

**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, Prohibition and
Mandamus under and in terms of Article 140 of
the Constitution of the Democratic Socialist
Republic of Sri Lanka.*

CA/WRIT/474/2021

1. M.A.D.A.K. Mallikarachchi
No.25, Senanayake Mawatha,
Rambukkana.

PETITIONER

Vs.

1. Dr.P.V.N.P. Amarasinghe
Director,
Medical Research Institute,
Baseline Road,
Colombo 08.
- 1(a).Dr.V.R.Gunasekara
Director,
Medical Research Institute,
Baseline Road,
Colombo 08.
- 1(b).Dr.W.D.C.U. Dias
Director,
Medical Research Institute,
Baseline Road,
Colombo 08.
2. S.H.Munasinghe
Secretary – Ministry of Health,
Nutrition
and Indigenous Medicine,
No 385, Rev.Baddegama Wimalawansa
Thero Mawatha,
Colombo 10.
- 2(a).S.J.S.Chandragupta
Secretary – Ministry of Health,

No 385, Rev.Baddegama Wimalawansa
Thero Mawatha,
Colombo 10.

3. Induka Mudumali
Director – Establishment &
Administration,
Ministry of Health, Nutrition and
Indigenous Medicine,
No 385, Rev.Baddegama Wimalawansa
Thero Mawatha,
Colombo 10.

3(a).Dr. Ishani Kollure
Director – Establishment &
Administration,
Ministry of Health, Nutrition and
Indigenous Medicine,
No 385, Rev.Baddegama Wimalawansa
Thero Mawatha,
Colombo 10.

RESPONDENTS

Before :Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel :Chrishmal Warnasuriya with Wardani Karunaratne for the Petitioner
Manohara Jayasinghe DSG and Avanti Weerakoon SC for the Respondents

Argued on :13.03.2023 and 17.03.2023

Written Submissions: Petitioner - 06.11.2023

Respondents - -

Decided on :14.11.2023

Sobhitha Rajakaruna J.

The Petitioner joined the Provincial Health Services (Sabaragamuwa) as a Public Health Inspector Grade II in the year 1999. While serving as a public officer, the Petitioner has applied on his own accord to a position at Sri Lanka Ports Authority ('SLPA'). After a competitive interview process, he was selected for the appointment to the position of

Superintendent of Works (Public Health Inspector) at SLPA. Thereafter, he has been requested by SLPA to be present at the Human Resources Division of the SLPA as per 'P12' to carry out the preliminary affairs relating to the said appointment. As a result, the Petitioner made a request to the head of the Department of Nutrition of the Medical Research Institute ('MRI') to get him released from his services enabling him to accept duties at the SLPA.

In the meantime, by way of a letter dated 30.04.2021 marked 'P17', the Petitioner has informed MRI that he would assume duties at SLPA with effect from 03.05.2021 subject to the approval of his above request for release. It appears, as per the letter dated 28.04.2021 ('P16(b)') addressed to MRI by the Ministry of Health, the said Ministry had not decided even as of that date to release the Petitioner from public service for him to accept duties of any post at SLPA. However, it is apparent that the Petitioner discontinuing the public service has reported to work at SLPA as reflected in the said letter 'P17' written by the Petitioner himself. Consequently, the Petitioner has been served with a letter of vacation of post (dated 23.06.2021 marked 'P18') with effect from 03.05.2021 due to not reporting to work at MRI without proper approval. In addition to the said letter of vacation of post, the Ministry of Health by a letter dated 25.06.2021 ('P19') has communicated to MRI that the Petitioner cannot be released from his services due to alleged disciplinary grounds.

The Petitioner has disclosed in his Petition that he had been served with a charge sheet on an allegation of committing an offense described in item 10 of the 1st schedule to chapter XLVIII of the Establishments Code (E-Code). Such charge sheet and the amended charge sheet are marked as 'P6(a)' and 'P6(b)' respectively. Further, as a consequence of the above vacation of the post, the Petitioner has been requested by a letter dated 15.08.2021 ('P25') to settle the festival advance and the distress loan obtained by him and also to return all official documents and other property belonging to the State.

The Petitioner seeks mandates in the nature of a writ of Certiorari quashing the said letters marked 'P18', 'P19', 'P6(a)', 'P6(b)' and 'P25'. Furthermore, the Petitioner seeks mandates in the nature of writs of Prohibition, among other things, preventing 1st and 2nd Respondents from resorting to any further steps to terminate the Petitioner's employment on the basis of the said vacation of the post. A writ of Mandamus is also sought to direct the 1st and 2nd

Respondents to proceed to immediate steps to release the Petitioner from his previous employment at the MRI.

The Petitioner classifies the disciplinary inquiry against him as a long-drawn and unattended inquiry that has been in progress with several delays since 2019. The contention of the Petitioner is that the 2nd Respondent has usurped the powers relating to disciplinary matters against the Petitioner. It is submitted that such powers ought to have been exercised by the Health Services Committee appointed by the Public Service Commission ('PSC') and not by the 2nd Respondent. As opposed to such arguments the Respondents contend that:

- I. As per paragraph 06 of schedule "A" of the Gazette Notification No. 1990/24 dated 27.10.2016, disciplinary powers upon the secondary and tertiary level officers (reflected in Public Administration Circular No. 06/2006 [Annexure II]) who do not belong to the combined service in relation to the offenses described in the Schedule 2 of Chapter XLVIII of the Establishment Code is vested with the Secretary to the subject Ministry.
- II. As per paragraph 04 of schedule "B" of the Gazette Notification No. 1990/24 dated 27.10.2016, disciplinary powers upon the secondary and tertiary level officers (reflected in Public Administration Circular No. 06/2006 [Annexure II]) who do not belong to the combined service in relation to the offenses described in the Schedule 2 of Chapter XLVIII of the Establishment Code is vested with the Secretary to the subject Ministry.
- III. As per Paragraph 06 of Schedule "A" of the Gazette No. 2004/49 published on 02.01.2017 amending the aforementioned Gazette Notification, the disciplinary powers upon secondary and tertiary level officers (reflected in the Public Administration Circular No. 06/2006 [Annexure II]), not belonging to the combined service, is vested with the Secretary to the Ministry to which the subject of Health has been assigned.
- IV. The post of Public Health Inspector belongs to the secondary-level officers according to the classification described under the Public Administration Circular 06/2006.

In light of the above and upon perusal of the relevant Gazette Notifications, I am convinced that the 2nd Respondent is vested with the powers in regard to the disciplinary control of the Public Health Inspectors attached to MRI including the Petitioner. The Petitioner has not formulated any contrasting view in relation to the provisions spelled out in the aforesaid Gazette Notifications.

The stand maintained by the Petitioner throughout these proceedings is that the 1st Respondent's decision to issue a letter of vacation of post and also not to release the Petitioner from the public service is unlawful, arbitrary, capricious and unreasonable. The basis for such contention of the Petitioner is that he has informed the 1st Respondent by letter marked 'P17' (dated 30.04.2021) the fact that he would report to work at SLPA with effect from 03.05.2021, anticipating the approval concerning the request made by him for release from public service.

The rules relating to the release of a public officer on appointment to another post in the public service and to a post outside the public service are stipulated in Chapter XII of the Procedural Rules¹ (published on 14.12.2022) of the PSC. On a careful perusal of those Rules, it implies that it is mandatory for a public officer to secure his release from the appointment he holds before accepting a new post either within the public service or outside. It is clearly demonstrated in section 173(VI) of Chapter XII of the said Procedural Rules ('Rules'), that unless otherwise decided as a Government policy, the appointing authority shall not refuse to release an officer who seeks to better his future prospects unless, where disciplinary action against the officer is in progress, or is contemplated against him. The said current Rules published in 2022 illustrate the word 'contemplation of disciplinary action' even to include a preliminary investigation. In the instant Application, the subject disciplinary inquiry against the Petitioner has presumably passed early steps and arrived at the domestic inquiry stage. It is also pertinent to note that the Petitioner places reliance on section 1.3 of Chapter V of the Establishments Code (E-Code) which describes certain grounds where the appointing authority will not refuse to release an officer, who seeks to better his prospects under normal circumstances.

¹ Procedural rules on appointment, promotion and transfer of public officers and to provide for matters connected therewith and incidental thereto published in the Gazette Extraordinary 2310/29 on 14.12.2022

In terms of Article 55(3) of the Constitution, the appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the PSC, subject to the provisions of the Constitution and such power shall be delegated to a committee of the PSC or to a public officer. It appears that in terms of Article 61B, the PSC of which the role and powers are constitutionally entrenched is empowered to make rules relating to the public service. Nevertheless, the E-Code has been issued with the approval of the Cabinet of Ministers and our courts have constantly decided that the E-Code has statutory force (see *Gayani Amitha Wickramasekara v Dharmasena Dissanayake Chairman, Public Service Commission and Others SC/FR/257/16 decided on 05.11.2021*, *Abeywickrama v Pathirana and others [1986] 1 Sri LR 120* and *Public Service United Nurses Union v Minister of Public Administration and others [1988] 1 Sri LR 229*). However, the E-Code should not reflect any conflict in reference to the provisions of the said Rules regarding the appointment, promotion and disciplinary control of public officers. In light of the above, a public servant is bound to follow the provisions of the said Rules and the E-Code and he should always uphold the highest standards of conduct, honesty and probity in discharging his public duties. Similarly, it cannot be assumed that the effect of the aforementioned section 173(VI) of the said Rules will be undermined by section 1.3 of Chapter V of the E-Code.

Even in the alleged letter of demand marked 'P22' it is stated that the Petitioner has remained to work at SLPA because he had a genuine expectation and understanding that his request for release from public service would be approved by the Secretary to the Ministry of Health. It is abundantly clear that the Petitioner giving 3 days' notice (including two days during the weekend) has commenced employment at SLPA without duly securing his release from public service. Such conduct of the Petitioner amounts to an obvious violation of the respective provisions of the E-Code and the said Rules.

The conduct of the Petitioner in the instant Application in my opinion can be viewed as a non-compliance of Rules for his own benefit on an alleged expectation. I simply cannot understand how a public officer could abandon his substantive post based on an alleged 'expectation' and an 'understanding', regardless of how genuine it appears to be to him. Clause 05 of the format of a letter of appointment reflected in Appendix 03 of the said Rules of the PSC emphasizes that a public officer has no right to engage himself in a job in any other

institution or any other profession as long as he is in public service. The submissions were made on behalf of the Petitioner claiming that he commenced work at SLPA on the grounds of legitimate expectation that his request for release would be approved. Anyhow, when the Petitioner has not adhered to the Rules of the PSC it cannot be assumed that he is entitled to claim for legitimate expectation. This is because he has accepted a post outside public service without securing a due release, but based only on an alleged expectation that the authorities would approve his release on a later date. A legitimate expectation cannot be formulated in the presence of a related conduct that is against the law.

The Petitioner concedes based on the jurisprudence developed under labor law, that the concept of vacation of post involves two aspects, i.e. the mental element and the physical element. In this regard, the Petitioner has sighted several judgements to establish that the physical absence alone is insufficient to establish a vacation of the post. There is no dispute in the instant Application, that the physical element of the Petitioner has been established by him being engaged in employment at SLPA as clearly depicted in his own letter marked 'P17'. Although the Petitioner has expressed in the said 'P17' his anticipation of receiving approval for his request for 'release', it is undeniable that he has proceeded to accept a post outside the public service without securing a due release as mandated by the said Rules and the E-Code. As such, a mere expectation of the Petitioner without adhering to the said Rules relating to such release cannot fall within the ambit of the above mental element. Hence, I take the view that not only the physical element but also the mental element of the Petitioner to abandon his duties in public service is well established.

Therefore, in view of the reasons given above, I cannot agree with the proposition of the Petitioner that the decision reflected in the letter of vacation of post, marked 'P18' and the decision of the 3rd Respondent reflected in 'P19', by which the release of the Petitioner from the public service has been restrained, are made without a legal basis.

Now I must advert to the issues relating to the impugned charge sheets dated 20.11.2019 and 31.07.2020 marked as 'P6(a)' and 'P6(b)' respectively. As observed above the 'P6(b)' is an amendment to the said 'P6(a)'. The Petitioner challenges the disciplinary proceedings instigated against him by the 2nd Respondent upon the said charge sheets. Anyhow, the Respondents contend that the said charge sheets were served in accordance with the law

without any malice or ulterior motive consequent upon the Petitioner boarding a vessel without lawful authority while he was serving as a public servant. The Respondents state that they possess disciplinary authority over the Petitioner and deny any usurpation of the powers of the Health Service Committee of the PSC. The other main contention of the Respondents is that the Petitioner has participated in the respective domestic inquiry for 2 years and did not at any stage challenge the legal authority of the Respondents to conduct the same. Placing reliance on the judgement of this Court in *Sunethra Rupasinghe v. D. S. K. Pushpakumara of the Sri Lanka Hockey Federation and Others CA/WRIT/627/2021 decided on 08.06.2022*, the Respondents assert that the Petitioner has failed to adduce any reasons as to why he has not challenged the impugned charge sheets before he participated at the said inquiry process. In a judicial review application, the conduct of the Petitioner relating to the affairs pleaded in the Petition should be assessed together with any unexplained lack of promptitude to apply to the Review Court.

Considering all such circumstances of this case, I have no option other than arriving at a conclusion upon the above aspect of the arguments that the Petitioner having acquiesced with the progression of the disciplinary proceedings has waited almost 2 years to challenge such charge sheets until an ancillary decision which is unfavorable to the Petitioner was taken by the Respondent. In the pretext of this scenario, I am unable to uphold the arguments of the Petitioner based on the Public Administration Circular No.6/2004 (1) which specifies a time period to conclude a disciplinary inquiry under certain circumstances. Hence, the facts and circumstances of this case do not leave room for me to quash the said 'P6(a)' and 'P6(b)' solely on the provisions of the said Circular No.6/2004 (1).

In addition to the above, it is noted that the Petitioner has divulged that he had tendered an Appeal in terms of section 7.4 of Chapter V of the E-Code and section 174 of the said Rules. The Petitioner urged that the instant Application be considered by this Court without prejudice to the said Appeal. However, the learned Deputy Solicitor General who appeared for the Respondents submitted to the Court on 19.05.2023 that the PSC was not going to take a decision on the Appeal lodged by the Petitioner. Besides the above, it is noted that in terms of Article 60 of the Constitution, upon delegation of the powers of the PSC to a Committee or a public officer appointed under Article 56 or Article 57 as the case may be, the PSC shall

not, while such delegation is in force, exercise or perform its functions or duties in regard to the categories of public officers in respect of which such delegation is made, subject to the provisions contained in paragraphs (1) and (2) of Article 58.

In view of the foregoing, I hold that the Petitioner is not entitled to any of the reliefs as prayed for in the prayer of the Petition. Thus, 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