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

CA (Writ) Application No: 282/2008

People's Bank,
Head Office, 12th Floor,
Sir Chittampalam A. Gardiner
Mawatha, Colombo 2.

PETITIONER

Vs.

1. Hon. Mahinda Samarasinghe,
   Former Minister of Labour,
   Labour Secretariat,
   Narahenpita, Colombo 5.

2. Hon. AthaudaSeneviratne,
   Minister of Labour,
   Labour Secretariat,
   Narahenpita, Colombo 5.

3. Mahinda Madihahewa,
   Former Commissioner of Labour,

4. D.S. Edirisinghe,
   Commissioner General of Labour,

   Both of Labour Secretariat,
   Narahenpita, Colombo 5.

5. Ashoka Serasinghe,
Arbitrator, Ministry of Labour,
Narahenpita, Colombo 5.

6. H.T.A. Amaratunga,
1/259, Galle Road,Hikkaduwa.

7. The Registrar,
Industrial Court,
9th Floor, Labour Secretariat,
Narahenpita, Colombo 5.

RESPONDENTS

Before: **Arjuna Obeyesekere, J**

Counsel: Sanjeeva Jayawardena, P.C., with Ms. Lakmini Warusevitane for the Petitioner

Ms. Yuresha De Silva, Senior State Counsel for the 1st – 4thRespondents

Srinath Perera for the 6th Respondent

Argued on: 18th October 2018

Written Submissions: Tendered on behalf of the Petitioner on 7th January 2019

Tendered on behalf of the 1st – 4thRespondents on 4th December 2018

Tendered on behalf of the 6th Respondent on 4th January 2019

Decided on: 28th June 2019

Arjuna Obeyesekere, J

The 6th Respondent had joined the Petitioner, People's Bank as a Clerk on 2nd December 1965. He had been promoted as Senior Manager, Grade II with effect from 21st March 1996 and had been transferred to the Internal Audit Department of the Petitioner Bank on 15th July 1996.

The 6th Respondent had been placed under interdiction on 20th August 1996. By a letter dated 15th May 1997, the Petitioner had requested the 6th Respondent to show cause as to why he should not be dismissed from service in respect of the incidents set out therein. This Court has examined the said letter and observes that the said incidents have occurred during the period when the 6th Respondent was serving as the Manager of the Hikkaduwa branch of the Petitioner, several years prior to the issuance of the said letter. The incidents referred to in the said letter relate *inter alia* to the 6th Respondent having granted overdraft facilities to certain customers of the Petitioner contrary to the procedure stipulated by the Bank.

The 6th Respondent had replied the said letter by letter dated 24th May 1997. This Court has examined the said response and observes that the 6th Respondent had taken up the position that the incidents referred to therein had taken place several years prior to the issuance of the said letter and that without access to the documents, he is unable to respond to the specific allegations made against him. While there is a general denial of the allegations, the 6th Respondent had also stated as follows:

" ව්‍යාපාර කටයුතු වර්ධනය කොට බලවත් තරඟකාරිත්වයක් තුලින් අප ආයතනයේ ව්‍යාප්තියට රුකුලක් වන ආකාරයට සත් චේතනාවෙන් මවිසින් ගන්නා ලද ඇතැම් තීරණ ඒ අවස්ථාවලදි අවදානම් හා අනතුරු දායක ලෙස පෙනියාමට ඉඩ තිබුනද කාලයාගේ ඇවැමෙන් එම තීරණ නිසා බැංකුවට කිසිම ආකාරයක පාඩුවක් සිදු නොවූ බව ඔප්පු වී ඇතැයි මම විස්වාස කරමි."

Inspite of the overall denial of the charges, and although not relevant to the issue that is presently before this Court, it appears to this Court that the above statement is an admission that the 6th Respondent did in fact grant overdraft facilities contrary to the procedure stipulated by the Petitioner.

It is an admitted fact that the Petitioner did not conduct a disciplinary inquiry relating to the matters set out in the said show cause letter, even though the Disciplinary Code of the Petitioner marked '**A16**'[1] required the Petitioner to conduct a formal inquiry into the allegations made against the 6th Respondent. Instead, the Petitioner, by letter dated 14th October 1997 marked '**A8**' reinstated the 6th Respondent with full back wages and bonus due to the 6th Respondent during the period of interdiction, subject to the following conditions:

"(2) 1993.09.28 දින සිට අවවාද කිරීම

(3) ප්‍රදේශිකයෙන් පිටතට මාරු කිරීම

(4) 1997.10.08 දින සිට අවුරුදු 03 ක් ගතවන තෙක් ශාඛා කළමණාකාර තනතුරක් ප්‍රදානය නොකිරීම."

The 6th Respondent had accordingly resumed duties and had continued to serve the Petitioner until his retirement on 10th March 2002.

[1] The 6th Respondent had produced before the Arbitrator, documents marked 'A1' – 'A16'.

It is admitted by the parties that the 6th Respondent had filed Writ Application No. CA 1363/98 challenging the punishments imposed on him. However, neither party has produced a copy of the petition filed in the said case and for that reason, this Court is unable to ascertain the precise complaint of the 6th Respondent or the relief claimed by the 6th Respondent in the said application. Be that as it may, the Petitioner states that the parties arrived at a settlement in the said case, and that as a result of the settlement, the Petitioner had issued a letter dated 22nd June 2000 marked '**A15**', informing the 6th Respondent as follows:

> "ඉහත කරුණ සම්බන්ධයෙන් වූ අපගේ 1997.10.14 දිනැති 'ප්‍රකළ 1/9/1' යොමුව සහිත ලිපිය මගින් ඔබ වෙත පනවා ඇති විනය පියවරයන් අතුරෙන්, ප්‍රාදේශිකයෙන් පිටතට මාරු කිරීම යන විනය පියවර හැර පහත සඳහන් අනෙකුත් විනය පියවරයන් ඉවත් කිරීමට තීරණය කර ඇත.
>
> 1. 1993.09.28 දින සිට අවවාද කිරීම.
> 2. 1997.10.08 දින සිට අවුරුදු 03 ක් ගතවන තුරු ශාඛා කළමනාකාර තනතුරක් ප්‍රදානය නොකිරීම.
>
> මේ අනුව එම විනය පියවරයන් ඉවත් කරන ලද බව මෙයින් දන්වම්."

This Court must observe that the claim of the Petitioner that the dispute was settled in the aforementioned Court of Appeal application had initially been admitted by the 6th Respondent but has since been denied in the written submissions of the 6th Respondent.[2] It appears that the 6th Respondent had not diligently pursued CA (Writ) Application No. 1363/98 and that the said

[2]Paragraph 11(f) of the petition has been admitted in paragraph 2 of the Statement of Objections of the 6th Respondent.

application had been dismissed for want of appearance on 3rd June 2003. According to the evidence led before the Arbitrator, the 6th Respondent had filed a re-listing application but this Court had refused the said application.

Be that as it may, by the said letter '**A15**', two of the punishments imposed on the 6th Respondent by letter '**A8**' had been removed. The Petitioner states that even though the 6th Respondent was to be transferred out of the region as part of the punishments imposed by '**A8**', such a transfer never took place. In other words, the Petitioner's position is that by June 2000, the punishments imposed on the 6th Respondent had, for all intents and purposes, been done away with.

Prior to the institution of CA (Writ) Application No. 1363/98, the 6th Respondent had submitted a complaint to the Department of Labour, presumably on the basis that punishments had been imposed without a formal inquiry. Even though the dispute referred to in the said complaint is said to have been referred for arbitration under Reference No. A2719, neither party has provided a copy of such reference. The said reference had apparently been cancelled by the Minister of Labour by his order dated 15th March 2002 and a fresh reference to arbitration has been made on the same date by the Minister of Labour under Section 4(1) of the Industrial Disputes Act.[3]

The said reference of 15th March 2002 reads as follows:

> "මහජන බැංකුවේ ප්‍රධාන කළමණාකාරිනි (මානව සම්පත්) ගේ 1997.10.14 දිනැති ලිපිය මගින් එම බැංකුවේ සේවකයෙකු වූ එච්. ටී. ඒ. අමරතුංග මහතාට විධිමත් විනය

[3] Section 4(1) reads as follows: "(1) The Minister may, if he is of the opinion that an industrial dispute is a minor dispute, refer it, by an order in writing, for settlement by arbitration to an arbitrator appointed by the Minister or to a labour tribunal, notwithstanding that the parties to such dispute or their representatives do not consent to such reference"

පරීක්ෂණයක් නොපවත්වා දඩුවම් පැනවීම යුක්තිසහගතද නොඑසේනම්, ඔහුට කුමන සහනයක් හිමිද යන්න පිළිබඳව වේ."

This Court must observe that by the time the reference to arbitration was made on 15th March 2002, the 6th Respondent had retired from service.

It appears from a statement submitted by the 6th Respondent after the said reference that the Petitioner's primary complaint was that he was deprived the opportunity of another promotion as a result of the punishments imposed on him without conducting a disciplinary inquiry.[4]

Proceedings were held before the Arbitrator, Mr. M.T.S. Fernando, the 5th Respondent to this application. Both parties had been afforded an opportunity of leading evidence as well as producing documents and there is no complaint with regard to the manner in which the arbitration proceedings were conducted by the 5th Respondent.

By an award dated 25th July 2007 annexed to the petition marked **'P9'**, the Arbitrator had held as follows:

" (අ)) උසස් වීම් අහිමි වීම

උසස් වීම් සම්බන්ධව ඉල්ලුම්කරු විසින් ඉදිරිපත් කර ඇති සාක්ෂි සැලකිමේ දී ඉල්ලුම්කරුට උසස් වීම් ලැබීමට ප්‍රමාණවත් හොඳ සේවා තත්ත්වයක් නොතිබීම යන කරුණු වගඋත්තරකාර බැංකුව විසින් ඉදිරිපත් කර ඇති සාක්ෂි ද ප්‍රකාරව වගඋත්තරකාර බැංකුව විසින් අවධිමත් ආකාරයේ සිදු කරන ලද දණ්ඩනයන් නිසා උද්ගත වූ තත්ත්වයක් බව පෙනී යයි. එනම් ක්‍රමවත් උසස් වීම් ලබා ඇති ඉල්ලුම්කරුට ප්‍රශ්නගත සිදු වීමෙන් අනතුරුව අවස්ථා දෙකක දීම උසස් වීම් ලබා ගැනීමට නොහැකි

[4] Statement dated 13th May 2002; page 22 of the proceedings before the Arbitrator.

වී ඇත. එම තත්ත්වය ඉල්ලුම්කරුට අහිමි කර ඇත්තේ වගඋත්තරකරුගේ ක්‍රියා කලාපය නිසා බව තහවුරු වේ. එසේ වුව ද මේ වන විට ඉල්ලුම්කරු විශ්‍රාමික පුද්ගලයකු හෙයින් එකී උසස් වීම් නැවත ලබා දීමේ හැකියාවක් නොමැති හෙයින් ද උසස් වීම් සඳහා ඉදිරිපත් වීමට සේවා දිගුවක් නොලැබූ සේවකයකු ලෙස අවස්ථාව අහිමි වී ඇති හෙයින් ද උසස්වීම් අහිමි වීමෙන් ඉල්ලුම්කරුට වූ හානිය පුරණය කිරීමට වගඋත්තරකාර බැංකුව බැඳී සිටින බව තීරණය කරමි.

මේ අනුව ඉල්ලුම්කරුට පරීක්ෂණයක් නොපවත්වා දඩුවම් පැමිණවීම යුක්ති සහගත නොවන බවත්, ඒ අනුව ඔහුට සහනයක් වශයෙන් ඔහුට අහිමි වී ගිය උසස් වීම් නියමිත දින සිට පිහිටුවා ඔහුගේ තනතුර වැටුප් හා වැටුප් වර්ධකයන් ද ඊට අදාල පරිදි විශ්‍රාම වැටුප් ද තීරණය කිරීමෙන් ප්‍රමාණවත් සහනයක් ලබා දිය යුතු යැයි තීරණය කරමි."

The said award had been published in Extraordinary Gazette No. 1532/6 dated 14th January 2008 by the Commissioner General of Labour in terms of Section 18(1) of the Industrial Disputes Act. The Petitioner, acting in terms of Section 20(1) of the Act had repudiated the said award on 29th January 2008. The said notice of repudiation had been published in Extraordinary Gazette No. 1545/4 dated 16th April 2008.

Dissatisfied with the said award of the arbitrator marked **'P9'**, the Petitioner has filed this application seeking a Writ of Certiorari to quash the said award. Before examining each of the grounds urged before this Court by the learned President's Counsel for the Petitioner, it would be useful for this Court to understand the role of the arbitrator, as provided for in the Industrial Disputes Act.

Section 17(1) of the Industrial Disputes Act sets out the role of the Arbitrator in the following manner:

"When an industrial dispute has been referred under section 3(1)(d) or section 4(1) to an arbitrator for settlement by arbitration, he shall make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award **as may appear to him just and equitable**."

In **Brown & Company v. Minister of Labour**[5], the Supreme Court, having analysed the wide powers and duties conferred on an arbitrator, has held as follows:

"Arbitration under the Industrial Disputes Act is intended to be even more liberal, informal and flexible than commercial arbitration, primarily because the Arbitrator is empowered to make an award which is "just and equitable". When an industrial dispute has been referred under Section 3 (1)(d) or Section 4(1) of the Industrial Disputes Act to an Arbitrator for settlement by arbitration, Section 17(1) of the said Act requires such Arbitrator to "make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him just and equitable". In my view, the word "make" as used in the said provision, has the effect of throwing the ball into the Arbitrator's court, so to speak, and requires him to initiate what inquiries he considers are necessary. The Arbitrator is not simply called upon "to hold an inquiry", where the ball would be in the court of the parties to the dispute and, it would be left to them to tender what evidence they consider necessary requiring the arbitrator to be just a judge presiding over the inquiry, the control and

[5](2011) 1 SCR 305, Marsoo.

progress of which will be in the hands of the parties themselves or their Counsel. What the Industrial Disputes Act has done appears to me to be to substitute in place of the rigid procedures of the law envisaged by the "adversarial system", a new and more flexible procedure, which is in keeping with the fashion in which equity in English law gave relief to the litigants from the rigidity of the common law. The function of the arbitral power in relation to industrial disputes is to ascertain and declare what in the opinion of the Arbitrator ought to be the respective rights and liabilities of the parties as they exist at the moment the proceedings are instituted. His role is more inquisitorial, and he has a duty to go in search for the evidence, and he is not strictly required to follow the provisions of the Evidence Ordinance in doing so. Just as much as the procedure before the arbitrator is not governed by the rigid provisions of the Evidence Ordinance, the procedure followed by him need not be fettered by the rigidity of the law."

In **Municipal Council Colombo vs Munasinghe**[6] it was held by Chief Justice H.N.G.Fernando as follows:

"I hold that when the Industrial Disputes Act confers on an Arbitrator the discretion to make an award which is 'just and equitable', the Legislature did not intend to confer on an Arbitrator the freedom of a wild horse. An award must be 'just and equitable' as between the parties to a dispute; and the fact that one party might have encountered 'hard times' because of personal circumstances for which the other party is in no way responsible is not a ground on which justice or equity requires the other

[6] 71 NLR 223 at page 225. Referred to with approval in Standard Chartered Grindlays Bank Limited vs The Minister of Labour [SC Appeal No. 22/2003; SC Minutes of 4th April 2008].

party to make undue concessions. In addition, it is time that this Court should correct what seems to be a prevalent misconception. The mandate which the Arbitrator in an industrial dispute holds under the law requires him to make an award which is just and equitable, and not necessarily an award which favours an employee. An Arbitrator holds no licence from the Legislature to make any such award as he may please, for nothing is just and equitable which is decided by whim or caprice or by the toss of a double-headed coin."

The learned President's Counsel for the Petitioner has drawn the attention of this Court to the following observation of Rajaratnam, J in **Ceylon Tea Plantations Company Limited vs Ceylon Estate Staff Union**:[7]

"A just and equitable order must be fair by all parties. It never means the safe guarding of the interest of the workman alone."

The Supreme Court, in **Singer Industries (Ceylon) Limited vs The Ceylon Mecantile Industral and General Workers Union and others**[8] agreeing with the observations in Municipal Council Colombo vs Munasinghe[9] held as follows:

"It is a cardinal principle of law that in making an award by an arbitrator there must be a judicial and objective approach and more importantly the perspectives both of employer as well as the employee should be

[7] SC Appeal 211/72; SC Minutes of 15th May 1974.
[8] SC Appeal No. 78/08; SC Minutes of 7th October 2010.
[9] Supra.

considered in a balanced manner and undoubtedly just and equity must apply to both these parties."

This Court will now proceed to consider whether the award made by the Arbitrator is just and equitable by both parties.

The first ground urged by the learned President's Counsel for the Petitioner was that the relief granted by the Arbitrator that the 6th Respondent should be given his promotion from the due date and be granted the salary increments that go with such promotion, together with the adjustment of the pension, is completely unwarranted, unjustified and is not supported by the evidence led before him.[10]

While the 6th Respondent gave evidence on his behalf before the Arbitrator, the Petitioner led the evidence of Mr. Manage Karunasena, Acting Senior Manager, Human Resources at the Petitioner Bank. This Court has examined the said evidence and notes that the 6th Respondent had been promoted to Grade II a few months prior to his interdiction. After the reinstatement of the 6th Respondent on 14th October 1997, the Petitioner had issued Circular No. 4904/97 dated 28th November 1997 calling for applications for promotion to Grade I. This Circular which had been marked as '**R13**' before the Arbitrator[11] specified that applications were being called to fill 29 vacancies in Grade I and that applications had to be submitted before 15th December 1997.

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[10] The relief granted was as follows: "මේ අනුව ඉල්ලුම්කරුට පරීක්ෂණයක් නොපවත්වා දඩුවම් පැමිණවීම යුක්ති සහගත නොවන බවත්, ඒ අනුව ඔහුට සහනයක් වශයෙන් ඔහුට අහිමි වී ගිය උසස් වීම් නියමිත දින සිට පිහිටුවා ඔහුගේ තනතුර වැටුප් හා වැටුප් වර්ධකයන් ද ඊට අදාළ පරිදි විශ්‍රාම වැටුප් ද නිරණය කිරීමෙන් ප්‍රමාණවත් සහනයක් ලබා දිය යුතු යැයි නිරණය කරමි"

[11] The Petitioner had produced before the Arbitrator, documents marked 'R1' – 'R14'.

'**R13**' very importantly states under 'Eligibility' that "Officers in Grade II (main banking stream) with a good record of service are eligible to apply." It is admitted by the Petitioner that the 6th Respondent submitted his application for promotion and that his application was duly considered and evaluated and that the 6th Respondent was called for the interview. This fact demonstrates that in the eyes of the Petitioner, the 6th Respondent had fulfilled the eligibility criteria laid down in **'R13'** of having a good record of service and that the disciplinary action taken against the 6th Respondent did not stand in the way of the 6th Respondent being considered for promotion. The argument of the 6th Respondent that the interdiction and the subsequent imposition of three punishments served as a black mark and prevented his promotion cannot therefore be sustained.

According to Karunasena, the marking scheme prepared by the Petitioner for promotion to Grade I consisted of the following sections:

Criterion	**Marks**
Seniority	40
Educational qualifications	10
Professional qualifications	13
Evaluation of the candidate's Performance	27
Performance at the interview	10

It was the position of the 6th Respondent that he was placed under interdiction soon after receiving the previous promotion and that as a result, he didn't have sufficient time to prove his performance in Grade II, which resulted in him

not obtaining sufficient marks for Performance. It was the position of the 6th Respondent that he would otherwise have been promoted to Grade I.

It was the evidence of Karunasena that the Petitioner had received 228 applications in response to '**R13**'. He stated that the Petitioner had prepared a table setting out the marks that each of the 228 applicants were entitled to, under the first three categories set out above. This table had been marked before the Arbitrator as '**R8**'. Karunasena's position that the said marks were shared with each applicant prior to the interview including the 6th Respondent, as required by a direction given by the Supreme Court in a previous application, was not disputed by the 6th Respondent.

This Court has examined '**R8**' and observes that the 6th Respondent, whose name appears at No. 226 in the said table[12], had been awarded 33, 3 and 7 marks respectively for each of the first three categories and had obtained an aggregate of 43 marks. Karunasena had produced marked '**R9**' a summary setting out the aggregate marks obtained by each applicant as well as the applicants who were chosen after the interview. According to '**R9**', 145 candidates had obtained more marks than the 6th Respondent in the first three categories while 36 candidates had obtained the identical mark as that of the 6th Respondent. Karunasena had not produced the final mark sheet showing the marks obtained by each applicant for the latter two categories on the basis that the said marks are confidential. This Court must observe that the Arbitrator could have directed the Petitioner to produce the final marks sheet but that such a course of action was not adopted by the Arbitrator nor had the 6th Respondent moved the Arbitrator in that regard.

[12] Marked 'R8(a)'.

However, what is important to note is that of the 145 candidates who had more marks than the 6th Respondent for the first three categories, only 25 candidates had been selected for appointment. Of the candidates who had the identical mark as that of the 6th Respondent, only 4 candidates had been selected, while one candidate who had less marks than the 6th Respondent had also been selected. It is the view of this Court that '**R8**' and '**R9**' clearly establishes that promotions were not automatic, that promotions were not given on seniority alone and thus, a conclusion cannot be reached that the 6th Respondent would have been promoted, if not for the interdiction and subsequent punishments imposed on him.

Karunasena submitted further that the Petitioner had called for applications for promotion to the Grade of Chief Manager in the year 2000 and that the 6th Respondent too had submitted his application. The marking scheme that was used for the promotions in 1998 was adopted for this round of promotions as well. The table of marks obtained by each of the 165 applicants for the first three categories was produced before the Arbitrator marked '**R10**'. The name of the 6th Respondent is at number 164, marked '**R10a**' and the 6th Respondent had been allocated 50 marks. There is no dispute on the marks allotted to the 6th Respondent. As with the earlier round of promotions, the Petitioner had filed before the Arbitrator marked '**R11**', a table setting out the range of the aggregate marks obtained by the applicants prior to the interview. This Court has examined '**R11**' and observes that 33 applicants had obtained marks higher than the 6th Respondent and that of them, only 15 applicants had been selected after the interview. While 33 applicants had obtained the same mark as that of the 6th Respondent, only 5 had been selected. '**R10**' and '**R11**' too

clearly establishes that promotions were not automatic and that promotions were not given on seniority alone.

In fact, the learned Counsel who appeared for the 6th Respondent before the Arbitrator cross examined Karunasena on this matter and his response was as follows:[13]

ප: ඒ නිසා මෙම ආර්. 8 සහ ආර්. 10 ලේඛණවල දැනට තිබෙන ලකුණු ප්‍රමාණයන් අනුව පමණක් කාහට උසස්වීම් ලැබෙනවාද, කාහට උසස්වීම් නොලැබෙනවාද, කියා තීරණය කරන්න බැහැ?

උ: ඔව්.

ප: මෙම ආර්. 8 සහ ආර්. 10 ලේඛණ අනුව මෙම නඩුවේ ඉල්ලුම්කරු වන අමරතුංග මහතාට ඉල්ලා සිටි උසස්වීම නොලැබුණේ, ඔහුගේ අඩුපාඩුවක්, දුර්වලකමක්, වැරැද්දක් නිසා බව නිගමනය කරන්න බැහැ.

උ: මෙම ලේඛණ දෙක අනුව නිගමනය කරන්න බැහැ?

This being the evidence before the Arbitrator, how should he have evaluated the evidence, especially considering the fact that his role was to deliver an order which was just and equitable by both parties. Before considering this issue, this Court shall consider some previous judicial decisions in this regard.

In **Heath and Company (Ceylon) Limited vs Kariyawasam**,[14] the Supreme Court held that in the assessment of evidence, an arbitrator appointed under the Industrial Disputes Act must act judicially. Where his finding is completely

[13] Proceedings of 20th July 2005; page 14.
[14] 71 NLR 382

contrary to the weight of evidence, such a finding can only be described as being perverse and his award is liable to be quashed by way of Certiorari.

In **All Ceylon Commercial and Industrial Workers Union vs Nestle Lanka Limited**[15] this Court held as follows:

> "The arbitrator to whom a reference has been made in terms of section 4 (1) of the Industrial Disputes Act as amended is expected to act judicially. He is required in arriving at his determinations to decide legal questions affecting the rights of the subject and hence he is under a duty to act judicially. Although such arbitrator does not exercise judicial power in the strict sense, it is his duty to act judicially.
>
> It has been stressed that such an arbitrator's function is judicial in the sense that he has to hear parties, decide facts, apply rules with judicial impartiality and his decision is objective as that of any court of law, though ultimately he makes such award as may appear to him to be just and equitable. Vide the decision in *Nadaraja Limited and 3 others. v. Krishnadasan and 3 others*[16].
>
> Thus, there is no evidence or material which has been adduced which could support the aforesaid inference and findings reached by the fourth respondent. Findings and decisions unsupported by evidence are capricious, unreasonable or arbitrary."

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[15] (1999) 1 Sri LR 343 at page 348.
[16] 78 NLR 255.

In **Council of Civil Service Unions v Minister for the Civil Service**[17] Lord Diplock, having identified illegality, irrationality and procedural impropriety as being three grounds for judicial review, went on to describe irrationality in the following manner:

> "It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

In **Brown & Company v. Minister of Labour and others**[18] the Supreme Court, having referred to the above description of irrationality held that, "in my opinion, these words are applicable with equal force to the discretionary powers exercised by an arbitrator .... in an industrial arbitration under Section 4(1) of the Industrial Disputes Act."

In this background, this Court shall re-visit the facts of this case in order to consider whether the Arbitrator had correctly evaluated the evidence before him and whether the decision of the Arbitrator is supported by the evidence that was available to him.

The Arbitrator has completely ignored the fact that the 6th Respondent being called for the interview by itself is sufficient evidence that the Petitioner considered the 6th Respondent as having a good record of service and therefore that the basis of the 6th Respondent's argument is without merit. This Court has already considered the manner in which marks were allotted when applicants were considered for promotions. When 225 applicants apply

[17] [1985] AC 374.
[18] Supra.

for 29 vacancies as in the round of promotions in 1998 or when 165 applicants apply for 25 vacancies as in the round of promotions in 2000, and when 181 candidates had obtained identical or more marks than the 6th Respondent in 1998 or 66 in 2000, how can the Arbitrator arrive at a conclusion that the 6th Respondent would have been promoted? It is the view of this Court that no one can say with any degree of probability that the 6th Respondent would have been promoted, if not for the disciplinary action that had been taken against the 6th Respondent. It is indeed significant that in his closing written submissions filed before the Arbitrator, even the 6th Respondent only moved for compensation, as opposed to the promotion that he had initially sought.[19] The arbitrator has failed in his duty of correctly evaluating the evidence that was before him. It is the view of this Court that the conclusion of the Arbitrator that the 6th Respondent would have been promoted if not for the disciplinary action, is not supported by the evidence led before him. The Arbitrator could not have acted on an assumption that the 6th Respondent would have been entitled to be promoted, if not for the disciplinary action; regretfully, this is not acting judicially.

In the above circumstances, this Court is of the view that the decision of the Arbitrator is a decision that no sensible person who had applied his mind to the evidence available to him could have arrived at, and therefore is liable to be quashed by Certiorari.

[19] Page 289 of the proceedings before the Arbitrator.

Whether a Court can intervene when there is 'no evidence' to support the finding of the administrative body has been discussed in **Administrative Law** by Wade and Forsyth[20] in the following manner:

> "No evidence" does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding; or where, in other words, no tribunal could reasonably reach that conclusion on that evidence. This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and *ultra vires*. It also has some affinity with the substantial evidence rule of American law, which requires that findings be supported by substantial evidence on the record as a whole."

In these circumstances, this Court is in agreement with the submission of the learned President's Counsel for the Petitioner that the conclusion reached by the Arbitrator that the 6th Respondent is entitled to a promotion is not supported by the evidence placed before him, and is therefore unreasonable and irrational.

The second ground urged by the learned President's Counsel for the Petitioner was that, in any event, the relief granted by the Arbitrator is ambiguous and cannot be given effect to. As set out earlier, the Arbitrator determined that as a result of the punishments imposed on the 6th Respondent without holding an inquiry, the 6th Respondent had been deprived of his promotion to the next grade and that the 6th Respondent should therefore be promoted. The

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[20] 11th Edition; page 227.

Arbitrator has however not determined whether the 6th Respondent was entitled to be promoted in 1998 or in 2000. The award is silent in this regard. This Court is in agreement with the submission of the learned President's Counsel that an award must be specific and must be capable of being given effect to, which unfortunately is not the case in this application. This Court must note that it was upto the Commissioner General of Labour to have sought an interpretation in terms of Section 34 of the Industrial Disputes Act, which he does not seem to have done.

In the above circumstances, this Court is of the view that the decision of the Arbitrator is irrational and unreasonable. Accordingly, this Court issues a Writ of Certiorari in terms of paragraph (b) of the prayer to the petition quashing the award marked '**P9**'. This Court makes no order with regard to costs.

Judge of the Court of Appeal