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

Standard Chartered Bank,
No. 37, York Street,
Colombo 1.

PETITIONER

Vs.

CA (Writ) Application No. 231/2009

1. The Minister of Labour Relations and Manpower,
   Ministry of Labour Relations and Manpower,
   2nd Floor, Labour Secretariat,
   Narahenpita, Colombo 5.

2. The Commissioner General of Labour,
   Labour Secretariat,
   Narahenpita, Colombo 5.

3. The Secretary,
   Ministry of Labour Relations and Manpower,
   2nd Floor, Labour Secretariat,
   Narahenpita, Colombo 5.

4. V. Vimalarajah,
   No. 153/1, Kirulapone Avenue,
   Colombo 5.

5. L.A.S.G. Samarawickrama,
   No. 264/2, Dalugama, Kelaniya.

6. A.L. Fernando.
   (nee A.L. Kellayar)

7. H.W.N. Weerasekera.
   (nee W. Fernando).

8. G.S de Silva.
   (nee S.D. Silva).

9. M.S.S. Fernando.
   (now deceased)

9A. Nilmini Kumari Fernando.
   (nee Nilmini Kumari Batuwitage)

10. R.K.B. Barnabas.
   (nee B.R.K. Theogarajah).

11. L.A. Perera.
   (nee A.L. Perera).

12. L.L.S de Silva.

All C/o. L.A.S.G. Samarawickrama
No. 264/2, Dalugama, Kelaniya.

RESPONDENTS

Before:	**Arjuna Obeyesekere, J**
Counsel:	Sanjeeva Jayawardena, P.C, with Senani Dayaratne for the Petitioner
	Sobitha Rajakaruna, Senior Deputy Solicitor General for the 1st and 2nd Respondents
	Jacob Joseph for the 5th – 9th, 11th and 12th Respondents
Argued on:	3rd September 2018 and 13th September 2018
Written Submissions:	Tendered on behalf of the Petitioner on 8th May 2019
	Tendered on behalf of the 1st and 2nd Respondents on 5th February 2019
	Tendered on behalf of the 5th – 9th, 11th and 12th Respondents on 8th February 2019
Decided on:	17th July 2019

Arjuna Obeyesekere, J

The Petitioner has filed this application, seeking *inter alia* a Writ of Certiorari to quash the decision of the 1st Respondent, Minister of Labour Relations and Manpower contained in the documents annexed to the petition marked '**X18(a)-(c)**' to refer the following dispute for arbitration:

> "Whether the 5th – 12th Respondents "whose services were terminated by the Standard Chartered Bank having treated them as excess staff, are entitled to receive pension rights from the said bank."

The facts of this matter very briefly are as follows.

The Petitioner is a commercial bank licensed by the Monetary Board of Sri Lanka under the provisions of the Banking Act No. 30 of 1988, as amended, to carry out banking business in Sri Lanka. The Petitioner states that in September 2000, the Standard Chartered Group had acquired the banking operations of a bank known as the Grindlays Bank resulting in a global merger of the two banks. The Petitioner states further that the merger of the banking operations carried out in Sri Lanka by each of the said banks had been approved by the Monetary Board. Consequent to the said merger and in order to streamline its operations, the necessity had arisen for the Petitioner to terminate the services of certain staff members whose services had become redundant.

Accordingly, the Petitioner had made three applications to the Commissioner General of Labour in terms of Section 2(1) of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971, as amended, (TEW Act), seeking his approval to terminate the services of employees who were working either at the Petitioner Bank or with the Grindlays Bank. A summary of the said applications are as follows:

Date of Application	**Category**	**Number of Employees**
9th November 2001	Support Staff	55
19th December 2001	Clerical	26
19th December 2001	Managerial	18

After a lengthy and comprehensive inquiry with the participation of the employees that lasted for a period of over one year in respect of each

application, the Commissioner General of Labour, acting on the recommendations of Mr. M.N.S.Fernando, Acting Deputy Commissioner of Labour who had functioned as the Inquiry Officer in all three inquiries, had granted approval to terminate the services of the said employees, subject to the payment of compensation as set out in the following table:

Category	**Approval granted on**	**Compensation**
Support Staff	12th December 2002	6 months' salary for each year of service
Clerical	19th March 2003	4 months' salary for each year of service
Managerial	19th March 2003	4 months' salary for each year of service

While some employees had accepted the compensation that was duly deposited by the Petitioner with the Commissioner General of Labour, some other employees including the 5th – 12th Respondents (the Employee Respondents) had filed Writ Application Nos. 2282/2002,[1] 1070/2003[2] and 1080/2003[3] in this Court seeking to quash the aforementioned decisions of the Commissioner General of Labour.

With the consent of the parties, the aforementioned three applications had been taken up for argument together and this Court, by its judgment dated 9th May 2007, annexed to the petition marked '**X4**' had dismissed the three applications. Although 42 employees had sought Special Leave to Appeal from the Supreme Court against the said judgment '**X4**',[4] by an order delivered on 11th February 2008 annexed to the petition marked '**X5**', the Supreme Court

[1] This application had been filed by 54 Support Staff Grade employees. The 7th, 8th, 11th and the 12th Respondents in this application were the 3rd, 6th, 26th and 51st Petitioners respectively, in CA 2282/2002.

[2] This application had been filed by 19 Clerical Grade employees. The 5th, 6th and 9th Respondents in this application were the 13th, 1st and the 2nd Petitioners respectively in CA 1070/2003.

[3] This application had been filed by 12 Managerial Grade employees. The 10th Respondent in this application was the 2nd Petitioner in CA 1080/2003.

[4] SC Special Leave Application Nos. 152 – 154/2007.

had refused to grant Special Leave to Appeal and all three applications had been dismissed.

The Petitioner states that it thereafter came to know that the Employee Respondents had made an application to the Commissioner General of Labour seeking the following:

(a) pension rights in terms of the Collective Agreement annexed to the petition marked '**X7**';

(b) concessionary rights in respect of the housing loans; and

(c) a re-consideration of the modality adopted for the purpose of computing compensation.

A copy of the said application dated 10th December 2007 has been annexed to the petition marked '**X9**'. The response of the Petitioner has been annexed to the petition marked '**X10**' – '**X12**'. The Petitioner states that consequent to an inquiry, the Commissioner of Labour (Industrial Relations) had arrived at a decision that there was no merit in the application made by the said Respondents. The said decision dated 24th July 2008, sent by the said Commissioner of Labour on behalf of the Commissioner General of Labour has been annexed to the petition marked '**X14**'.

The Petitioner states that even though the Department of Labour had by its letter '**X14**' decided that there is no merit in the application of the Employee Respondents for a pension, the Minister of Labour had proceeded to make a

reference to arbitration, in terms of Section 4(1) of the Industrial Disputes Act in respect of the aforementioned dispute, namely, "Whether the *Employee Respondents* whose services were terminated by the Standard Chartered Bank having treated them as excess staff are entitled to receive pension rights from the said bank." The said decision to refer the dispute for arbitration is reflected in '**X18(a)-(c)**'.

Aggrieved by the decision of the Minister of Labour to refer the said dispute for arbitration, the Petitioner filed this application seeking a Writ of Certiorari to quash the said reference and a Writ of Prohibition preventing the Minister of Labour from invoking the provisions of Section 4(1) of the Industrial Disputes Act.

The learned President's Counsel for the Petitioner has challenged the said decision of the Minister on three grounds.

The first ground of challenge is that the entitlement of Employee Respondents to a pension has already been agitated by the Employee Respondents before the Commissioner General of Labour when the application was made under the TEW Act, as well as in the aforementioned three Writ Applications and, as a determination has been made with regard to all matters agitated in those applications including the pension rights of the Employee Respondents, the Minister could not have made a reference in respect of a matter that had already been considered and decided by this Court as well as by the Supreme Court.

It is the view of this Court that considerations of public policy[5] would prevent an issue, once determined, from being re-agitated by the parties before different fora, at different times. An individual has the right to be protected from vexatious multiplication of suits and prosecutions at the instance of an opponent[6], and there must be a finality to litigation, whatever the status may be of the parties involved. To continue to re-agitate an issue, once determined by a Court of law would also be an abuse of process.

A consideration of the first argument of the learned President's Counsel requires this Court to examine the proceedings before the Inquiry Officer, this Court and the Supreme Court.

As noted earlier, there were three inquiries that were conducted by the Commissioner General of Labour. This Court has examined the proceedings conducted before Mr. M.N.S.Fernando, Acting Deputy Commissioner of Labour in respect of the Support Staff,[7] and finds that the following references demonstrate that the issue of pension had been agitated by the Employee Respondents at the inquiry:

1. Page 123 – Submission of the learned President's Counsel who appeared for the employees that, "The pension is a terminal benefit. That is a relief we are claiming in this proceedings. I am instructed that the *Audited Statement of Accounts* would show the financial position of the Bank and that they have the necessary resources to pay pensions to these poor people."

---

[5] Expressed in the maxim *interest (or expedit) reipublicae ut sit finis litium.*
[6] Expressed in the maxim *nemo debet bis vexari pro una et eadem causa.*
[7] The case record in CA (Writ) Application No. 2282/2002 has been annexed to the petition marked 'Z1(a)'.

2. Pages 203 – 205 – Cross examination of the Bank witness by Counsel for the employee respondents:

Q – An important financial benefit that Bank employees have at the Standard Chartered Bank and Standard Chartered Grindlays Bank is the payment of a pension?

A – Yes.

Q – A pension in this country is normally paid to the Government employees only?

A – Yes.

Q – The payment of pension in the private sector is an unusual feature in this country?

A – In the banking sector, most banks pay pension.

Q – And persons would have joined the Standard Chartered Bank and the Standard Chartered Grindlays Bank because they were attracted by a pension scheme?

A – I don't know.

Q – This pension scheme is payable to the employees concerned?

A – Employees are eligible to a pension when they reach the required age.

Q – And that pension is a life time payment?

A – Yes.

Q – There is a provision in that to commute the payment of a monthly pension to payment of a commuted amount?

A – Yes.

Q – In your VRS,[8] that benefit is just written off?

A – It is not."

3. Pages 230 - 232 – Cross examination of the Bank witness by Counsel for the employee respondents:

"Q – Will you agree with me that if you take the case of Mr. Kahaduwa if he is allowed to stay in service till his retirement age, he would have earned not only the amount that you have mentioned as Rs. 2,176,229 he would also acquire a right to get a pension?

A – If he stayed (till) 55 years yes.

---

[8] The Petitioner had initially offered a Voluntary Retirement Scheme (VRS) to the employees. The application under Section 2(1) of the TEW Act was made only with regard to those employees who did not accept the VRS.

Q – Can you please assist the Tribunal by saying in the Banking sector what portion of his terminal salary is generally paid as pension?

A – According to the formula 60%.

Q – As a result of your attempt to terminate their services you are trying to deprive them of that benefit also?

A – I cannot comment on that.

Q – You will agree that people joined the banking sector purely because of the attraction of the pension?

A – Some may do.

Q – If you look at your audit statements of accounts you will find that every year the Banks, Standard Chartered Bank as well as Standard Chartered Grindlays Bank have contributed a certain sum of money to what is known as a Pension Fund?

A – Yes.

Q – That is to pay a pension to these people?

A – That is to pay pension when they reached age of 55 years."

The above evidence demonstrates that the employees have quite rightly raised all issues that have a bearing on the compensation payable to them, at the inquiry.

It is therefore clear to this Court that the issue of pension has been raised by the Support Staff at the inquiry before the Commissioner of Labour, and to that extent, the position taken up the learned President's Counsel for the Petitioner is correct.

The crucial factor is whether the Inquiry Officer considered the question of pension when he arrived at his determination that each employee in the Support Staff must be paid 6 months' salary as compensation for each year of service.

It is an admitted fact that the Employee Respondents rejected the Voluntary Retirement Scheme (VRS) offered to them. Thus, when the Petitioner made its application on 9th November 2001 to the Commissioner General of Labour under Section 2(1) of the TEW Act, it sought approval for the payment of the following compensation package, which had been offered to the employees under the VRS:

Age group	**Number of months' salary for each completed year of service**	**Number of months' salary for each year of future service upto the age of 55**
Below 30 years	1	0
30 – 40 years	2	0.5

40 to 50 years	3	0.5
50 and above	2	2

In order to consider whether the Inquiry Officer has considered the issue of pension in arriving at his decision, this Court has examined the recommendation of Mr. M.N.S.Fernando, Acting Deputy Commissioner of Labour which had been filed by the Commissioner General of Labour in CA (Writ) Application No. 2282/2002, marked '1R1'[9] and observes that the Inquiry Officer has in fact done so, as borne out by the following excerpts from the said Report:

"බැංකු සාක්ෂිකරු හරස් ප්‍රශ්න වලට පිළිතුරු දීම

සියලුම සේවකයන් වෙනුවෙන් ක්‍රියාත්මකව සාමුහික ගිවිසුමක් ඇති බවත්, ඊට අනුකූල වැටුප් සහ අනෙකුත් දීමනා ගෙවන බවත්, මූලික වැටුපට අමතරව ජීවනාධාර දීමනාව බැංකුව විසින් යෝජිත වන්දි ක්‍රම යටතේ ගණන් ගෙන ඇති බවත් කියා ඇත. සාමුහික ගිවිසුමට අනුව විවිධ දීමනාවන්ට සේවකයන් හිමිකම් දරණ බවත් ඒ අතර අඩු පොලියට නිවාස ණය, ආපදා ණය, වාහන ණය මුදල් ලබා දෙන බවත් ඇතැමෙකුට ගමන් වියදම් වැනි සහන රාශියකට හිමිකම් ඇති බවත්, ඒ සමගම වසර 10 ක් සහ වයස අවුරුදු 50 ඉක්මවන සෑම සේවකයෙකුටම පුරණ විශ්‍රම වැටුපකට හිමිකම් ඇති බවත් කියා සිටී."

නිරීක්ෂණ හා නිර්දේශ

බැංකු දෙක වෙනුවෙන් දිවුරුම් සහතිකයක් ඉදිරිපත් කර සක්ෂිදුන් එකම සාක්ෂිකරු වෙතින් ඉතා දීර්ඝ ලෙස දින 10 පමණ කාලයක් සේවක පක්ෂය විසින් හරස් ප්‍රශ්ණ විමසනු ලැබවා. ඉන් දීර්ඝ කාලයක් දිවුරුම් සහතිකයක් වලංගුභාවය පිලිබඳව මෙන්ම සේවකයන්ට හිමි දීමනා ඇතුලත් වැටුප් ක්‍රමය, විශ්‍රම වැටුප් ක්‍රමය සහ බැංකුවල ලාභ

[9] The Statement of Objections has been annexed to the petition marked 'Z1(c)'.

අලාභ ගිණුම් ඇතුලත් මූල්‍ය විස්තර සම්බන්ධ ප්‍රශ්ණ කිරීම් වලට හරස් ප්‍රශ්ණ ඇසීමේ කාලය වැය විය.

මෙම ඉල්ලුම් පත්‍රය සම්බන්ධයෙන් සේවක පක්ෂය පරීක්ෂනය පුරාම දැඩි උනන්දුවක් දක්වන ලද්දේ සේවකයන් දැනට භුක්ති විඳින වරප්‍රසාද හුවා දැක්වීමටත් ඒ අතර ඔවුන්ට හිමිකම් ඇති විශ්‍රාම වැටුප් හිමිකම සහ විශ්‍රාම ගන්නා තෙක් දක්වා උපයාගතහැකි ඉපයීම් පිලිබඳව කරුණු ඉදිරිපත් කිරීම මගින් වෙනසක් ගන්නා ලදි. ඒ සම්බන්ධයෙන් ගණනය කිරීම් කර පරීක්ෂණය සඳහා ඉදිරිපත් කිරීම පිණිස හුදෙක් සේවක පක්ෂයේ ඉල්ලිම මත කටයුතු කිරීමට බැංකු ශාක්ෂිකරු එකඟතාව පළකොට එම විස්තර ඉදිරිපත් කරන ලදි. පරීක්ෂණයේදී ඉදිපත් වූ ශාක්ෂි අනුව විශ්‍රාම වැටුප් හිමිවීම සඳහා කිසියම් කොන්දේසි සපුරාලීම අවශ්‍ය වෙන අතර සේවාන්ත හිමිකම් ගණනය කිරීමේදී කිසියම් සේවකයකු විශ්‍රාම ගන්නා ඉදිරී දිනයන් පදනම් කොට එකී මුළුකාලයට හිමිවිය හැකි හිමිකම් සහ වරප්‍රසාද සියල්ල සැලකිල්ලට ගෙන මූල්‍යමය ආකාරයක් ප්‍රධාන කිරීම සාධාරණ සහ යුක්ති සහගත ක්‍රමවේදයක් නොවේ.

<u>නිර්දේශය</u>

ඒ හේතුකොට ඔවුන්ගේ පිවිත රටාවද හැඩගැස්වී ඇත්තේ ඒ අනුව බව උපකල්පනය කිරීම වැරදි නොවේ. තවද වෙනත් පුද්ගලික අංශයේ සේවා නියුක්තියකට සාමාන්‍යයෙන් හිමි නොවන විශ්‍රම වැටුපකට ද නියමිත කොන්දේසි සපුරාලීමෙන් අනතුරුව ඔවුන්ට හිමිකම් ඇත. මෙම සේවකයන් අතුරින් වැඩිම සේවා කාලය වසර 22 වන අතර අඩුම සේවා කාලය වසර 06 ක් වේ. එසේම විශ්‍රම වැටුපට හිමිකම් ලැබීමට මෙම සේවකයන් 55 දෙනා අතුරින් හිමිකම් ලැබෙනුයේ 03 දෙනෙකු වැනි ඉතා සීමිත සංඛ්‍යාවකට පමණි. සේවය අහිමිවීම තුලින් වැඩි පිරිසකට එකී වරප්‍රසාදයද අහිමි වීම සැලකිල්ලට ගත යුතු බව තවත් කරුණකි.

මෙම සියලු කරුණු සැලකිල්ලට ගනිමින් සියලුම සේවකයන්ට සාධාරණවුත් සහ යුක්ති සහගතවුත් වන්දි මුදල් ප්‍රමාණයක් ගෙවා බැංකු විසින් අතිරික්ත සේවකයන් ලෙස හඳුනාගෙන මෙම ඉල්ලුම් පත්‍රය තමන් ඉදිරිපත් කර සේවකයන්ගේ සේවය අවසන් කිරීමට අනුමැතිය ලබාදීම නිර්දේශ කරන අතර ඒ අනුව එකී සේවකයන් සම්පූර්ණ කර ඇති සෑම පූර්ණ සේවා වසරක් වෙනුවෙන් මාස හයක (6) වැටුප සමාන වන්දි මුදලක් ගෙවීමත් සේවා යෝජක බැංකු දෙකට නියෝජනය කිරීමටත් එසේ ගෙවීම් කිරීමෙන් පසු සේවකයන්ගේ සේවය අවසන් කිරීම සඳහා අනුමැතිය ලබාදීමටත් නිර්දේශ කරමි."

In the above circumstances, this Court is satisfied that the Acting Commissioner of Labour who conducted the inquiry has taken into consideration the entitlement of a pension, when he arrived at his decision that an employee in the Support Staff must be paid 6 months' salary as compensation for each year of service, as opposed to the 1-4 months that was proposed by the Petitioner.

This Court has examined the petition filed by the 7th, 8th, 11th and 12th Respondents, who were employees of the Support Staff, in Writ Application No. 2282/2002 challenging the decision of the Commissioner General of Labour, and observes that the said Respondents had specifically adverted to their entitlement to a pension in paragraph 27 thereof. One can only assume that an argument relating to the non-consideration of the right to a pension was in fact advanced by the Employee Respondents, since it was pleaded in the said application.

Be that as it may, it appears that this Court did not see any merit in the arguments advanced on behalf of the Employee Respondents as all three applications were dismissed by this Court. It is the view of this Court that the issue relating to pension and all issues arising from and relating to the termination of the services of the Employee Respondents came to a close after the refusal of Special Leave to Appeal by the Supreme Court.

This Court will now consider if the position with regard to the Managerial Staff is identical to the Support Staff. This Court has examined the proceedings before the Inquiry Officer, particularly pages 70 and 77-81, and observes that the issue of pension had been extensively agitated by the said employees. This

Court has examined the decision of the Inquiry Officer annexed to the Statement of Objections of the Commissioner General of Labour in CA(Writ) Application No. 1080/2003 marked '2R3' and observes that the Inquiry Officer has referred to the fact that the bank employee had been extensively cross examined for more than 10 days by the Counsel for the workers and the Bank Unions on "factors which could be treated as information of vital importance to arrive at a reasonable and justifiable decision on this application" and that in testifying at the inquiry, the said witness had disclosed the fact that employees, once entitled, receive a pension for life. The Inquiry Officer had also observed that the witness, under re-examination stated that in order to become eligible for pension rights, workers will have to satisfy two requirements, namely that they should reach the retirement age, and have 10 years of service.

At pages 18 and 19 of '2R3', the Inquiry Officer has observed as follows:

> "It is also very important to bear in mind that however much the reasons attributed for the restructuring process are justifiable, the workers who would lose their jobs in the process cannot be held responsible since it is of no fault of theirs. It is a situation exclusively created by an act of their employers for their own betterment which would lead to deprive the workers and their families, the lifestyle they would have enjoyed with high emoluments they received in the past. **At the same time, some of these workers would have to forego their pension rights at this juncture, consequent to the termination of employment prematurely**.

In terms of the primary objectives of the Termination of Employment Act, the Commissioner with an open, impartial, unbiased mind should take into consideration all the relevant facts that had been highlighted in the course of the inquiry by both parties in making a reasonable and justifiable order adhering to the fundamentals of fair play.

Taking all the aforementioned factors and the findings at the inquiry held in regard to this application, it is recommended that an order may be made to pay 4 months' salary for each completed year of service with an upper limit of 90 months' salary to each workman remaining in service and grant approval to the banks to retrench them."

In these circumstances, it is the view of this Court that the Deputy Commissioner of Labour who conducted the inquiry was mindful of the repercussions that the employees would have to suffer by an order approving the termination of their services and their loss of pension, and that it had a bearing on his decision with regard to the award of compensation.

Similarly, this Court observes that in the petition in CA (Writ) Application No. 1080/2003, filed by the Managerial Staff, the loss of pension rights has been pleaded in paragraph 16(c).

In CA (Writ) Application No. 1070/2003, filed by the Clerical Staff, this Court observes that even though the Statement of Objections of the Commissioner General of Labour has been annexed to the petition marked '**Z2(c)**', the said objections do not contain a copy of the report of the Inquiry Officer. However, in paragraph 14(g) thereof, the 2nd Respondent has specifically pleaded that

the compensation awarded adequately compensates the said workmen, having regard to the circumstances relevant to them. What is significant however is that the averment of the employees in paragraph 25(c) of the petition in CA (Writ) Application No. 1070/2003 that the Commissioner General of Labour failed to take into account the pension rights of the employees has been specifically denied in the aforementioned Statement of Objections and the affidavit of the Commissioner General of Labour. In these circumstances, this Court is at a loss to understand how the Commissioner General of Labour can affirm an affidavit in this application subscribing to a contrary position than that taken in the previous three applications. It is perhaps worth mentioning at this stage that in attempting to justify the reference to arbitration, the Commissioner General of Labour has completely ignored the findings of his own Deputy Commissioner of Labour who conducted the inquiry under the TEW Act, and his own affidavit filed before this Court in CA (Writ) Application Nos. 2282/02, 1070/03 and 1080/03.

In the above circumstances, this Court is in agreement with the first ground urged by the learned President's Counsel for the Petitioner that the issue of the eligibility of the Employee Respondents to a pension did form the subject matter of the inquiry that was conducted by the Department of Labour under the TEW Act and that it has in fact been considered in the determination of compensation payable to the Employee Respondents. Hence, it is the view of this Court that the Employee Respondents cannot have a second bite at the 'pension pie' through a reference to arbitration.

The second ground that was raised by the learned President's Counsel for the Petitioner, is that the Minister's decision to refer the said dispute, **in the above circumstances**, is irrational and arbitrary.

In order to consider the said ground, it would be important for this Court to examine the relevant provisions of the law which empower the Minister to make a reference to arbitration under Section 4(1).

Section 4(1) of the Industrial Disputes Act reads as follows:

> "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."

It is the view of this Court that in terms of Section 4(1), the Minister must form the opinion that there exists an industrial dispute, prior to making any reference of such dispute for resolution by arbitration. This Court is further of the view that where such a reference is challenged, as in this application, the Minister must explain the matters that were considered by him in forming such an opinion, or, as submitted by the learned President's Counsel for the Petitioner, that the "Minister had applied a judicial mind or even an objective mind, or with all due deference a sensible mind to the matter".

This Court has already discussed in detail the manner in which the issue of pension arose during the inquiry and the manner in which the Inquiry Officer

considered the said issue. When the Employee Respondents raised the issue of a pension once again through '**X9**', the Commissioner of Labour, having conducted an inquiry, communicated through the letter '**X14**' dated 24th July 2008, the following decision:

"එල්.ඒ.එස්.පී. සමරවික්‍රම මහතා සහ ස්ටැන්ඩඩ් වාර්ටඩ් බැංකුව අතර
පවත්නා කාර්මික ආරවුල

උක්ත කරුණ සම්බන්ධයෙන් මෙම කාර්යාලයේ පවත්වන පරීක්ෂණය හා බැඳේ.

දෙපක්ෂය විසින් ඉදිරිපත් කර ඇති කරුණු පිළිබඳව ගැඹුරින් අධ්‍යනය කළෙමි. ඒ අනුව මෙම ආරවුල බේරුම්කරණයට යොමු කිරීමට කුසලතා නොමැති බව කාරුණිකව දන්වමි"

The reference to arbitration was made thereafter by '**X18(a)-(c)**'[10]. It is the position of the Petitioner that it has not been informed as to what transpired between the issuance of '**X14**' and '**X18(a)**'. This Court must therefore look at the Statement of Objections filed on behalf of the Minister of Labour and the Commissioner General of Labour in order to ascertain the reasons that prompted the Minister to make the said reference to arbitration by '**X18(c)**'.

In paragraph 11 of the Statement of Objections, the Respondents have stated as follows:

"(i) The 1st Respondent together with the 2nd Respondent were satisfied that the appeal marked as X9 contained reasonable grounds to refer the dispute mentioned therein to an arbitrator under Clause 4(1) of the Industrial Disputes Act.

[10] 'X18(a)' is dated 3rd February 2009, while 'X18(b) and (c)' are dated 13th February 2009.

(ii) In referring the dispute mentioned in the appeal marked as X9, the following grounds, *inter alia* that submitted by the relevant employees were taken into consideration:

a) In terms of clause 17 of the said collective agreement those employees were entitled for a pension after reaching the age of 55.

b) Those employees were compulsorily terminated by the Petitioner bank on the issue of excess staff while they were ready to be in service until their retirement age.

c) The termination of the services of the respective employees was not due to any request made by them and it was fair and reasonable to consider their capability of serving the Petitioner until their age of retirement.

d) Several clerical and minor staff who were eligible in terms of the Thalagodapitiya award have been given the pension rights.

(iii) The subject dispute has been referred to the Arbitrator merely for the interest of justice and also for the purpose of enabling the arbitrator to ascertain all the facts and material in view of making a just and equitable order."

Several issues arise from the above explanation. The first is, the 1st and 2nd Respondents have only considered '**X9**' and have not considered '**X10**', '**X11**' and '**X12**', inspite of admitting the receipt of '**X10**', '**X11**' and '**X12**' and inspite of the said documents being available to the 1st and 2nd Respondents. This Court is of the view that in terms of Section 4(1) of the Industrial Disputes Act, the Minister is not obliged to refer for arbitration, each and every dispute that he or she is presented with. The Minister must look at each request objectively and exercise his discretion judiciously. The fact that the Minister has a discretion is clearly established when one considers that the Minister **may** refer for arbitration only if, "he is of the opinion that an industrial dispute is a minor dispute". How does he form an opinion that there exists an industrial dispute and that such dispute is a minor dispute? Is it only by considering the argument advanced by the employee or should the Minister also consider the position of the employer, as well as any other matters that the Minister may consider relevant? This Court, whilst not subscribing to the view that it is mandatory for the Minister to obtain the views of all parties prior to making a reference under Section 4(1), takes the view that in this application, given the background circumstances such as the inquiry under the TEW Act, and the litigation challenging the findings of the Inquiry Officer, the Minister was under a duty to consider the documents '**X10**', '**X11**' and '**X12**' prior to forming an opinion that there exists an industrial dispute. Unfortunately, the Minister has not done so, and therefore it is the view of this Court that the Minister has failed to take into consideration relevant matters, prior to arriving at a decision.

The learned Senior Deputy Solicitor General for the 1st and 2nd Respondents had submitted that in terms of Section 4(1), the consent of the parties is not

required for a reference and that this is an indication that the Minister does not have to consult the other party, prior to making the reference to arbitration. Whilst agreeing that the consent of the parties is not required, this Court is of the view that this is not an indication that the Minister is not required to address his mind in a judicial manner. If this Court may borrow the language used by the Supreme Court in **Municipal Council Colombo vs Munasinghe**[11] with reference to the power of an arbitrator appointed under the Industrial Disputes Act, the Minister or for that matter, no public official 'has the freedom of the wild horse' to do whatever he or she wants to. All exercise of statutory duties and functions must be within the four corners of the statute that confers such duties and functions, and any transgression will be dealt with in terms of the law.

There is one other matter that this Court would like to advert to, which is the submission of the learned Counsel for the Employee Respondents that the Minister is only exercising a ministerial function when he makes a reference to arbitration, and that his decision cannot therefore be questioned by this Court.[12]

This issue was considered by this Court in **Frewin and Company Limited vs Dr. Ranjith Atapattu and others**[13] where it was held as follows:

> "Finally, I have to consider the submission of learned Senior State Counsel that the order of reference to arbitration made by the Minister is not in

[11] 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].
[12] See the judgment of this Court in Chas P. Hayley and Company Limited vs Commercial and Industrial Workers and others [(1995) 2 Sri LR 42].
[13] (1993) 2 Sri LR 53.

any event subject to review in an application for a Writ of Certiorari. Learned Senior State Counsel sought to support this submission on the judgment of Pathirana, J. in the case of *Aislaby Estate Ltd. vs Weerasekera.*[14] In that case a reference to arbitration was sought to be quashed on the basis *inter alia*, that the Minister had previously decided that the dispute should not be referred to arbitration.

Pathirana, J. characterised the act of the Minister in making an order of reference under section 4 (1) of the Industrial Disputes Act as an administrative act and observed that "the court cannot objectively review that decision". (p250). At a later stage in the judgment (p254) the finding in the case is stated as follows:

"I, therefore, hold that the Minister's decision under Section 4 (1) in the circumstances of this case and his reference dated 15th April 1968 to the Labour Tribunal (V) for settlement by arbitration cannot be questioned by the Court, and is a valid decision."

It is seen from this finding that the judgment in the case does not go so far as to hold that a reference made by the Minister under section 4 (1) is not subject to review even in a situation where the Minister has acted *ultra vires*. Furthermore, the finding is specifically that in the circumstances of that case the Minister's decision is valid. On the other hand, in the case of *Nadaraja Ltd. vs N.Krishnadasana*[15] bench of three judges of the Supreme Court issued a Writ of Certiorari quashing a second reference made by the Minister to another arbitrator, at a time when

[14] 77 NLR 241.
[15] 78 NLR 255.

earlier reference made in respect of the same dispute was pending. Sharvananda, J. (as he then was) held that the second reference was "invalid in law as being in excess of the powers of the Minister." (p264). The description of the order of reference by the Minister as an administrative act by Pathirana. J. in the *Aislaby Estate* case (supra), does not have the effect of removing it altogether from the pale of judicial review. As noted by Sharvananda, J. in Krishnadasan's case "though the order of reference under section 4 (1) may be administrative in motivation, yet the order, according to the scheme of the Act, is designed to eventuate by a quasi-judicial process, in an award potent with consequences to the parties". (p261). The decision in that case is authority for the proposition that an order of the Minister referring a dispute to arbitration, made under section 4 (1), is subject to judicial review on the ground that it is *ultra vires*."

The view already taken by this Court that the decision of the Minister under Section 4(1) is subject to judicial review is fortified by the above judgment of this Court.

The second issue that arises from the explanation offered in the Statement of Objections is that the 1st and 2nd Respondents seem to be completely oblivious to the fact that the Commissioner General of Labour himself had conducted an *inter partes* inquiry into the application filed by the Petitioner under the TEW Act seeking approval to terminate the services of the Employee Respondents, and that such approval was granted only because the Commissioner General of Labour himself was satisfied that the Employee Respondents were excess staff. This fact is evident when one considers the Statement of Objections filed by

the Commissioner General of Labour in the previous three Writ applications where he justified the decision to terminate the services of the employees under the TEW Act.

The third and most crucial issue that arises from the said explanation is that it is none other than a Commissioner of Labour himself that considered the question of whether approval for the termination of the services of the Employee Respondents should be granted and that the issues relating to the entitlement to a pension was infact considered extensively by the said Commissioner. It is perhaps worth reiterating that the approval to terminate the services of the Employee Respondents was granted on the condition that compensation at the rate of 4-6 months' salary for each year of completed service must be paid and that in doing so, the Commissioner of Labour has infact taken into consideration the very matters that have now been offered as the reasons that led to the issuance of '**X18(a)-(c).**'

This Court also observes that the 1st and 2nd Respondents while admitting '**X14**' have stated that they "were satisfied that there were reasonable grounds to refer the subject dispute to an arbitrator on the subsequent appeal made by the relevant Respondents." The Respondents have however not produced this subsequent appeal to this Court and the explanation offered in paragraph 11 of the Statement of Objections does not contain any reference to any subsequent appeal but is limited to '**X9**'. The Employee Respondents have submitted with their Statement of Objections, three letters marked '**5R7(A)**' – '**5R7(C)**' said to have been sent by them to the Minister of Labour and the Secretary, Ministry of Labour, after the issuance of '**X14**'. This Court has examined the said three letters and observes that the Employee Respondents

have specifically submitted that their right to a pension was not considered during the inquiry, which is not correct, as illustrated above. In the absence of any explanation from the Minister to this Court, this Court cannot conclude that the Minister was influenced by these letters, but if he was, then it is clear that he had acted under a misapprehension of the factual circumstances.

What is most significant however, is the failure on the part of the Minister to have affirmed by way of an affidavit to the matters that prompted the reference. When the decision of the Minister to make a reference to arbitration is challenged and the law requires the Minister to form an opinion prior to making such a reference, shouldn't the Minister have filed an affidavit explaining the basis for his opinion? Is an affidavit from the Commissioner General of Labour sufficient? Or is the filing of a Statement of Objections on behalf of the Minister sufficient? It is the view of this Court that the Minister ought to have filed an affidavit disclosing the basis on which he formed his opinion. An affidavit from the Minister, supported by cogent reasons for the reference, would have satisfied this Court that the Minister in fact did give his mind to the issue, as opposed to merely placing his signature on one among several documents that are routinely submitted to a minister for his signature. Furthermore, this Court must observe that the 1st and 2nd Respondents have not filed any contemporaneous documents that would demonstrate the decision making process that eventually led to '**X18(a)-(c)**'.

Taking into consideration all of the above matters, can it be said that the Minister has acted reasonably? Or, as articulated by Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Service**[16] is the said decision "so

[16] [1985] AC 374.

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?" For the reasons set out earlier in this judgment, this Court must state that any reasonable person who had applied his mind to the facts of this application and especially the evidence led before the inquiry conducted under the TEW Act could not have formed an opinion that there now existed an industrial dispute[17] between the parties relating to the payment of a pension that required a reference to arbitration. In these circumstances, this Court is of the view that the decision contained in '**X18(a)-(c)**' is unreasonable and irrational and is liable to be quashed by a Writ of Certiorari.

The third ground urged by the learned President's Counsel for the Petitioner was that in any event, the Petitioners are not entitled to a pension and that the Minister has failed to consider this fact, at the time he issued '**X18(c)**'. It is the view of this Court that Section 4(1) would require the Minister to be satisfied at least on a prima facie basis that the Employee Respondents were entitled to a pension at the time he formed an opinion on the existence of an industrial dispute.

The eligibility of the Employee Respondents to a pension arises in terms of the Collective Agreement dated 15th May 2000 annexed to the petition marked '**X7**' that nine licensed commercial banks including the Petitioner have entered into with the Ceylon Bank Employees Union.

---

[17] Industrial Dispute has been defined in Section 48 of the Industrial Disputes Act as "any dispute or difference between an employer and a workman or between employers and workmen or between workmen and workmen connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, or the termination of the services, or the reinstatement in service, of any person, and for the purpose of this definition "workmen" includes a trade union consisting of workmen";

Clause 17(a) of '**X7**' reads as follows:

> "An employee shall, **upon reaching the retirement age** of the Bank and who **is in the permanent employment of the Bank at such time**, and **shall have completed not less than 10 years of actual continuous service** (excluding absence/leave without pay), be entitled to a monthly pension

It is not in dispute that the Employee Respondents were 48, 42, 46, 42, 46, 41, 39 and 41 years of age respectively, at the time the Commissioner General of Labour granted approval to terminate their services under the provisions of the TEW Act. Thus, it is clear that the Employee Respondents did not serve the Petitioner until they reached the age of 55 years and that they have failed to satisfy two of the criteria laid down in Clause 17(a) of '**X7**'. Thus, on the face of it, the Employee Respondents were not entitled to a pension.

The 1st and 2nd Respondents have stated in their Statement of Objections that in terms of clause 17 of the Collective Agreement, the employees were entitled for a pension after reaching the age of 55. While this is true, what the 1st and 2nd Respondents have failed to consider is that an employee must be in service at the time he reaches the age of retirement in order to be entitled to a pension. While it is also true that the premature termination of services deprived the Employee Respondents of their entitlement to a pension, the Minister has failed to consider (a) that the issue of the pension was in fact raised by the Employee Respondents before the Inquiry Officer; (b) that the Commissioner of Labour did in fact take into consideration the pension that the Employee Respondents would have been entitled to, if not for the premature termination of their services, in deciding the quantum of

compensation; (c) that the entitlement to a pension has been considered in the computation of the compensation payable; and (d) that the said premature termination was approved by the Commissioner General of Labour.

In the said circumstances, this Court is of the view that the reasons adduced in paragraph 11 of the Statement of Objections as being the grounds that prompted a reference to arbitration has not addressed the factual situation that prevailed at the time the reference was made. This Court is of the view that the failure by the Minister to take into consideration the above matters renders the decision of the Minister *ultra vires* and illegal. The following passage from **Administrative Law** by Wade and Forsyth[18] illustrates the above position clearly:

> "There are many cases in which a public authority has been held to have acted from improper motives or upon irrelevant considerations, or to have failed to take account of relevant considerations, so that its action is ultra vires and void....
>
> Lord Esher MR stated the 'irrelevant considerations' doctrine in a case where a vestry had mistakenly fixed the pension of a retiring officer on the erroneous assumption that they had no discretion as to the amount[19]:
>
> > "But they must fairly consider the application and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the

[18] 11th Edition, page 323.
[19] R v. St. Pancras Vestry (1890) 24 QBD 371 at 375.

exercise of their discretion, then in the eye of the law they have not exercised their discretion."

The doctrine applies equally to failure to take account of some consideration which is necessarily relevant..."

This Court is therefore in agreement with the submission of the learned President's Counsel that the Minister failed to take into consideration relevant matters when he made the reference to arbitration and that this failure renders his decision liable to be quashed by a Writ of Certiorari.

In the above circumstances this Court is of the view that the decision of the Minister of Labour to make a reference to arbitration of the issues set out in '**X18(a) – (c)**' is irrational and unreasonable and is therefore liable to be quashed by a Writ of Certiorari. Accordingly, this Court proceeds to issue the Writs of Certiorari sought in paragraphs (c) and (d) of the prayer to the petition to quash the reference to arbitration in '**X18(a) – (c)**' and the Writ of Prohibition sought in paragraph (e) of the prayer to the petition. This Court makes no order with regard to costs.

Judge of the Court of Appeal