letter marked “9R4” by the Vice-Chancellor of the said University that the Petitioner was recommended by the Selection Committee for the appointment and it was approved by the Council of the University on 09.07.2014. The selection of the Petitioner for the post of Lecturer (Probationary) was subsequently submitted for approval of the University Grants Commission (UGC) by letter dated 23.07.2014 marked “9R5”. However, the UGC refused to approve the said selection on the following grounds in their decision marked “9R7”:

- I. “Not allocating any marks at the practical test for the 5 candidates who falls under category I, which is a portion 30% of the mark sheet of this selection.”
- II. “Mr. Ranjith Jayasinghe has been recommended by the selection committee under category 3; overlooking 5 candidates falling to category 1 and 2 candidates falling to category 2, without a strong justification.”

Nonetheless, due to the alleged failure of the said University to fill the vacancy for the post of Lecturer (Probationary) for a lapse of 2 years, the Petitioner, appealed to the University Services Appeals Board (USAB), seeking an order directing the UGC and the University to appoint him to the said post and pay his arrears of salary from the date of his selection (Vide-P38). However, pending the hearing of the Petitioner’s appeal a 2nd advertisement dated 23.11.2016 marked “P39” was published by the University calling for applications for the same post. The Petitioner proclaims that the USAB noted that he could take part in the interview process, and come before the USAB in the event he was not selected to the relevant post.

Anyhow, the interviews under the said 2nd advertisement were subsequently cancelled and a 3rd advertisement was later published, marked “P43”. Eventually, recruitment in terms of the 3rd advertisement was also cancelled due to reasons not known to Court. After being submitted by the Petitioner about the cancellation of the said 3rd interview, the USAB by an

interim order dated 04.12.2018 marked “P46” directed the above 1st to 24th Respondents to conclude the recruitment process within a period of 3 months from the date of the said order and further observed that in the event of a delay, it would be reasonable to appoint the Petitioner to the post of Lecturer (Probationary) in light of him initially being selected to the said post in 2013. It is observed that a 4th advertisement was published subsequently for the vacancy of the same post, to which the Petitioner then applied and was selected for the second time for the post of Lecturer (Probationary). Upon his selection and consequent approval from the UGC for this selection, the Petitioner was appointed to the post of Lecturer (Probationary) in the Department of Kandyan Dance attached to the Faculty of Dance and Drama at the said University by the letter of appointment dated 03.01.2020 marked “P54”.

The Petitioner thereafter, during the pendency of his Appeal, submitted his concerns to USAB regarding the effective date of his appointment. However, the USAB in its final order dated 19.05.2020 marked “P56” expressed the view that it is unable to make an order that the Petitioner’s recruitment pursuant to the 2nd selection process be backdated to the first which had been concluded by that time. The USAB emphasized its decision by stating the following:

- I. “If the Appellant has faced a 2nd selection process in response to the second advertisement and if he has been selected and appointed consequence to the 2nd recruitment process, totally independent of the 1st, there is no possibility of backdating his appointment.”
- II. “If the Appellant on the other hand has been appointed on the basis of the 1st selection process, where he was selected after a written examination and an interview, and recommended, and due to the failure on the part of the University Grants Commission his appointment was not approved, which appointment has now been approved, he should be entitled to have his appointment backdated to the date of disapproval by the Commission. Since in that event the Commission has now corrected the error they previously committed by disapproving this appointment”.

The Petitioner thereafter opposed this decision in the instant Application before this Court by claiming that it was “unreasonable, arbitrary and ultra vires”. The prayer of the Petition of the Petitioner formally requests the Court to provide reliefs in the form of the following:

- a) Issuing a mandate in the nature of a writ of Certiorari quashing the Order dated 19.05.2020 of the USAB marked "P56".
- b) Issuing a mandate in the nature of a writ of Certiorari quashing the decision of the University along with the decision of the Council made on 27.08.2020 at the 174th Council meeting that there will be no change in the date of the Petitioner's appointment to the post of Lecturer (Probationary) and also the confirmation of the said decision at the 175th Council meeting dated 22.09.2020 marked "P58".
- c) Issuing a mandate in the nature of a writ of Mandamus directing the UGC and the Council of the University to backdate the appointment of the Petitioner as Lecturer (Probationary) effective from 09.04.2015, which is the date of the UGC's original refusal to approve the selection of the Petitioner to the said post.
- d) Issuing a mandate in the nature of a writ of Mandamus directing the Council of the University to pay to the Petitioner all arrears of salary and other benefits with effect from 09.04.2015.

The Petitioner contends that one of the reasons given by the UGC in its refusal to antedate the effective date of his appointment to the said post, was on the basis that antedating his appointment would not be deemed appropriate as the Petitioner has faced an additional interview separate from the other candidates who applied for the same said post. The Petitioner argues that this refusal is "grossly misconceived" as the sole reason for him facing a second interview was due to the USAB refusing the Petitioner's interim application to stay the process of filling the vacancy for the post of Lecturer (Probationary) (Vide- "P42").

Apart from this, as previously mentioned the Petitioner further argues that, following his initial selection to the said post, though his appointment was not approved by the UGC, the University entrusted him to conduct the functions of a Lecturer (Probationary). These functions are specified in his Petition as a) conducting classes for all undergraduates from first to final year, b) functioning as an examiner at all undergraduate examinations by setting question papers, marking answer scripts and, c) Serving as a member of the Board of Examiners at the practical examination (Vide- "P7-P20"). The Petitioner goes on to describe the role of an "Instructor (Grade II)", which was the position held by the Petitioner at the time, to mean "Academic Support Staff". Anyhow, the Petitioner has failed to provide this

court with sufficient evidence to prove that the above mentioned tasks are unique to the position of a Lecturer (Probationary) and are not expected to be performed by an individual in the position of an “Instructor (Grade II)”. As opposed to such arguments the Council and the University asserts that the performance of the Petitioner at the aforementioned 2nd interview process was different from that of the 1st, which took place six years earlier.

In light of the above what needs resolution by this Court in the instant Application is whether the Petitioner is entitled to get his appointment ("P54") antedated based on the outcome of the initial interview held on 19.05.2014. Hence, this court is required to examine the following questions:

- I. Whether the petitioner is entitled to raise a claim based on the initial selection process which was compelled to be abandoned by the University?
- II. What is the effect of abandoning or canceling a selection process relating to recruitment of the University staff?
- III. Has the Petitioner waived his rights by exhausting his entitlement of reapplying for the same post and facing a distinct interview?
- IV. Can the Petitioner seek relief based on the recommendations made following the initial interview, without challenging the abandonment of the initial selection process?

The primary relief sought by the Petitioner is to quash the USAB order dated 19.05.2020. (“P56”) and also the decision taken by the Council that there shouldn't be any change in the date of the Petitioner’s appointment as Lecturer (Probationary). The Petitioner has appealed to the USAB seeking similar reliefs. Additionally, the Petitioner is seeking a Writ of Mandamus in order to get the appointment of the Petitioner antedated. However, it is paramount to note that the Petitioner is not challenging the decision of the authorities to call for fresh applications for the appointment to the relevant post by re-advertising the same. In other words, the abandonment of the initial process relating to the selection of candidates is not being challenged.

It is significant that the process of selection of a candidate does not consist of a single step but includes an interview, a practical examination etc., particularly according to the scheme of

recruitment. The initial selection process has not been completed as no final appointment has been made after a formal winding up of such a process. Although the Council of the University has approved the Petitioner's name during the initial selection process, no final decision was made in that regard due to the defects highlighted by the UGC found in the process of the said selection process. The UGC by its letter dated 27.04.2015. ("9R7") has instructed the University to re-advertise the said post of Lecturer (Probationary). Ironically, such decision of the UGC remains unchallenged and stands valid up to date as the Petitioner is contesting only a subsequent decision taken by the University. On a careful perusal of the prayer of the Appeal "P38" lodged in the USAB by the Petitioner and the law relating to appeals to USAB, I am unable to presume that the Petitioner's above Appeal is comparable to a due protest or challenge against the UGC decision marked "9R7".

The Petitioner has not provided adequate material in order to consider his reliefs by this court, based on a process of selection abandoned previously as enumerated above. The Petitioner, without challenging the UGC decision, waited until a consequential or ancillary decision was taken by the University to file the instant Application. I have considered the 'conduct' of a Petitioner mainly referring to acquiescence in the case of *K.G.D Walter Abeyesundera and another vs. S. Hettiarachchi, Secretary, Ministry of Tourism and others CA / WRIT/371/2020 decided on 22.09.2021*, quoting a paragraph from *Judicial Remedies & Public Law, 4th edition. (at para 9-17)*

Waiver involves voluntary or intentional abandonment of a known, existing legal right (Vide- *M. P. Jain & S. N. Jain, 'Principles of Administrative Law', 9th edition, p. 2543*). The Indian Supreme Court has observed¹ that a waiver is an intentional relinquishment of a known right and there can be no waiver unless the person against whom the waiver is claimed has full knowledge of his rights and facts enabling him to take effectual action for the enforcement of such rights. In this backdrop, no contrary evidence can be seen against the fact that the Petitioner in this instant Application had the full knowledge of his right to canvas the previous decision of the authorities. This implies that the Petitioner has waived whatever his

¹See M.P. Jain & S.N Jain, "Principles of Administrative Law" (9th ed); p. 2543; Associated Hotels India Ltd v S.B.Sardar Singh, AIR 1968 SC 933: 1968 (2) SCR 548. Also see: Shri Krishandas Tikara v State of Madhya Pradesh, AIR 1977 SC 691: (1977) 2 SCC 741; Greater Bombay Municipal Corporation v Dr. Hakimwadi Tenants Association, AIR 1988 SC 233, 240: 1988 Supp SCC 55.

entitlements in respect of the 1st selection process by facing the interview held during the final selection process which was independent of the first one. Christopher Forsyth in '*Administrative Law*' by Wade and Forsyth (11th Edition, Oxford) at p. 199, referring to the judgements of the House of Lords submit that no consent can confer on a court or tribunal any power to act beyond its jurisdiction. As such, any view or comment expressed during the proceedings of the aforesaid appeal process by USAB which is in the nature of an obiter would not affect the Petitioner's consent or waiver described above. At the same time, for the reasons given above and based on the circumstances of this case I am not convinced that the UGC or the University has acted beyond its jurisdiction during the selection process in respect of appointing a candidate to the post of Lecturer (Probationary).

The case of *Suneetha Aggarwal v State of Haryana, AIR 2000 SC 1058* narrates a similar situation to the instant case. The Supreme Court of India has observed therein;

“The management of the institution advertised the post of Hindi Lecturer. In response to the said advertisement, the appellant and other persons applied for selection to the said post. The Selection Committee of 15th July 1996 interviewed the candidates. The nominee of the Vice Chancellor and the Director of High Education approved the name of the appellant to be placed at Sr. No. 2 whereas, one Kiran Bala was placed at Sr. No.1. However, the Selection Committee recommended the name of the appellant and for the said post. This was not approved by the Vice-Chancellor who, by order dated 5-8-96, directed the said post to be re-advertised.”

“Accordingly, on the 13th November 1996, the post was again advertised and in response thereto, the appellant again applied to for being considered for the post of Hindi Lecturer. The date of interview was fixed as 10th January, 1997. On the said date the appellant appeared before the Selection Committee without any kind of protest and simultaneously filed a writ petition challenging the order of the Vice-Chancellor dated 5-8-96 whereby the Vice-Chancellor disapproved the recommendation of the Selection Committee and issued a direction for a fresh advertisement.”

The court in the above-mentioned case finally held that the appellant having appeared before the selection committee without any protest and having taken a chance is estopped by her

conduct from challenging the earlier order of the Vice- Chancellor. Accordingly, the relevant writ petition has been dismissed.

For the reasons mentioned above, I take the view that a plea of antedating an appointment placing reliance on a previous selection process cannot subsequently be invoked in a case where such candidate has opted to undergo a fresh selection process for the same post, unless the relevant public authority has taken decisions against statutory restrictions or exceeding its jurisdiction. A candidate who becomes successful during such a subsequent selection process should not be able to raise claims upon his purported rights allegedly emanating from a previous process of selection that took place, without first protesting or challenging the abandonment of the said previous selection process. Re-advertising or calling for fresh applications for the same posts amounts to an abandonment of the initial selection process if there are no special circumstances available to deviate from such a proposition. The initial instance, wherein the candidate faced an interview but did not secure final approval for the position, cannot be retrospectively altered based on the outcome of a subsequent interview conducted years later. The notion of backdating an appointment is grounded in the concept of rectifying past errors or oversights, which is not applicable in this scenario as further expressed by the USAB in their above-mentioned order dated 19.05.2020 ("P56").

Accordingly, I am of the view that the passage of time between the two interview processes introduces a clear demarcation, treating each instance as an independent event. The eventual success in the latter interview should not serve as a basis for antedating the appointment to the date of the initial refusal of the appointment. Doing so would undermine the integrity of the distinct interview processes and compromise the principle of meritocracy that governs appointment decisions. It is essential to recognize that candidates evolve over time, acquiring new skills, experiences, and perspectives. As such, the decision to appoint following a later interview reflects the candidate's updated qualifications and suitability for the position at that juncture.

Similarly, although this court finds that there has been serious mismanagement on the part of the said University with regard to the cancellation of the 2nd and 3rd interviews and not being able to fill the vacancy for the post of Lecturer (Probationary) at the University for 6 long years, the act of antedating an appointment to the date of first refusal, based on a subsequent

successful interview conducted years later, is untenable as it would not accurately reflect the individual's qualifications and approval status at the time of the second interview. The progression of time and the evolution of circumstances necessitate treating each recruitment process as a discrete event, thereby upholding the integrity of the selection process and ensuring fairness in appointments. Based on such circumstances, I am not inclined to uphold the contention of the Petitioner that the USAB have abdicated the power vested in them by law when issuing its order marked "P56".

In light of the foregoing, I hold that the Petitioner is not entitled to any of the reliefs prayed for in the prayer of the Petition. Thus, 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