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 under and in terms of Article 140 of the Constitution.

CA/WRIT/486/2021

Timex Garments (Private) Limited,
No.455/1, Baudhaloka Mawatha,
Colombo 08.

PETITIONER

Vs.

1. The Commissioner General of Labour,
   Department of Labour,
   Labour Secretariat,
   Kirula Road, Colombo 05.

2. D.P.Dhammika Sadhasena,
   Inquiry Officer/Assistant Commissioner of Labour,
   Termination Unit,
   Department of Labour,
   Labour Secretariat,
   Kirula Road, Colombo 05.

3. Hettige Don Nuwan Sameera,
   No.108/10, Gunawardena Mawatha (Rawana Mawatha),
   Pelenwatte, Pannipitiya.

4. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

RESPONDENTS

Before: Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel: Mohomed Adamaly P.C. with Sindhu Ratnarajah for the Petitioner
Abigail Jayakody S.C. for the 1st, 2nd and 4th Respondents

Argued on: 02.10.2023, 10.11.2023

Written submissions: Petitioners - 08.01.2024
1st, 2nd and 4th Respondents - 06.11.2023

Decided on: 08.02.2024

Sobhitha Rajakaruna J.

The Petitioner in the instant Application seeks a mandate in the nature of a Writ of Certiorari quashing the decision, marked 'P9', made on 05.08.2021 by the 1st Respondent - Commissioner General of Labour. The said Order has been issued in terms of section 6 of the Termination of Employment of Workmen (Special Provisions) Act, No.45 of 1971 ('TEWA'). In the said Order 'P9' the 1st Respondent has decided that the Petitioner had terminated the services of the 3rd Respondent, without the written consent of the 3rd Respondent or the prior written approval of the Commissioner of Labour ('Commissioner'). Additionally, the Petitioner has been directed to pay a sum of Rs.450,000 to the 3rd Respondent as compensation.

The services of the 3rd Respondent had been terminated with effect from 16.05.2020 by way of a letter dated 17.04.2020 marked 'P5(c)'. The Petitioner's main contention is that the 3rd Respondent is not entitled to any relief under TEWA as his employment was terminated during his probationary period. The Petitioners argue that there cannot be automatic confirmation in respect of the probationary period of the 3rd Respondent given the relevant contract of employment and according to the Common Law relating to probationers. The Petitioner advances its arguments based on the following provisions in Clause 8 of the Letter of Appointment marked 'P2'. It reads as follows:

> *"Your employment shall be on probationary basis for a minimum period of six (06) months from the date of Appointment.*
>
> *The management also specifically reserves the right to extend your period of probation by further term of three (03) months, if they see fit to do so.*

On completion of this probationary period, the Management, if satisfied with your work, performance honesty, integrity, discipline and standards, etc. will confirm your appointment in writing. In the event of your appointment not being confirmed in writing after 12 months from the date of Appointment your services will be deemed to be confirmed with effect from the date of expiry of your probationary period or at the end of the extended period of probation. (if applicable).

During your probationary period this employment may be terminated by either party by giving to the other one (01) months' notice or one (01) months' salary in lieu of such notice."

The primary viewpoint of the Petitioner in the instant Application is that the Common Law principles relating to the respective rights and limitations of the employer and workman, where the workman is a 'probationer' are not overridden by the TEWA.

Firstly, I must consider whether the services of an employee who is on probation can be terminated for reasons other than those arising out of an appropriate assessment in respect of the performance and conduct of such an employee.

The 1st, 2nd and 4th Respondents heavily rely on the precedence laid down in ***Lanka Canneries v. Commissioner of Labour CA/WRIT/385/2021 decided on 31.08.2022***. This Court in the said case held that:

"Hence, I take the view that when an employer takes a decision to extend the probationary period or to terminate the services, he should follow a procedure, according to law, where such decision-making power may not infringe the Rule of Law and the principles of Natural Justice. In light of the above, I hold that any employer should mandatorily follow an effective procedure right throughout the period of probation if an employer needs to enjoy the benefit of not confirming probationers as per the propositions in the aforesaid judgements cited by the Petitioner. Further, it is abundantly clear that no employee can escape without giving reasons under section 2(5) of TEWA." (p.05)

"Furthermore, it is my considered view that in order to terminate the services of an employee during the probationary period or to extend such probationary period, any employer should adopt a reasonable procedure according to law." (p.04)

It is noted that this Court has pronounced the Judgement of the above ***Lanka Canneries*** case analyzing the purported argument that the employer has a right to terminate the services of the probationer without assigning any reason and that the probationer has no right to be confirmed in his service. In such analysis, this Court has well considered the judgments of ***Hettiarachchi vs. Vidyalankara University 76 NLR 47, Ceylon Cement Corporation vs. Fernando (1990) 1 Sri. L.R. 361, Priyadarshana and two others vs. Lanka Ports Authority (2008) 2 Sri. L.R. 208, Moosajees Limited vs. Rasiah (1986) 1 Sri. L.R. 365, Brown & Company Limited vs. Samarasekara (1996) 1 Sri. L.R. 334, 335, Liyanagamage vs. Road Construction and Development Private Limited (1994) 2 Sri. L.R. 230, State Distilleries Corporation vs. Rupasinghe (1994) 2 Sri. L.R. 395., Ceylon Ceramic Corporation vs. Premadasa (1986) 1 Sri. L.R. 287*** which were cited on behalf of the said ***Lanka Canneries***.

In arriving at the above decisions in the ***Lanka Canneries*** case the Court has considered the nature of an employee on probation. A similar approach has been taken by this Court even in the case of ***K. A. D. T. Kulawansa v. University of Moratuwa and Others CA/WRIT/111/2022 decided on 17.11.2022.*** Having regard to this approach, Court has further decided in the ***Lanka Canneries*** case:

> "Therefore, my view is that when a workman (workman or an employee who comes within the scheduled employment in TEWA) is serving during the probationary period, the employer's duty is not only to assess the employee but also to provide necessary training, guidance and supervisory support to the employee. More than anything, it is the mandatory duty of the employer to complete a formal review of the performance of the employee by the end of the probationary period stipulated in the letter of appointment. It is vital that the outcome of the review be communicated to the employee." (p.04)

In the same vein, this Court held ***Chandima Sudeshika Kumari Dissanayake v. Uva Provincial Council and Others CA/WRIT/28/2021 decided on 10.10.2023*** that;

> "The clear purpose of extending the period of probation beyond three years is to provide opportunities for such officers to diligently engage in improving their performances during such an extended period. Thus, it can be clearly assumed that the

extension of probationary period was eventually in favor of this Petitioner and such extension should not be used as a tool to seek from Court to employ the doctrine of ultra vires or any other ground of review in order to obtain reliefs as prayed for in the prayer of the Petition. This is especially because the Petitioner is not adequately impugning the reasons given by the Respondents to extend her period of probation but challenging only the extension per se."

In line with the precedence laid down by the aforementioned cases, it is well established that the services of a workman who is on probation cannot be terminated without assigning a reason in respect of his/her conduct, performance etc. Furthermore, the employer should assess the probationer's progress by adopting reasonable criteria.

On a careful perusal of the letter of termination marked 'P5(c)', it is abundantly clear that the Petitioner has terminated the services of the 3rd Respondent without his prior consent in writing or prior written approval of the said Commissioner. In this regard, the following paragraphs in the said 'P5(c)' is vital.

"During a serious global crisis like this, we must take immediate steps to survive financially, until the world returns to normalcy. Whilst many organizations failed to disburse salaries for the month of March, Timex paid the full salary well before the due date. However, we regrettably note that the Company is not financially capable of continuing to make such payments, as there is no cash inflows meet our expenses. This situation is totally unforeseen, completely beyond our control and not anticipated by any of us.

In this context, the absence of work caused by external reasons and the current lockdown has frustrated the employment contract between us. These exceptional circumstances and financial emergency faced by the Company has completely changed the opportunities for employment in our Company.

As you are aware, you are currently employed by us in a probationary capacity, in terms of your Contract of Employment. In view of the above situation, we are compelled to treat your probationary employment with us as frustrated, and or to terminate same, with. effect from 16th May 2020. You will of course be paid all your accrued entitlements in full up to the date of termination."

Thus, it is crystal clear that the 3rd Respondent's services have been terminated due to financial distress of the Petitioner - Company and not by arriving at an independent decision by the Petitioner concerning matters such as work, performance honesty, integrity, discipline and standards of the 3rd Respondent. J.A.N. De Silva J. (as he was then) in ***Magpeck Exports Ltd v. Commissioner of Labour and Others (2000) 2 Sri L.R. 308*** **(CA)** has held that the doctrine of frustration has no application; where one party and not the other foresees the events which are said to have frustrated the contract that party is not entitled to plead frustration. ***Magpeck Exports Ltd*** has filed the respective Writ application dealing with the provisions of TEWA**.**

At this juncture, I must examine the Petitioner's assertions that the TEWA does not apply to a workman on probation as a result of the Common Law principles. The Petitioner claims that the law makes it clear that the Common Law in that area will always be presumed to be in effect unless there is a deliberate and unequivocal intention to change or discard the Common Law as appearing from a Statute. In other words, the Petitioner argues that the TEWA does not specifically deal with probationers, and hence would not have intended to disturb the Common Law relating to workmen on probation.

Referring to two authors (namely S.R.De Silva[1] and S.Egalahewa[2]) and certain portions of the judgements in ***Singer Industries (Pvt) Ltd v. CMU and Others SC/Appeal 78/08 decided on 07.10.2010 (reported in XVII B.A.L.R 161), Wijenaike v. Air Lanka Limited and Other 1990 1 Sri L.R. 293, The Lanka Estate Workers' Union v. The Superintendent, Hewagama Estate S.C. (SCM) 7-9/69, Jayasuriya v. Sri Lanka Plantation Corporation (1995 2 Sri L.R. 407)*** the Petitioner tends to advance an argument that:

a. the Roman-Dutch Law is the Common Law in Sri Lanka
b. the Common Law of Sri Lanka governs the relationship of master and servant

Moreover, the Petitioner brings to the attention of this Court the cases of ***Brown & Co. Ltd v. Samarasekara (1996) 1 Sri L.R. 334, Hettiarachchi v. Vidyalankara University 76 N.L.R. 47*** *and* ***State Distilleries Corporation v. Rupasinghe (1994) 2 Sri L.R., 395****.* The crux of the argument relied on by the Petitioner based on those judgements is that:

[1] The Contract of Employment (Reprint 2012) at p.6
[2] A General Guide to Sri Lanka Labour Law (1st Edition, Stamford Lake) at p.8

a) as per the contract of employment and the Common Law relating to probationers, there was no automatic confirmation on his post
b) under the Common Law of Sri Lanka, the period of probation continues until confirmation either in writing, or until circumstances arise that establish that the period of probation must necessarily have come to an end.

What is meant by Common Law? What is the Common Law in Sri Lanka?; are essential issues which need to be considered in this Judgement.

The learned State Counsel who appeared for the 1st, 2nd and 4th Respondents referring to *Encyclopædia Britannica* submits that:

> *".....Common Law is generally defined as 'the body of customary law, based upon judicial decisions and embodied in reports of decided cases, that has been administered by the common-law courts of England since the Middle Ages. From it has evolved the type of legal system now found also in the United States and in most of the member states of the Commonwealth (formerly the British Commonwealth of Nations)."*

The learned State Counsel, in addition to the above, has cited the case of ***Vasantha Kumara v. Skypan Asia (Pvt) Ltd. (2008) 1 S.L.R 324*** where Dr. Shirani Bandaranayake J. (as she was then) has observed;

> *"It is to be noted that although this position would have been correct under the common law, where either party was entitled to terminate the contract of employment in accordance with its provisions without any consequential effect, the introduction of Labour Laws had modified this position. Through the establishment of the Labour Tribunals, the common law concepts dealing with labour relations were changed, and the Industrial Disputes Act, as stated earlier, expressly provided for a Labour Tribunal to take action, notwithstanding anything to the contrary in the contract of service between an employer and his employee."*

In order to substantially answer the question of 'what is meant by the Common Law?' I wish to draw my attention to the following paragraph by Glanville Williams in ***"Learning the Law" (1963) (7th Edition, Stevens & Sons) p.p.24-25***

"The phrase "the common law" seems at first a little bewildering in use because it is always used to point a contrast, and its precise meaning depends upon the contrast that is being pointed. An analogy may perhaps make this clearer. Take the word "layman." In the foregoing paragraph the word was used to mean a person who is not a lawyer. But when we speak of ecclesiastics and laymen, we mean by "laymen" non-ecclesiastics. When we speak of doctors and laymen, we mean by "laymen" non-doctors. Laymen, in short, are people who do not belong to the particular profession that we are speaking of. Again, take "aliens." In England if we speak of " aliens" we generally mean by that word people who are not British subjects. But in France the French equivalent of the word would mean people who are not French subjects, and so on for other countries.

It is somewhat similar with "the common law." (1) Originally this meant the law that was not local law, that is, the law that was common to the whole of England. This may still be its meaning in a particular context, but it is not the usual meaning. More usually the phrase will signify (2) the law that is not the result of legislation, that is, the law created by the custom of the people and decisions of the judges. Within certain narrow limits, popular custom creates law, and so (within much wider limits) do the decisions of the courts, which we call precedents. When the phrase " the common law" is used in this sense it may include even local law (in the form of local custom), which in meaning (1) is not common law. Again, (3) the phrase may mean the law that is not equity; in other words it may mean the law developed by the old courts of common law as distinct from the system (technically called " equity") developed by the old Court of Chancery. In this sense "the common law" may even include statutory modifications of the common law, though in the previous sense it does not. Finally, (4) it may mean the law that is not foreign law-in other words, the law of England, or of other countries (such as America) that have adopted English law. In this sense it is contrasted with (say) Roman law or French law, and in this sense it includes the whole of English law— even local customs, legislation and equity. It will thus be seen that the precise shade of meaning in which this chameleon phrase is used depends upon the particular context, and upon the contrast that is being made. When I said in the second sentence of this chapter that our law is made up of common law, equity and legislation, I meant it in a mixture of senses (2) and (3), as the context itself showed."

Through my wide reading I have observed that the approach taken by various scholars on the term Common Law do not show any conclusive point of view in regards to the said term. According to L.J.M. Cooray (***"An Introduction to the legal System of Sri Lanka", Stanford Lake 2003 - 3rd print, p.95***) Sri Lanka has been influenced by South African developments, and South African case law and academic writing has influenced our judges and academics; the basic reason is of course that in both countries Roman Dutch Law is the residuary law. In this backdrop, I am inclined to refer to the relationship drawn by H. R. Hahlo and Ellison Kahn ("***The Union of South Africa. The Development of Its Laws and Constitutions", 1960 Stevens & Sons Ltd., pp.47,50-51***)[3] between the Roman Dutch Law and the English Law which are considered as composites of the modern South African Law.

> *"Following in the grand tradition of the text writers of the Roman-Dutch era, our great South African judges have built and are continuing to build out of the two components of our law a legal system which is adapted to the conditions of South Africa, eschewing both the archaisms of the old Dutch law and the technicalities of the English law. And it can confidently be expected that as our own body of jurisprudence grows, reference to the old writers will become less and less necessary. It has been rightly said that the law of any country can be found in the last thirty years of its law reports. This stage of certainty has not as yet been reached in South Africa, but the time is undoubtedly approaching when reference to the old writers will be the exception rather than the rule.*
>
> *South African law today is no longer an importation from Holland or England or any other country, but a sturdy indigenous growth with its roots firmly in the soil of South Africa. It is South African law, "made by South Africans for South Africans". We may as well get used to calling it by its proper name. "I consider" said Classen, J.P. in R.v.Goseb,[4] "that the term 'Roman-Dutch Law' is confusing, for in fact the common law of the Union or for that matter of the Cape of Good Hope is not Roman-Dutch law. It is South African common law".*

On perusal of several legal literature illustrating the term Common Law, I take the view that I should adopt here the wisdom of Hahlo and Kahn as described above. With the current socio-economic trends and developments in the Country, including the laws made by the

[3] Also see: "*An Introduction to the legal System of Sri Lanka", Stanford Lake 2003 - 3rd print, p.101*
[4] [1956 (2) S.A. 696, 698 (S.W.A.)]

legislature and the judges, the traditional definitions given to the phrase Common Law (which are distinct to each other) should be constructively redefined. In this regard, L.J.M. Cooray[5] emphasizes that the case of "***Kodeeswaran v. The Attorney General*** [6] is a pointer which could enable the legal fraternity in Sri Lanka to move away from the old formulation of the Roman-Dutch law as the common law, and to think in terms not of Roman-Dutch or English law and of the antithesis between Roman-Dutch law and English law in our legal system - and to recognize that there is a body of law, in the decisions of our courts, a body of law not English nor Roman-Dutch but which is the creation of our courts and which in Lord Diplock's words in the ***Kodeeswaran*** case may be called 'the indigenous common law' of Sri Lanka."

It is paramount to note that Lord Diplock has recognized in the said ***Kodeeswaran*** case the power of the Courts to develop the law to suit changing circumstances and also give effect to a local practice without abruptly applying the Roman-Dutch or English rules[7]. Anyhow, when the legislature on its own wisdom passes laws, the residual laws cannot be considered effective in reference to the areas covered under such laws created by the legislature. In light of the above, the pertinent question that emerges in the instant Application is how this Court concludes, as pleaded by the Petitioner, that the applicability of TEWA is ousted in respect of workmen who are on probation. I am unable to find any material to support the Petitioner's claim that the law governing the workmen on probation in Sri Lanka is the Roman-Dutch Law or the alleged Common Law.

In other words, the Petitioner has not enlightened Court as to what test should be applied to determine whether or not the probationers fall outside the purview of TEWA. Furthermore, the absence of a series of express and unbroken decisions of Court which favor the proposition that the Roman-Dutch Law governs the law relating to the probationers in this country is also an important factor. It is a puzzle to me as to how this Court could jump into a conclusion on the applicability of Roman-Dutch law in the instant Application based on the judgements cited by the Petitioner which merely refers to the term 'Roman-Dutch Law' or the 'Common Law'. A mere citation of a judgement that reflects the terminology of Roman-Dutch Law or

[5] Supra FN 3,pp.101,102
[6] *72 N.L.R. 337.* A Privy Council judgement by Lord Hodson, Viscount Dilhorne, Lord Donovan, Lord Pearson, Lord Diplock
[7] Supra FN 3 p.76

the Common Law is insufficient to resolve the questions of the case in hand without thoroughly examining what are the ratio decidendi and obiter dictum of the respective judgements.

In light of the above, I am not convinced with the argument of the Petitioner that the law relating to the workmen who are on probation is still a foreign law such as Roman-Dutch Law. I am strongly of the view that the interpretation of the provisions of TEWA especially concerning the issue of its applicability to probationers should be done giving preference to the evolving circumstances in today's context and also considering the indigenous Common Law of Sri Lanka as referred to by Lord Diplock in the ***Kodeeswaran*** case. If not, there would be grave prejudice caused to the harmony of the employer-employee relationship that exists in Sri Lanka.

Further the Petitioner argues that there is no automatic confirmation of service of the 3rd Respondent. Anyhow, the said argument fails, in my view, due to the phrases embodied in the said Clause 8 of the letter of appointment marked 'P2' itself. The Petitioner has a right under such Clause 8 to confirm the 3rd Respondent only if it is satisfied with the work, performance honesty, integrity, discipline and standards of the 3rd Respondent. In that event, it should be the bounden duty of the Petitioner to decide after a due assessment, but before terminating the services, that the 3rd Respondent has failed in his work, performance honesty, integrity etc.

For the reasons set forth above and on a careful consideration of the whole matter, I have come to the conclusion that;

i) The provisions of TEWA apply to the workmen on probation including the 3rd Respondent.
ii) The Petitioner has terminated the services of the 3rd Respondent in violation of the provisions in section 2 of the TEWA.

The residual argument of the Petitioner is that the compensation under TEWA can only be awarded if the respective workman has completed one year of service. The alleged basis for such argument is that the 3rd Respondent has served only for a period less than one year and the formula for computation of compensation prescribed under section 6D of the TEWA does not stipulate a figure for compensation for a period less than one year of service. Having

considered that the termination of services of the 3rd Respondent is unlawful, now to turn to the residual argument of the Petitioner may be quite mundane. This is because, the 3rd respondent should be entitled to some sort of redress in lieu of the said unlawful termination. Nevertheless, I observe that the provisions of the said section 6D as well as the contents of the said formula for payment of compensation bestowed the Commissioner a discretion to a considerable extent when deciding the amount of compensation within the range given in the said formula. Hence, I am not inclined to go into an in-depth examination upon the said formula based on the facts and circumstances of this Case.

In the circumstances, I hold that the Petitioner is not entitled to any of the reliefs as prayed for in the prayer of the Petition. Therefore, I proceed to dismiss the Application of the Petitioner.

Application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal