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 of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A.(Writ) Application No.167/2010

Mahaweli Reach Hotels PLC
No.35, P.B.A. Weerakoon Mawatha,
Kandy.

Petitioner

Vs.

1. W.J.L.U. Wijayaweera,
   Commissioner General of Labour,
   Department of Labour,
   Labour Secretariat, Colombo 5.

2. H.K. K. A. Jayasundera,
   Assistant Commissioner of Labour,
   Department of Labour,
   Labour Secretariat, Colombo 5.

3. D.M.S. Dissanayake,
   Commissioner of Labour,
   (Industrial Relations),
   Department of Labour,
   Labour Secretariat, Colombo 5.

4. R.M.A.B. Rajanayake,
Kotuwegedera Road,
Madanwala,
Hanguranketha.

5. E.R.M.R.M.T. Jayawardena
No 1/8, Aluviharaya, Matale.

6. K.P. Abeythileka Bandara,
No. 33, Imbulpitiya,
Karagahahinna. (Via Matale.

7. B.A.M. Kuda Banda
No. 85/A, Bomaluwa Road,
Watapuluwa, Kandy.

8. R.M. Ranbanda,
Malulla, Gonakantenna,
Hanguranketha.

9. W.M. Anura Bandara,
No. 286, Delgasgoda,
Alawathugoda.

10. I.D. Hettiarachchi,
No. 3/2, Uggahakumbura,
Pujapitiya.

11. E.M.A.S.K.S.J. Loku Bandara
No. 50, Elkaduwa Road, Wattegama.

12. P.U.S.R. Manjula Nishantha Nandasiri
No. 65/15, Hewaheta Road,
Talwatte, Kandy.

13. W.W.M.S. Weerasekera,
No. 36, New Town, Kundasale.

14. S.M.S. Samarakoon,
No. 11, Wathurakumbura,
Muruthalawa.

15. W.S.P. Gamini Premanayake,
No. 59-A, Bogahakumbura,
Jambugahapitiya.

16. W. A. Sisira Kumara,
No. 190-B, Pahala Eriyagama,
Peradeniya.

17. R.M.P. Padmalal,
No. 174, Angammana, Gampaha.

18. W.M. Karunaratne,
No. 99, Bomaluwa Road,
Watapuluwa, Kandy.

19. C.G. Balasinghe,
No. 92, 3rd Lane,
Agalawatte Road, Matale.

20. Suranga Kumara Rajapaksa,
No. 75, Panorama Park,
Mullegama, Ambatenna.

21. D.G.A.Thilakasiri
No. 19/2, Dematagahadirama,
Kahalla, Katugastota.

22. W.G. Amarasinghe,
No.187/3, Wehigaldeniya,
Ethulgama, Thalthu Oya.

Respondents

Before: **Arjuna Obeyesekere, J**

Counsel: Indra Ladduwahetty for the Petitioner

Nuwan Peiris, State Counsel for the 1st – 3rd Respondents

Argued on: 25th July 2018

Written Submissions: Tendered on behalf of the Petitioner on 12th September 2018

Tendered on behalf of the 1st – 3rd Respondents on 15th November 2018

Decided on: 12th December 2018

Arjuna Obeyesekere, J.

The Petitioner has filed this application seeking a Writ of Certiorari to quash the decision contained in document marked '**P3**', which is the Order of the Commissioner General of Labour dated 1st December 2009, where he held that the services of the 4th - 22nd Respondents had been terminated in violation of the provisions of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 (as amended) (TEW Act).

This Court, having heard the learned Counsel for the Petitioner in support of this application had issued notices on all Respondents on 26th March 2010. According to the journal entry dated 28th July 2010, Objections have been filed on behalf of the 4th, 6th, 8th, 10th – 16th and 18th – 22nd Respondents on 19th July 2010 and the said Respondents had been represented by Counsel, until 25th

September 2014. The 4th – 22nd Respondents had been absent and unrepresented thereafter and argument had proceeded in their absence.

The facts of this matter very briefly are as follows.

The Petitioner is a company duly incorporated under the laws of Sri Lanka and is engaged in the business of managing the Mahaweli Reach Hotel, Kandy, of which the Petitioner is the owner. The 4th - 22nd Respondents were employees of the Petitioner and were working in the capacity of security guards at the said Hotel.

The 4th - 22nd Respondents, along with four other employees of the Petitioner, had made individual applications dated 7th May 2009, to the Commissioner of Labour (Termination of Employment Unit), alleging that their services were unjustly terminated by the Petitioner. The contents of the letters are identical except for the individual details of each employee and reads as follows:

> "ඉහත නම සහ ලිපිනය සඳහන් මා අංක 35, වීරකෝන් මාවත මහනුවර ලිපිනයෙහි පිහිට මහවැලි රීච් හෝටලයේ අභ්‍යන්තර ආරක්ෂක අංශයේ ආරක්ෂක නිලධාරියකු/ නිලධාරිනියක ලෙස සේවය කරමින් සිට අතර, කිසිදු දැනුම් දීමකින් තොරව 2009 මැයි මස 05 වන දින වාචික දැනුම් දීමකින් පසු ඉතා අසාධාරණ ලෙස මහවැලි රීච් හෝටලයේ කළමනාකාරීත්වය විසින් සේවයෙන් ඉවත් කරන ලදි.
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> සේවය අහිමි කිරීම සම්බන්ධයෙන් මා විසින් කටුගස්තොට පොලිස් ස්ථානයේ පැමිණිල්ලක් ද සටහන් කොට ඇත. මාගේ සේවයට සම්බන්ධ විස්තර පහතින් සඳහන් කොට ඇත.
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> ඒ අනුව මේ සම්බන්ධයෙන් මැදිහත් වී මා හට නැවත රැකියාව, සේවය අහිමිව සිට කාලයට වැටුප් හා ගරු කම්කරු කොමසාරිස් තමන්ට උචිත යැයි හැඟි යන වෙනත් ආධාර උපකාරයන් ලබා දීමට කටයුතු කරන ලෙස ඉතා කරුණිකව ඉල්ලා සිටිමි."

Section 2(1) of the TEW Act reads as follows:

> "No employer shall terminate the scheduled employment of any workman without-
>
> (a) the prior consent in writing of the workman; or.
>
> (b) the prior written approval of the Commissioner."

Section 2(4) of the TEW Act specifies as follows:

> "For the purposes of this Act, the scheduled employment of any workman shall be deemed to be terminated by his employer if for any reason whatsoever, otherwise than by reason of a punishment imposed by way of disciplinary action, the services of such workman in such employment are terminated by his employer."

Thus, the primary function of the Commissioner General of Labour under the TEW Act is to determine whether the services of the 4th – 22nd Respondents had been terminated in accordance with the provisions of the TEW Act.

The said applications of the 4th – 22nd Respondents were taken up for inquiry before the 2nd Respondent on 29th May 2009, where the parties agreed that the 2nd Respondent could pronounce his order on the written submissions to be filed by the parties.

In the written submissions filed before the 2nd Respondent, the Petitioner did not dispute the fact that the prior written consent of the workmen or the prior written approval of the Commissioner had not been obtained. The Petitioner, having admitted that the services of the 4th – 22nd Respondents were terminated on 5th May 2009 took up the position that the said termination took place on grounds of misconduct on the part of the 4th – 22nd Respondents.

In support of this position, the Petitioner cited several instances of misconduct on the part of the said Respondents including the consumption of food inside hotel rooms during working hours, loss of goods belonging to the Petitioner as well as that of hotel guests and the said Respondents found sleeping during working hours. The Petitioner claimed that these acts of negligence resulted in the security of the hotel being threatened and that the Petitioner was compelled to discontinue the services of the 4th – 22nd Respondents on disciplinary grounds.

The 4th – 22nd Respondents have however denied the said allegations made by the Petitioner. It was their position that on 5th May 2009, they were called up and told by the management that their services were no longer required and to vacate the hotel premises by noon of that day. They further complained that they had not been issued with any written communication and that their consent had not been obtained to terminate their services.

This Court observes that in terms of Section 2(5) of the TEW Act, "where any employer terminates the scheduled employment of any workman by reason of punishment imposed by way of disciplinary action the employer shall notify such workman in writing the reasons for the termination of employment

before the expiry of the second working day after the date of such termination."

It is not in dispute that the Petitioner did not notify the 4th – 22nd Respondents, in writing or otherwise, the reasons for the termination of their services. The Petitioner cannot therefore seek to justify its actions on the grounds of misconduct of the 4th – 22nd Respondents, even if that was correct, as the Petitioner has failed to comply with the provisions of Section 2(5) of the TEW Act.

After hearing both parties, the 1st Respondent Commissioner General of Labour, by a letter dated 1st December 2009 annexed to the petition marked '**P3**', informed the Petitioner that the services of the said Respondents have been terminated in violation of the provisions of the TEW Act. This Court is satisfied that the termination of the services of the 4th – 22nd Respondents by the Petitioner was clearly in violation of the provisions of Section 2(1) of the TEW Act and therefore is in agreement with the said decision of the 1st Respondent.

The necessary consequence of a violation of the provisions of Section 2(1) is set out in Section 5 of the TEW Act which reads as follows:

> "Where an employer terminates the scheduled employment of a workman in contravention of the provisions of this Act, such termination shall be illegal, null and void, and accordingly shall be of no effect whatsoever."

Section 6 of TEW Act sets out the powers of the Commissioner of Labour in the event a decision is made that Section 2(1) of the TEW Act has been violated.

> "Where an employer terminates the scheduled employment of a workman in contravention of the provisions of this Act, the Commissioner **may** order such employer to continue to employ the workman, with effect from a date specified in such order, in the same capacity in which the workman was employed prior to such termination, **and** to pay the workman his wages and all other benefits which the workman would have otherwise received if his services had not so been terminated; and it shall be the duty of the employer to comply with such order. The Commissioner shall cause notice of such order to be served on both such employer and the workman."

The 1st Respondent, acting in terms of Section 6 of the TEW Act, accordingly ordered the Petitioner to reinstate the 4th – 22nd Respondents with back-wages. The reasons given by the 2nd Respondent for the said decision are as follows:

> "1971 අංක 45 දරණ කම්කරුවන්ගේ රැකියාව අවසන් කිරීමේ (විශේෂ විධිවිධාන) (පසුව සංශෝධිත) පනතේ විධිවිධානයන්ට පටහැනිව සේවකයින්ගේ පූර්ව ලිඛිත කැමැත්ත හෝ කම්කරු කොමසාරිස් ජනරාල්ගේ පූර්ව ලිඛිත අනුමැතිය ලබානොගෙන 2009.05.05 දින සිට මෙම සේවකයින්ගේ සේවය අවසන් කර ඇත."

Being dissatisfied with the said decision, the Petitioner invoked the jurisdiction conferred on this Court by Article 140 of the Constitution, seeking a Writ of Certiorari to quash the said decision contained in '**P3**'.

At the hearing of this application, it was submitted by the learned Counsel for the Petitioner that the Petitioner is not contesting the fact that the termination of the services of the 4th – 22nd Respondents was contrary to Section 2(1) of the TEW Act. It was however contended by the learned Counsel for the Petitioner that the 4th – 22nd Respondents play a very important and strategic role within the hotel by providing security to the hotel and its guests and that the Petitioner must have a very high degree of trust and confidence in its security personnel. It was contended further that the working relationship between the parties had deteriorated and that the reinstatement of the 4th – 22nd Respondents was not feasible and would only lead to a breakdown of the industrial peace at the work place, not only between the Petitioner and the said Respondents but also with other employees of the Petitioner.

The Petitioner submitted to this Court that in view of the above circumstances, it informed the 2nd Respondent during the inquiry that it was willing to pay compensation to the 4th - 22nd Respondents for loss of employment but that the said Respondents were not agreeable to the said settlement. It was submitted by the Petitioner that in terms of Section 6 of the TEW Act, the 1st Respondent has the discretion to grant compensation as opposed to the automatic reinstatement of the employees in question. The Petitioner stated further that the 1st Respondent erred by issuing the said order '**P3**' for reinstatement without taking into consideration the realities of the strained employer-employee relationship between the Petitioner and the said Respondents.

It was in this background that the learned Counsel for the Petitioner submitted that the 1st – 3rd Respondents ought to have taken into consideration the above circumstances, and ordered compensation, if they were of the view that the services of the 4th – 22nd Respondents have been terminated in violation of the TEW Act, as opposed to the reinstatement of the 4th – 22nd Respondents.

The question that arises for consideration in this application is therefore whether the Commissioner General of Labour can only order reinstatement with back wages and other benefits in a situation where the services of an employee has been terminated in violation of Section 2(1) of the TEW Act, or whether the Commissioner General of Labour has a discretion to order compensation, in lieu of reinstatement.

The learned Counsel for the Petitioner quite correctly pointed out that there are judgments of this Court that take a very strict view of Section 6 that the only consequence of a termination of employment in violation of Section 2(1) of the TEW Act is reinstatement with back wages. He also submitted that there are several judgments of this Court and the Supreme Court that have taken a more liberal or practical view that the Commissioner General of Labour has in fact been conferred a discretion by Section 6 and that in exercising that discretion, the Commissioner of Labour can order the payment of compensation as opposed to reinstatement.

The strict view referred to by the Petitioner has been taken by this Court in **Eksath Kamkaru Samithiya vs Commissioner of Labour**[1] where Upali De Z Gunewardena J, having observed that the word "may" used in Section 6 comes

[1] 2001 (2) Sri LR 137.

in the wake of Section 5 and that Section 6 of the Act must necessarily be read as referring back to the preceding provision i.e. Section 5, held as follows:

> "It is clear that Section 6 of the Act has to be understood or interpreted in the light of or against the backdrop of the circumstance adumbrated or contemplated in section 5 of the Act - the circumstance being that the termination of employment of a workman, in contravention of the provisions of the relevant Act viz. Termination of Employment of Workmen Act No.45 of 1971 shall be of no effect whatsoever. From what has been said above, it would be clear that section 6 of the Act caters to the circumstance or situation specified in section 5 which, as shown above, states emphatically that termination of employment of a workman in contravention of the provisions of the relevant Act is illegal and null and void, that is, destitute of any effect whatsoever. In other words such a termination being wholly incapable of giving rise to or affecting any rights or obligations - the contract of employment will subsist and remain intact. Section 5 renders any termination of employment in contravention of the relevant Act absolutely illegal. And section 6 states that the Commissioner "may order the employer to continue to employ the workman" in case the termination was in breach of the provisions of the Act."[2]

The above reasoning is acceptable if Section 5 is read together with Section 6. It is also logical that where the services of the employee is terminated contrary to Section 2(1) of the TEW Act, such termination is held to be illegal in terms of Section 5 and hence, on the basis that the contract of employment continues

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[2] At page 142.

in force, to order reinstatement with back wages, in terms of Section 6. The only concern that this Court has with the said reasoning is that the word 'may' in Section 6 then becomes superfluous. It would also prevent the Commissioner General of Labour from taking into consideration the facts and circumstances of each case and arriving at a practical solution.

This Court is mindful that a liberal interpretation of Section 6 without any restrictions or controls can lead to abuse and a complete violation of the industrial laws of this country. With this in mind, this Court would seek to examine the several judgments that have taken a liberal approach towards Section 6 by interpreting the word, 'may' as conferring a discretion on the Commissioner General of Labour.

The first case relied upon by the Petitioner is the judgment of the Supreme Court in **Ceylon Mercantile Union vs Vinitha Limited and the Commissioner of Labour**[3]. In this case, M/s Vinitha Limited made an application to the Commissioner of Labour in November 1974 under the TEW Act seeking permission to terminate the services of five of its employees. After inquiry, the Commissioner of Labour made an order granting permission to the employer to terminate the employment of the said employees. However, prior to the said order of the Commissioner of Labour, the employer had terminated the services of the said employees. The Petitioner Union subsequently made an application to the Commissioner of Labour for an order on the employer, under Section 6 of the TEW Act, to continue the employment of the said employees on the ground that the employer had terminated the services of the said employees without the permission of the Commissioner of Labour.

[3] SC Application No. 884/75; SC Minutes of 29th March 1976.

After further inquiry, the Commissioner of Labour refused to make an order under Section 6 of the TEW Act.

After considering the above facts, Tennekoon C.J held as follows:

> "A further point made by counsel for the petitioner is that in regard to the application under Section 6, it is mandatory on the Commissioner to hold an inquiry when a workman complains that his employer has terminated his employment without the permission of the Commissioner of Labour and to make an order in terms of Section 6.
>
> In regard to this submission, it would appear from the facts that have been placed before us that the Commissioner has held an inquiry before he refused to make an order on the employer to continue the employment of the workmen concerned. The words in the section[4] are "may order" and not "shall order". The Legislature obviously did not contemplate that in every case of termination of employment without the permission of the Commissioner of Labour it would be mandatory on the Commissioner to order reinstatement or continuance of employment upon a complaint being made to him under Section 6."

It appears to this Court that the Supreme Court was influenced by the fact that the Commissioner of Labour had granted approval under Section 2(1) of the TEW Act, although such approval was still pending at the time of the termination of services of the said employees.

[4] Section 6 of the TEW Act.

The next case that was referred by the Petitioner was the judgment of the Supreme Court in **Lanka Multi Moulds (Pvt) vs. Wimalasena**[5]. In this case, the employee, a British national was employed by the Appellant under a contract of employment commencing on 1st September 1992, for an initial period of 3 years. By letter dated 29th April 1994, the Petitioner informed the employee of its decision to terminate his services with effect from 30th July 1994. Upon a complaint being made, the Commissioner of Labour, acting in terms of Section 6 of the TEW Act ordered that the employee be reinstated with effect from 15th January 1996 (although the initial period of 3 years of employment had lapsed) and that he be paid his back wages. Upon an application for a Writ of Certiorari, this Court noted that the contract of employment was only for 3 years which meant that the contract ought to have ended on 31st August 1995. This Court confirmed the order that the termination was illegal, quashed the order for reinstatement and held that the employee was 'entitled only to get wages for the balance period of his 3 year contract.'

On an appeal to the Supreme Court, the Counsel for the Petitioner contended that while the Commissioner had a discretion whether or not to order reinstatement under the first limb of Section 6, he was not entitled to make an order for compensation under the second limb unless he had first made an order for reinstatement; and that an order for wages could not be made as an alternative to, but only in addition to, an order for continued employment.

Mark Fernando, J, having rejected the said argument, held as follows:

[5] 2003 (1) Sri LR 143.

"section 6 must also apply in situations where reinstatement has become impossible ***pendente lite.*** A workman due to retire in one year's time might complain of wrongful termination. The anomalous consequence of the Petitioner's interpretation would be that if the Commissioner's order was made ***before*** the due date of retirement, the workman could be awarded reinstatement and back wages up to that date; but if it was made even one day thereafter, he could get nothing. The contrary interpretation, however, avoids anomaly, inconvenience and injustice: **if the Commissioner finds himself unable to order reinstatement although he holds the termination to be unlawful**, he can nevertheless order the employer to pay the workman "his ***wages and all other benefits*** which the workman would otherwise have received". It is unnecessary to consider whether that amounts to "compensation" or not, because section 6 expressly empowers the Commissioner to order payment of "wages" and "benefits". The Petitioner's restrictive interpretation would create other anomalies too. Thus, the Commissioner may find that although termination was not justified the workman was guilty of some lapse which merited some punishment, and that therefore part of the back wages should be withheld. However, the Petitioner's interpretation would deprive the Commissioner of the equitable power to order anything less than full back wages. In my view, the conferment of the power to grant the greater relief includes the power to grant the lesser relief. Accordingly, I hold that "may" in section 6 confers a discretion on the Commissioner; that "and" must be interpreted disjunctively; and that the Commissioner had the power to order payment of wages and benefits for the balance period of the 2nd Respondent's contract without making

an order for reinstatement. The Court of Appeal was therefore entitled to order such payment when setting aside the order for reinstatement."[6]

The following passage on the manner of applying Section 6 is important in the consideration of the matter presently before Court and is re-produced below:

"It would be inequitable to interpret section 6 as requiring a mechanical order for back wages from the date of wrongful termination up to the date of reinstatement or the date on which the employment comes to an end. There is no doubt whatever that the object which section 6 intended to achieve was to annul an unlawful termination and to restore - **insofar as it was reasonably possible** - the status quo: to put a workman in the position in which he would have been if his services had not been terminated."[7]

In the case of **J.P Alensu vs. Mahinda Madihahewa**[8], several employees of Chandrasiri Hotel which was owned by the Petitioner had threatened the Petitioner that the work of the hotel would be disrupted unless the Petitioner granted leave to a fellow employee. Upon an application by the employees under the TEW Act and after an inquiry, the Commissioner General of Labour had made an order to pay compensation to the employees. Sriskandarajah, J, having considered the above judgments as well as several other judgments[9], held as follows:

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[6] At page 149.
[7] At page 151.
[8] CA (Writ) 455/2006; CA Minutes of 14th February 2011.
[9] K.D.C.Pradeep and 16 Others v Skyspan Asia (Pvt) Ltd and 4 Others [2005 (3) Sri LR 121]; Blanka Diamonds (Pvt) Ltd. v Coeme [1996 (1) Sri LR 200].

"If the circumstances are such that ordering reinstatement causes employer-employee unrest in the opinion of the Commissioner he could order compensation instead of ordering the employer to continue to employ the workman."

Although the above cases were categorized as taking a liberal view, this Court observes that in each of the said cases, there were clearly identifiable and compelling reasons as to why reinstatement could not be made and the making of an order for compensation was the only option available.

Applying the rationale laid down in the judgments referred to above, this Court is of the view that the use of the word 'may' in Section 6 of the TEW Act does in fact confer the Commissioner General of Labour a discretion on whether to order reinstatement with back wages or to limit the relief to compensation. This Court is further of the view that the termination of employment of an employee contrary to the provisions of Section 2(1) of the TEW Act would under normal circumstances attract reinstatement with back wages, as provided for in Section 6. However, there can be exceptional situations as have arisen in the judgments referred to above, which justify the Commissioner General of Labour making an order for compensation. This Court is therefore of the view that while reinstatement with back wages should be the norm, awarding of compensation, depending on the facts and circumstances of each case, should be the exception.

This brings me to the next question – should the 1st Respondent have considered the payment of compensation as opposed to reinstatement? It does not appear from the Order '**P3**' that any consideration has been given to

this issue or that the 1st Respondent was mindful that he in fact had a discretion. In these circumstances, this Court is of the view that the Commissioner of Labour erred in law when he failed to consider the submission of the Petitioner that the Commissioner was vested with discretion in terms of Section 6 of the TEW Act.

Under normal circumstances, this Court should remit this matter to the Commissioner General of Labour for a determination by the Commissioner as to whether this is a fit matter for the Commissioner to exercise the discretion vested in him in terms of Section 6 of the TEW Act. However, this Court is of the view that remitting this matter to the Commissioner General of Labour after almost 9 years after the initial decision would not be in the best interests of the parties and hence, this Court decides to consider whether this is a fit and proper case where the Commissioner General of Labour ought to have exercised his discretion.

This Court is in agreement with the learned Counsel for the Petitioner that the 4th – 22nd Respondents play a critical role in the day to day functioning of the Petitioner's hotel and that it is absolutely important that the Petitioner has the fullest possible trust and confidence in the said Respondents. Any ill-feeling between the Petitioner and the said Respondents would have an adverse impact on the day to day affairs of the Petitioner. The Petitioner has stated further that it has already outsourced to a third party the provision of security services for the hotel. In these circumstances, this Court is of the view that reinstating the 4th – 22nd Respondents in service would not be a practical solution and that this is a fit case where the Commissioner of Labour ought to have exercised his discretion in favour of the Petitioner and granted

compensation to the 4th -22nd Respondents, instead of mechanically following the provisions of Section 6 of the TEW Act. This Court however does not wish to proceed any further than this, as it is of the view that the decision on the quantum of compensation, back wages or other benefits that should be paid, should be best left to the Commissioner General of Labour.

In these circumstances, this Court, while upholding the decision of the 1st Respondent contained in '**P3**' that the termination of services of the 4th – 22nd Respondents is contrary to the provisions of the TEW Act, proceeds to issue a Writ of Certiorari quashing only that part of '**P3**' by which the 1st Respondent ordered that the 4th – 22nd Respondents be reinstated in service with back wages. This Court directs the 1st Respondent to hear the parties and make a suitable decision, within four months of this judgment, on the compensation that should be paid to the 4th – 22nd Respondents under and in terms of Section 6 of the TEW Act.

This Court makes no order with regard to costs.

Judge of the Court of Appeal