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

Bogawanthalawa Tea Estates PLC.,
No. 153, Nawala Road,
Narahenpita, Colombo 5.

PETITIONER

Vs.

CA (Writ) Application No: 282/2018

1) Commissioner General of Labour.

2) N.R. Ranawaka,
Assistant Commissioner of Labour,
Colombo East District Labour Office,

3) C.G.H. Sanathlanka,
Assistant Commissioner of Labour,
Colombo East District Labour Office.

4) D.W.N. Viraji,
Deputy Commissioner of Labour,
Termination Unit.

5) L.T.G.D. Dharshana,
Assistant Commissioner of Labour,
Colombo East District Labour Office.

1st – 5th Respondents at
Labour Secretariat,

Department of Labour,
No. 56, Kirula Road, Colombo 5.

6) Kithsiri Bandara,
175/F6, Elvitigala Mawatha, Colombo 8.

7) Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: **Yasantha Kodagoda, P.C., J/ President of the Court of Appeal**
Arjuna Obeyesekere, J

Counsel: M. Bastians with D. Kaneshayogan for the Petitioner

Suranga Wimalasena, Senior State Counsel for the 1st – 5th Respondents

M. Sathiyendran for the 6th Respondent

Argued on: 5th September 2019

Written Submissions: Tendered on behalf of the Petitioner on 30th September 2019

Tendered on behalf of the 1st – 5th Respondents on 27th September 2019

Tendered on behalf of the 6th Respondent on 31st October 2019

Decided on: 20th December 2019

Arjuna Obeyesekere, J

The Petitioner has filed this application seeking *inter alia* a Writ of Certiorari to quash the decision of the 2nd Respondent contained in the letter dated 25th June 2018 annexed to the petition marked '**P21**', by which the 2nd Respondent confirmed the decision of the 3rd Respondent that the Petitioner is liable to pay a sum of Rs. 223,450/= as gratuity to the 6th Respondent together with a further sum of Rs. 67,035/= as surcharge.[1]

The facts of this matter very briefly are as follows.

The 6th Respondent had been employed by the Petitioner from 1st May 1997 in the post of Manager – Logistics. The letter of appointment marked '**6R1**' sets out the terms and conditions relating to the said employment, including the fact that the age of retirement shall be 55 years, subject to extension on a yearly basis upto 60 years, at the sole discretion of the Petitioner. The 6th Respondent had been promoted as General Manager (Administration) in the Petitioner Company in April 2006, subject to the same terms and conditions contained in the letter of appointment, '**6R1**'.[2]

It is the position of the Petitioner that the age of retirement of its employees is 55 years, but that extensions of service may be granted at the discretion of the Petitioner. It is not in dispute that the 6th Respondent turned 55 years of age in January 2006, and that his services were extended on an annual basis thereafter. The Petitioner states that the last extension of service was granted to the 6th Respondent by way of letter dated 17th January 2011, annexed to the

[1] Vide amended petition dated 14th January 2019.
[2] Vide letter dated 10th March 2006 produced by the 6th Respondent, marked '6R2'.

petition marked '**P16**', just prior to the 6th Respondent reaching the age of 60 years.

This Court has examined '**P16**' and observes that:

(a) The extension has been granted at the request of the 6th Respondent;

(b) The 6th Respondent had been informed that his date of retirement will be 20th January 2012.

It is the position of the Petitioner that no further extensions of service was granted to the 6th Respondent, and that the 6th Respondent retired from service on 31st January 2012. The Petitioner states further that the 6th Respondent was offered 'fresh employment' in the Petitioner company as a 'Consultant' for a period of one year, commencing 1st February 2012. In terms of Clause 5 of the contract denoting the 'fresh employment', annexed to the petition marked '**P2**', the 6th Respondent was required to '*perform the duties and responsibilities as performed by you under your previous post as General Manager / Administration*'. Clause 2 of '**P2**' provided further that the 6th Respondent '*will continue to avail the same perks such as medical benefits, travelling allowance, fuel allowance, telephone allowance etc., which were enjoyed by (the 6th Respondent) as at 31st January 2012.*'

At the end of the contract period in '**P2**', the Petitioner offered a fresh 'Consultancy Contract' on the same terms and conditions as in '**P2**' for a further period of one year as evidenced by the contract annexed to the petition marked '**P3**'. It is not in dispute that the 6th Respondent, having duly

noted the contents thereof, accepted the terms and conditions set out in '**P2**' and '**P3**'.

Acting on complaints made by two female employees that the 6th Respondent had sexually harassed the said employees, the Petitioner had issued a show cause letter dated 25th June 2013 to the 6th Respondent. Having conducted a preliminary investigation, the Petitioner had initiated a formal inquiry into the said complaints, with the participation of the 6th Respondent. The inquiring officer, who is an Attorney at Law, having taken the view that "*from the evidence placed before me, it is crystal clear that both these young girls have suffered a lot due to the harassment of the accused employee*", had come to the conclusion that the 6th Respondent was 'guilty' of both charges leveled against him. By its letter dated 2nd September 2013, annexed to the petition marked '**P6**', the Petitioner had informed the 6th Respondent that it had decided to terminate his services with immediate effect. Thus, the 'Consultancy contract' came to an end on 2nd September 2013.

Dissatisfied by the said decision, the 6th Respondent, by his letter dated 18th December 2013,[3] had complained to the Commissioner General of Labour *inter alia* that his EPF and ETF entitlements have not been paid since 1st February 2012, and that he is entitled to the payment of *balance gratuity* from 1st February 2012. The claim for gratuity, which is the subject matter of this application, is based on the premise that the contracts '**P2**' and '**P3**' are a continuation of the initial Contract of employment evidenced by '**6R1**', and that the 6th Respondent is entitled to be paid gratuity for the full period that he served with the Petitioner – i.e. 1st May 1997 to 2nd September 2013.

[3] This letter is an annexure to the letter annexed to the petition marked 'P7'.

Provisions relating to the payment of gratuity are found in the Payment of Gratuity Act No. 12 of 1983, as amended. Section 5(1) of the Act reads as follows:

> *"Every employer who employs or has employed fifteen or more workmen on any day during the period of twelve months immediately preceding the termination of the services of a workman in any industry shall, on termination (whether by the employer or workman, or on retirement or by the death of the workman, or by operation of law, or otherwise) of the services at any time after the coming into operation of this Act, of a workman who has* ***a period of service of not less than five completed years under that employer****, pay to that workman in respect of such services, and where the termination is by the death of that workman, to his heirs, a gratuity computed in accordance with the provisions of this Part* ***within a period of thirty days of such termination****."* (emphasis added).

The Petitioner had not disputed its liability regarding the payment of EPF and ETF for the periods covered by '**P2**' and '**P3**', and had accordingly made the payment. The Petitioner had however disputed its liability to pay gratuity for the periods covered by '**P2**' and '**P3**' (i.e. from 1st February 2012 to 3rd September 2013) *inter alia* on the basis that:

(a) The contract of employment evidenced by '**6R1**' had come to an end on 31st January 2012; and

(b) The contracts '**P2**' and '**P3**' are fresh contracts, which do not attract any liability on account of gratuity, as the minimum period of employment required by Section 5 of the Gratuity Act has not been satisfied.

The 3rd Respondent, Assistant Commissioner of Labour, having conducted an inquiry with the participation of the Petitioner and the 6th Respondent, had sent the Petitioner a letter dated 13th July 2016, annexed to the petition marked '**P19**', which reads as follows:

"**J.W.K. Bandara** මයාගේ පැමිණිල්ල

ඉහත නම සඳහන් අය විසින් 2013.12.27 දින මා වෙත ඉදිරිපත් කර ඇති පැමිණිල්ල සම්බන්ධයෙනි. පැමිණිලි පරීක්ෂණය කිරීමෙන් පසු ඔහු සඳහා හිමි පාරිතෝෂික මුදල් 1992 අංක 62 දරණ පාරිතෝෂික ගෙවීමේ සංශෝධිත පනතින් කියවෙන 1983 අංක 12 පාරිතෝෂිත පනතේ 05 වගන්තිය යටතේ පහත සඳහන් පරිදි ගණනය කරන ලදී.

පාරිතෝෂික මුදල් ගණනය කිරීම

සේවයට බැඳුනු දිනය	:1997.05.01
සේවය අවසන් කළ දිනය	:2013.09.02
මුලු සේවා කාලය (අවු)	:අවු 16
අවසන් වරට ලැබූ වැටුප	:රු.200000.00
ඒ අනුව පාරිතෝෂික මුදල	:රු.$\frac{200000 \times 16}{2}$ = රු1600000.00
ගෙවන ලද පාරිතෝෂික මුදල	:රු.1376550.00
හිඟ පාරිතෝෂික මුදල	:රු.1600000.00 – 137655.00 :රු.223450.00
හිඟ පාරිතෝෂික අධිභාරය 30%	:රු.223450.00 x $\frac{30}{100}$ = රු.67035.00
අය කර දිය යුතු මුදල	:රු.223450.00 + 67035.00 :රු.290485.00"

By '**P19**', the 3rd Respondent had accepted the position of the 6th Respondent, even though no reasons have been given in '**P19**' for the said decision. This Court must state that if '**P19**' was challenged, this Court would not have had any hesitation in quashing '**P19**' on the basis that no reasons had been given by the decision maker.

The appeal lodged by the Petitioner against '**P19**' had been rejected by the 5th Respondent, by his letter dated 24th July 2017 marked '**6R4**', which reads as follows:

> " බණ්ඩාර මහතා 2012.01.31 දින විශ්‍රාම ගන්වා ඔහුට හිමි පාරිතෝෂික මුදල් 2012.04.23 දින ගෙවනු ලැබුවද, ඔහු විශ්‍රාම ගැන්වූ දිනට පසු දිනම එනම් 2012.02.01 දින සිටම නැවත සේවයේ යොදවාගෙන ඇත. එසේ සේවයට යොදවා ගැනීමේදී මෙම සේවක මහතා භුක්ති විඳි වරප්‍රසාද හා නිවාඩු හිමිකම් සම්බන්ධයෙන් සලකා බැලීමේදී මොහු නවක සේවකයෙකු ලෙස කටයුතු කිරීමක් සිදුකර නැත."

The Petitioner filed an appeal against '**6R4**'[4] as well. Having held a fresh 'inquiry' on the said appeal[5], the 2nd Respondent by his letter dated 25th June 2018 annexed to the petition marked '**P21**', informed the Petitioner as follows:

> "ඒ අනුව 2017.08.15 දිනැතිව ඔබ විසින් ඉදිරිපත් කර ඇති අභියාචනය පිළිගත නොහැකි බවත්, සේවකයා වෙත වාර්ෂික නිවාඩු සඳහා ගෙවීම සිදුකර ඇති බැවින් සේවා බාණ්ඩනයකින් තොරව සේවයේ යොදවා ඇති බවත්, විශේෂ විමර්ෂණ අංශය විසින් සිදුකර ඇති පරීක්ෂා වලදී අනාවරණය වී ඇති බැවින් මාගේ 2016.07.13 දිනැති නිවේදනය අනුව අදාළ පාරිතෝෂික මුදල් මෙම ලිපිය ලැබී දින 14ක් ඇතුළත ගෙවීමට කටයුතු කරන ලෙසත් දන්වා සිටිමි."

[4] Vide letter dated 15th August 2017, produced by the 6th Respondent marked '6R5'.
[5] Vide written submissions filed by the Petitioner, produced by the 6th Respondent marked '6R6'.

Dissatisfied with the above decision, the Petitioner has filed this application seeking *inter alia* a Writ of Certiorari to quash the decision contained in the letter '**P21**'.

The reasons given by the Commissioner General of Labour as to why the Petitioner must pay a sum of Rs. 223,450/= as gratuity and a surcharge on such amount, as conveyed by the three letters referred to above, namely '**P19**',[6] '**6R4**' and '**P21**' can be summarised as follows:

a) The 6th Respondent's contract of employment has proceeded without an interruption (vide '**6R4**' and '**P21**')

b) The 6th Respondent continued to receive the privileges and the leave entitlement that was available prior to 1st February 2012 and hence, the 6th Respondent had not functioned as a new employee. (vide '**6R4**')

The question that arises for the determination of this Court therefore is whether the above decisions are irrational and unreasonable or otherwise unlawful, and if so, whether the said decisions are liable to be quashed by a Writ of Certiorari. In determining this question, this Court would have to consider whether the contract of employment of the 6th Respondent, as evidenced by '**6R1**' came to an end on 31st January 2012, with the Petitioner arguing it did, and the Respondents arguing that there was continuity of service, in that the same contract of employment ('**6R1**') continued in terms of '**P2**' and '**P3**', and that the contract of employment was terminated only on 2nd September 2013.

[6] 'P19' does not contain any reasons.

However, prior to considering the said issue, this Court would like to briefly consider the several objections taken up by the learned Counsel for the 6th Respondent who submitted that if one or more of the said objections are answered in favour of the 6th Respondent, it would disentitle the Petitioner to the relief sought in this application.

The ability of this Court to grant relief in the face of such objections was considered by this Court in **Selvamani vs Dr. Kumaravelupillai and Others**[7] where this Court held as follows:

> *"A person who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has a discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction are all valid impediments, which stand against the grant of relief."*

The first objection taken up by the 6th Respondent is that, the Petitioner is guilty of delay in invoking the jurisdiction of this Court. The decision '**P19**' was issued on 13th July 2016, and the Petitioner has filed this application only on 7th September 2018. Thus, on the face of it, there appears to be a delay in the Petitioner invoking the jurisdiction of this Court.

However, dissatisfied with '**P19**', the Petitioner filed an appeal against '**P19**' on 8th August 2016. The Department of Labour did not reject the appeal, but proceeded to hear it. It gave reasons for its decision for the first time only in '**6R4**' dated 24th July 2017. The Petitioner again appealed by letter dated 15th

[7] (2005) 1SLR 99; per Sisira de Abrew J.

August 2017, marked '**6R5**'. The Department of Labour again considered the appeal, even though there is no provision for an appeal. '**P21**' was issued thereafter on 25th June 2018, and this application was filed on 7th September 2018. '**P21**' is the culmination of the complaint made by the 6th Respondent on 18th December 2013. The Petitioner has filed this application in less than three months from the final decision of the Department of Labour, and this Court is therefore of the view that the Petitioner is 'not guilty' of delay.

The second objection taken up by the learned Counsel for the 6th Respondent is that the Petitioner has not sought to quash '**P19**' and '**6R4**', and that even if this Court quashes '**P21**', the decisions in '**P19**' and '**6R4**' would continue to be valid. As observed earlier, '**P21**' is only the culmination of the process that started with the complaint of the 6th Respondent, and is only a confirmation of '**P19**' and '**6R4**'. This Court is therefore of the view that, if this Court quashes '**P21**', the effect of such a decision would be to set aside all previous decisions that the Department of Labour has taken on the complaint of the 6th Respondent, including '**P19**' and '**6R4**'. This Court therefore does not see any merit in the second objection raised on behalf of the 6th Respondent.

The final objection of the learned Counsel for the 6th Respondent was that the Petitioner has failed to disclose (a) the fact that it filed an appeal against '**P19**'; (b) the fact that it received the decision marked '**6R4**'; and (c) the fact that it appealed against '**6R4**'. He therefore submitted that the petition is liable to be dismissed on account of this 'suppression'. This Court, while being of the view that the Petitioner could have disclosed the said facts in order to complete its narration of events, is further of the view that the said documents are not material to a consideration of the issue before this Court, as the final decision on the complaint of the 6th Respondent was taken only in '**P21**'. Hence, the

failure to disclose the said documents is not fatal to the maintainability of this application.

A consideration of the position of the Petitioner requires this Court to go back to '**P16**' by which the 6th Respondent was informed of an extension of service for a period of one year and that his date of retirement will be on 20th January 2012. It appears that the 6th Respondent continued to be in 'employment' even after 20th January 2012, even though there was no formal agreement on the basis on which the 6th Respondent was to continue.

The 6th Respondent, keen on formalizing his continuation with the Petitioner, had sent to the Petitioner a letter dated 10th February 2012, which reads as follows:[8]

> " ***Service Extension***
>
> *This is further to the conversation the undersigned had with you today on the above consequent to the message recently conveyed to me by the Chief Executive Officer, Mr. Sarath Fernando stating that as per the decision of the management my* ***service could be extended*** *for a period of one year* ***on contractual capacity****.*
>
> *Whilst thanking the management for the favourable decision in this regard, I kindly request you to* ***reconsider the possibility of extending my service by way of an annual extension as in the recent past*** *since I would otherwise stand a financial loss of about Rs. 800,000/- by way of denial of*

[8] This letter is an annexure to the letter annexed to the petition marked 'P10'.

increment due in next April, loss of statutory benefits and ***loss of gratuity*** *as enumerated below.*

Amount on denial of increment due in April	-	*Rs. 183,540.00*
Loss on EPF & ETF	-	*Rs. 357,902.00*
Loss on Gratuity	-	*Rs. 238,602.00*
		Rs. 780,044.00

In the circumstances, may I trust that you would be so good enough to favourably consider my request taking into consideration my tenure of 15 years in the Company" (emphasis added)

It is clear from this letter that the 6th Respondent was keen to continue in employment without a break but on the basis of an extension of the existing contract of employment evidenced by '**6R1**'. Although there is an endorsement on this letter by the Chief Executive Officer of the Petitioner that the said request be considered favourably, it appears from another endorsement on the said letter itself that the Chairman of the Petitioner was not agreeable. The result of this negotiation was the appointment of the Petitioner as a 'Consultant' by the Contract dated 20th February 2012, marked '**P2**'.

This Court therefore observes the following:

a) The Petitioner has made it clear to the 6th Respondent that what is being offered is **not** an extension of service based on the letter of appointment '**6R1**' **but** a fresh employment evidenced by a Consultancy Contract for a period of one year;

b) The contents of the above letter demonstrates that the 6th Respondent was very much aware of the consequences of being re-engaged on a contractual basis;

c) It is interesting and crucial to note that the said consequences of being re-engaged on a contractual basis involved a loss of gratuity as admitted and acknowledged by the 6th Respondent;

d) The 6th Respondent has consented to the said arrangement.

e) The 6th Respondent clearly knew that what he was agreeing to, was not an 'extension of service'.

It is in the above factual background that the learned Counsel for the Petitioner submitted that the 6th Respondent 'retired' from the employment of the Petitioner with effect from 31st January 2012, and that the employment evidenced by '**6R1**', came to an end on 31st January 2012.

There is no dispute between the parties that the 6th Respondent was entitled to the payment of gratuity for the period that he was employed pursuant to '**6R1**'. The Petitioner states that accordingly, upon the cessation of employment on 31st January 2012, the Petitioner had taken steps to pay the 6th Respondent the sum of money due as gratuity. The Petitioner has annexed to the petition marked '**P4**', the calculation sheet dated 21st February 2012 which depicts that gratuity had been calculated, taking into consideration the date of appointment as 1st May 1997 and the date of cessation of employment (due to retirement) as 31st January 2012. The 6th Respondent's period of service has been taken as 15 years and a sum of Rs. 1,376,550/= had been paid to the 6th

Respondent as gratuity soon thereafter, with the final 10% having been paid on 23rd April 2012.[9] The 6th Respondent does not deny having received that sum of money.

It is therefore clear to this Court that the Petitioner, having given a contractual appointment to the 6th Respondent on 20th February 2012, had taken steps the very next date to comply with the provisions of the Payment of Gratuity Act. As gratuity is payable in terms of Section 5(1) only at the cessation of employment, and **in the light of the factual circumstances of this case,** it is the view of this Court that the 6th Respondent, by accepting the said payment of gratuity, has acknowledged that his contract of employment evidenced by '**6R1**' came to an end on 31st January 2012.

The position of the Respondents that the contract of employment evidenced by '**6R1**' continued in terms of '**P2**' and '**P3**' and that the contract of employment was terminated only on 2nd September 2013 is contradicted by the aforementioned letter of the 6th Respondent, sent at or about the time of retirement in January 2012, and by the 6th Respondent accepting the payment of gratuity, with full knowledge of what it entails.

Pursuant to the complaint made by the 6th Respondent to the Department of Labour, the 3rd Respondent afforded the parties an opportunity to tender written submissions in support of their respective cases. This Court, having examined the written submissions filed by the Petitioner, annexed to the petition marked '**P8**' and the response of the 6th Respondent at '**P9**', observes that the 6th Respondent has admitted the following facts:

[9] The Petitioner has deducted a sum of Rs. 500,000 taken by the 6th Respondent as an advance of the gratuity and paid the balance.

a) **That he retired from employment with effect from 31st January 2012.** (Response to paragraph 1 of '**P8**'.)

b) That **the retirement was occasioned** at the request made by the Petitioner enabling the employer to re-appoint him on an annual contract basis. (Response to paragraph 1 of '**P8**').

c) That he was appointed as a 'consultant' on a fixed term contract (response to paragraph 2 of '**P8**').

This Court also observes that in page 4 of letter dated 27th June 2013, annexed to '**P8**', the 6th Respondent had stated that, *"It must also be stated that you have commenced your letter stating that my employment was on one year contract.* ***I do not deny this*** *...."*

It is clear to this Court that the scope of work assigned to the 6th Respondent during his contract of employment '**6R1**' and during the period that he functioned as a Consultant is identical. The 6th Respondent continued to enjoy the rights and benefits that he enjoyed as General Manager – Administration. The Petitioner does not dispute this, nor does the Petitioner dispute the fact that the 6th Respondent continued without any change, even after 1st February 2012.

What is significant however is the policy of the Petitioner on retirement, which the Petitioner, admittedly, was trying to enforce on a uniform basis. In terms of the company policy, employees must retire at 55, and the sole discretion with regard to extension was with the Petitioner. In fact, as General Manager –

Administration, it was the duty of the 6th Respondent to enforce the said retirement policy, a fact which the 6th Respondent has admitted.

The 6th Respondent, probably as a result of holding a senior position in the Petitioner company, had been granted one extension beyond the age of 60 years. However, when the 6th Respondent was informed that any further extensions will not be granted, and that he can be offered employment only on contract basis, the 6th Respondent was fully aware of what this meant – i.e. his contract of employment evidenced by '**6R1**' was not being extended, and thus he would not be entitled to the payment of gratuity for any future periods. The 6th Respondent even did his own calculation of how much he would lose, as a result of not getting an extension of the existing contract as evinced by the letter dated 10th February 2012 annexed to '**P10**'. The 6th Respondent therefore made a request that he be offered a 'customary' service extension, which was rejected by the Petitioner. The 6th Respondent could have walked away, but he chose to sign the Contract '**P2**' for one year, knowing fully well the consequences.

The very next day after '**P2**' was issued, the Petitioner proceeded to process the gratuity claim of the 6th Respondent, and made the payment. It was certainly a win-win for both parties, with the Petitioner enforcing its policy on retirement, but yet being able to have the services of the staff that it wanted even beyond the age of retirement, and the 6th Respondent continuing to enjoy the same rights and privileges that he enjoyed as General Manager, subject of course to a re-calibration of the gratuity clock.

What is significant is that even the 6th Respondent does not call this arrangement a 'sham', which was executed to benefit both the Petitioner and

the 6th Respondent. This Court is making this observation as it is conscious that an employer can take advantage of the bargaining power that it has over its employees and for instance, force an employee who is a long way from his retirement age to resign, on the understanding that he would be re-employed on contract basis simply to avoid paying gratuity for a longer period on a higher salary. This kind of arrangement can be categorized as being a 'sham' transaction, but that is certainly not what happened in this instance.

The learned Counsel for the 6th Respondent drew the attention of this Court to the judgment in **The Finance Company Limited vs Kodippili**[10]. In that case, the employee had reached his retirement age of 55 on 21st May 1999, and had been re-employed on contract basis from the next day itself in the same post and with the same benefits. The said contract had subsequently been extended until 31st May 2002. The employer had paid the employee his gratuity on 24th June 1999, in spite of the employee requesting the employer not to pay the gratuity in view of the extension in service. The Commissioner of Labour held that the employee was entitled for gratuity for the period 22nd May 1999 – 31st May 2002, which decision was upheld by this Court upon being satisfied that there was no break in service, even though gratuity had been paid. Thus, on the face of it, the facts in this application and the facts in **Kodippilli** appears to be similar. There are however two features that distinguish the present application from the said judgment. They are:

a) In **Kodippilli's** case, the employee was informed before he reached his retirement date, by letter dated 17th May 1999, that his services would be extended for one year with effect from 22nd May 1999, and the employee continued to work on the understanding that he had got an 'extension'.

[10] (2005) 3 Sri LR 281; Sriskandarajah, J (as he then was).

However, in the present application, the 6th Respondent's request for a further extension was specifically rejected by the Petitioner, who instead offered the 6th Respondent, a Consultancy Contract;

b) In **Kodippilli's** case, the employee by letter dated 4th June 1999, by which time his services had been extended, specifically requested that the payment of gratuity be deferred in view of the extension of service. However, in the present application, the 6th Respondent was aware that he would not be entitled to gratuity prior to '**P2**' being issued, and nonetheless accepted the gratuity that was paid to him.

The learned Counsel for the Petitioner cited the judgment of the Supreme Court in **Brown and Company Limited vs The Commissioner of Labour and others**[11] which had considered an issue which is almost identical to the issue in this application. In that case, the employee M.V Theagarajah joined the appellant company on 1st January 1962 and retired on 31st October 1986 upon reaching the retirement age of 55 years. The employee was paid his gratuity soon after, for a period of 24 years. On the next day, 1st November 1986, as in **Kodipilli**'s case and the present application, the employee was back in employment in the same capacity on the conditions contained in a document which granted employment to the employee initially for 9 months. The employee was granted similar fixed term contracts from time to time, and his service was extended up to 30th June 2006, by which time he was serving as the Chairman of the appellant company. A complaint by the employee that he should be paid gratuity taking into consideration his period of service as having commenced in 1962 was rejected by the Department of Labour, which decision

[11] SC Appeal No. 84/2011; SC Minutes of 3rd August 2016.

was later reversed by the Department of Labour on an appeal by the employee.

The Court of Appeal refused to quash the latter decision of the Department of Labour. On appeal, the Supreme Court held as follows:

> *"(We) further note that it was* ***not*** *an extension of service which was granted to him at the end of 55 years of age. He was given prior notice of sending him on retirement and he accepted it. He never objected to that. Neither did he ask for any extensions.*
>
> *(We) find that the Court of Appeal has gone wrong in its judgment by having decided that the service was not interrupted just because the Complainant Respondent had physically come to work on the very next day after the date of retirement at 55 years.* ***The Court of Appeal had ignored the fact that he was retired and then he accepted the fixed term contract and commenced services anew according to the contract and come on the next day as a worker on contract basis.***" (emphasis added)

The Supreme Court further held that unlike in **Kodipilli's** case, the employee was not on an extension of service, and that he was on prior notice of sending him on retirement which he never objected to and simply accepted his new fixed term contract. The facts in **Brown and Company Limited vs The Commissioner of Labour and others**[12] are almost identical to the facts in this application. In addition, in this application, there was a specific request by the 6th Respondent for an extension of service, which request was turned down by the Petitioner.

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[12] Ibid.

The judgment of the Supreme Court in **Brown and Company Limited vs The Commissioner of Labour and others**[13] and the judgment of this Court in **Kodippilli**[14] establishes an important principle, namely:

(a) That it is difficult to lay down a general principle that there is no break in service and that it is a continuation of the original contract of employment merely because the employee continues in service from the very next day after his / her retirement, on the same and terms and conditions; and

(b) The outcome of each case is dependant entirely on the facts and circumstances peculiar to such case.

It is in these circumstances that this Court must consider whether the decisions of the 2nd – 5th Respondents that '**P2**' was a continuation of the Contract of Employment that existed as at 31st January 2012, is reasonable and rational.

It is not in dispute that the 6th Respondent continued to perform the same tasks on the same terms and conditions. However, the 2nd – 5th Respondents were presented with overwhelming evidence, referred to earlier in this judgment, that:

(a) The 6th Respondent had prior notice that his contract of employment would not be extended beyond 20th January 2012 (vide '**P16**');

[13] Ibid.
[14] Supra.

(b) The 6th Respondent sought an extension of service at the end of the period specified in '**P16**' but that was turned down;

(c) The Petitioner did not 'extend the service' of the 6th Respondent when it executed '**P2**';

(d) '**P2**' was a new arrangement (a lawful contract) to reflect the policy of the Petitioner on the age of retirement of its employees; and

(e) The 6th Respondent was fully aware of the consequences of accepting '**P2**'.

The 2nd – 5th Respondents were also presented with material to demonstrate the following:

(a) The Petitioner did not forcibly pay gratuity to the 6th Respondent, and that the gratuity payment was accepted by the 6th Respondent, knowing fully well the consequences of accepting the said payment.

(b) The arrangement reflected in '**P2**' was as a result of a negotiation between the Petitioner and the 6th Respondent and was not an arrangement that was thrust on the 6th Respondent.

The 2nd – 5th Respondents however have not considered the above material that the parties placed before them, and now presented to this Court,` which material, in the view of this Court, were crucial to a proper determination of the issue before the said Respondents.

The consequence of the failure to consider relevant material has been set out in **De Smith's Judicial Review** as follows:[15]

> *"When exercising a discretionary power a decision-maker may take into account a range of lawful considerations. Some of these are specified in the statute as matters to which regard may be had. Others are specified as matters to which regard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully take into account. If the exercise of discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised."*

This Court is of the view that the decision taken by the 2nd – 5th Respondents without considering the material that was presented to them by the Petitioner makes the said decision irrational and unreasonable, and is a decision which, as pointed out in **Council of Civil Service Unions vs Minister for the Civil Service**,[16] *" 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 the above circumstances, this Court is of the view that the decisions reflected in '**P19**', '**6R4**' and '**P21**' are unreasonable and irrational, and are liable to be quashed by a Writ of Certiorari. This Court accordingly issues a mandate in the nature of a Writ of Certiorari quashing the decision of the 2nd

[15] Harry Woolf, Jeffry Jowell and Andrew Le Sueur, 6th Edition at page 280
[16] 1985 AC 374.

Respondent in '**P21**' that the 6th Respondent be paid a sum of Rs. 223,450/= as gratuity together with surcharge. This Court makes no order with regard to costs.

Judge of the Court of Appeal

Yasantha Kodagoda, P.C., J/

President of the Court of Appeal

I agree

President of the Court of Appeal