

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

Ceylon Electricity Board,
No.50,
Sir Chittampalam A.
Gardiner Mawatha,
P.O. Box 540,
Colombo 02.
Petitioner

CASE NO: CA/WRIT/16/2016

Vs.

1. M.D.C. Amaratunga,
Commissioner General of Labour,
Labour Secretariat,
Colombo 05.
2. T. Piyasoma,
No.77,
Pannipitiya Road,
Battaramulla.
3. P. Thilakaratne,
Internal Auditor,

Ceylon Electricity Board,
No.50, Sir Chittampalam A.
Gardiner Mawatha,
P.O. Box 540,
Colombo 02.

4. W.D.J. Seneviratna,
Minister of Labour,
Labour Secretariat,
Colombo 05.

4A. Dinesh Gunawardana,
Minister of Skills Development,
Employment & Labour Relations,
2nd Floor,
Labour Secretariat,
Colombo 05.

Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Pasindu Silva with Chamari Hatharasinghe
for the Petitioner.
Avanthi Weerakoon, S.C., for the 1st and 4A
Respondents.
Manohara De Silva, P.C., with Hirosha
Munasinghe for the 3rd Respondent.

Argued on: 23.06.2020

Decided on: 21.07.2020

Mahinda Samayawardhena, J.

The 3rd Respondent employee joined the Petitioner, the Ceylon Electricity Board, on 14.07.1977 as a Clerk and was thereafter appointed as an Internal Audit Assistant (salary scale K5) on 05.06.1994. From 05.06.1994, the 3rd Respondent had not been promoted for twenty years. In 2004, he complained of this matter to the Ombudsman¹ and also to the Political Victimisation Committee.² The Political Victimisation Committee held an inquiry into the matter and made a recommendation that the 3rd Respondent be promoted to the post of Internal Auditor (salary scale K4) with effect from 01.10.2004.³ This recommendation was approved by the Cabinet of Ministers and the Ceylon Electricity Board gave effect to the Cabinet decision.

Thereafter, in 2006, the 3rd Respondent reagitated the matter and urged the 1st Respondent Commissioner General of Labour to give effect to the said promotion from 05.06.1990, claiming he was entitled to be promoted to the post of Internal Auditor after six years of service in his previous position of Internal Audit Assistant.⁴

The Commissioner General of Labour held an inquiry into this complaint and a settlement was reached between the employer and employee to backdate the said promotion to 31.05.1999.⁵

¹ *Vide* page 486 of X1.

² *Vide* page 493 of X1.

³ *Vide* page 501 of X1.

⁴ *Vide* page 37 of X1.

⁵ *Vide* pages 9 and 39 of X1.

However, the Ceylon Electricity Board later resiled from this settlement, stating to the Commissioner General of Labour that such an agreement is tantamount to overriding the Cabinet decision, which cannot be done.⁶

It is in this context the 4th Respondent Minister, by virtue of section 4(1) of the Industrial Disputes Act, referred this dispute for arbitration.

At the arbitration proceedings, the Ceylon Electricity Board had taken up a preliminary objection that, in light of the Cabinet decision, the Arbitrator lacks jurisdiction to inquire into the matter. But the Arbitrator overruled the said objection and, having proceeded with the inquiry, made the impugned decision dated 29.06.2015 backdating the said promotion to 05.06.1990, on the basis the 3rd Respondent should have been promoted to the post of Internal Auditor after exactly six years of service as Internal Audit Assistant. However, even according to the 3rd Respondent, in terms of the relevant circulars, “*internal audit assistant (K5) should be promoted to the post of internal audit (K4) after 6-year service, after an exam and interview held by the Petitioner.*”

It is against this decision of the Arbitrator that the Petitioner has come before this Court seeking it to be quashed by certiorari.

The pivotal argument of the Petitioner is the Minister could not have referred the dispute for arbitration nor could the Arbitrator have decided the matter because such a reference and/or decision is in sharp conflict with the said Cabinet decision made

⁶ *Vide* page 42 of X1.

on the recommendation of the Political Victimisation Committee. It is not the position of the 3rd Respondent that although the dispute is the same, the Arbitrator could revisit the matter and make an order. Rather, the 3rd Respondent's contention is "*the application to the Political Victimisation Committee was made purely due to the 3rd Respondent being subject to political victimisation*" and "*the application made to the Commissioner General of Labour and later referred to Arbitration was purely based on Petitioner's failure to implement relevant circulars*", and therefore there is no conflict between the two grievances. In the facts and circumstances of this case, I am unable to agree.

In fact, although the 3rd Respondent complained to the Political Victimisation Committee, his complaint makes no mention of political victimisation. Rather, the said complaint pertains to grave injustice caused to him due to the inefficiency of the management of the Ceylon Electricity Board, which compelled him to stagnate in the post of Internal Audit Assistant (salary scale K5) for twenty long years. The said complaint refers to the non-implementation of the relevant circulars as well. The argument of the 3rd Respondent that the complaint made to the Arbitrator was different from the complaint made to the Political Victimisation Committee is therefore unsustainable.

Let me quote in full the complaint of the 3rd Respondent sent to the Political Victimisation Committee for better understanding.

විගණන සහකාර සේවයට ඇති උසස්වීම් ලබා නොදීම

මා 1984 ජුනි 05 වන දින විගණන සහකාර තනතුරට පත්වූ අතර මේ දක්වා අවුරුදු 20ක් පමණ එම තනතුරේම සේවය කරන ලද අතර මෙතෙක් කිසිදු උසස්වීමක් ලබාදී නොමැත.

විගණන සහකාර සේවය ලංවීම කේ.5 වැටුප් ප්‍රමාණයට අයත් විධායක ශ්‍රේණියක් වන අතර ඊළඟ උසස්වීම වන්නේ කේ.4 වැටුප් ප්‍රමාණයේ විගණන නිලධාරී තනතුර වේ. ලංවීම උසස්වීම් පරිපාටියට අනුව එම තනතුර සඳහා පුරප්පාඩු වලින් 75% ක් බාහිරින්ද 15% අභ්‍යන්තර විභාග මගින්ද 10% ක ජ්‍යෙෂ්ඨතාවය මතද ලබා දීමට නියමිතව තිබුණි. නමුත් මේ දක්වාම අභ්‍යන්තර විභාග පැවැත්වීම සිදුකර නැත. එම නිසා එම විභාගයට පෙනී සිටීමට මට අවස්ථාව නොලැබී ගොස් ඇත.

මීට අමතරව ලංවීම උසස්වීම් පිළිබඳව නිකුත් කරන ලද අංක DGM/Policy/HRM (P)/GS (2)/4/71 හා 2002.10.29 දින දරණ චක්‍රලේඛය අනුවද අභ්‍යන්තර විභාග මගින් හා ජ්‍යෙෂ්ඨතාවය මත උසස්වීම් ලබාදිය යුතුව ඇත. නමුත් එම චක්‍රලේඛය නිකුත් කර දැනට වසර 2 ක කාලයක් ගතවී ඇතත් අභ්‍යන්තර විභාග තවමත් පවත්වා නැත.

තවද එකී චක්‍රලේඛය අනුව ජ්‍යෙෂ්ඨතාවය මත උසස්වීම් ලබා දීමේදී අවුරුදු 12 ක විගණන සහකාර සේවයේ පළපුරුද්ද ඇති අය ගෙන් සම්මුඛ පරීක්ෂණයක් මගින් උසස්වීම් ලබාදීම සිදුකළ යුතු බව සඳහන් වුවත් ඒ වන විට අවුරුදු 19 ක පමණ සේවා කාලයක් සපුරා ඇති මා හට සම්මුඛ පරීක්ෂණයට වත් කඳවුරක් නැත. මේ අනුව මා හට බලවත් අසාධාරණයක් සිදුවී ඇත. නමුත් මීටත් වඩා ජ්‍යෙෂ්ඨතාවයෙන් අඩු අයකුට පමණක් සම්මුඛ පරීක්ෂණයට කැඳවා උසස්වීම් ලබා දී ඇත.

ඉහත කී චක්‍රලේඛය අනුව විභාගයක් පැවැත්වූයේ නම් හා අවුරුදු 12ක සේවා කාලය පදනම් කරගෙන උසස්වීම් දුන්නේ නම් මා හට 1996 වසරේ සිට කේ.4 වැටුප් තලයේ විගණන නිලධාරී තනතුර ලැබිය යුතුය.

එමෙන්ම උසස්වීම් පරිපාටිය අනුව කේ.4 ශ්‍රේණියේ සිට කේ.3 ශ්‍රේණියට උසස් කිරීම ජ්‍යෙෂ්ඨතාවය මත ලබාදීම කේ.4 ශ්‍රේණියේ අවුරුදු 4ක ක්‍රියාකාරී සේවයකින් පසු ලබාදිය යුතුවේ. ඒ අනුව කේ.4 ශ්‍රේණියේ උසස්වීම් පරිපාටිය ක්‍රියාත්මක වූයේ නම් 2000 වසරේදී මා හට කේ.3 ශ්‍රේණියේ උසස්වීම් ලැබිය යුතුව ඇත.

මේ අනුව එකම තනතුරේ (කේ.5) මා හට අවුරුදු 20ක සේවා කාලයක් ගතවී ඇතත් මේ දක්වා උසස්වීමක් ලබා නොදීමෙන් බලවත් අසාධාරණයක් සිදුකර ඇත.

මෙම කරුණු සලකා බලා මා හට සිදුවී ඇති අසාධාරණය ඉවත් කිරීමට කේ.3 ශ්‍රේණියට උසස් කරන ලෙස කරුණාවෙන් ඉල්ලමි.⁷

It may be relevant to note that in his complaint to the Commissioner General of Labour,⁸ which was made after the Cabinet decision, the 3rd Respondent does not say other employees of his service, i.e. the Internal Audit Assistant service, were promoted upon six years of service. Rather, he says employees in *parallel* services were promoted upon six years of service. In the said complaint, the 3rd Respondent admits a promotion scheme for the Internal Audit Assistant service was first introduced by circular dated 31.05.1999.

In the award sought to be quashed, the Arbitrator has referred to the promotions of three other officers of the Ceylon Electricity Board having been backdated, upon the recommendations of the Human Rights Commission, beyond the Cabinet decision.⁹ The Arbitrator places great weight on this matter in rejecting the

⁷ Vide page 493 of X1.

⁸ Vide page 37 of X1.

⁹ Vide pages 8-9 of the arbitration award marked P2.

argument of the Ceylon Electricity Board that to backdate the promotion of the 3rd Respondent would effectively override the Cabinet decision. The 3rd Respondent also takes this point to the forefront and emphasises: *“(The Petitioner’s) Ceylon Electricity Board’s position that they have no power to backdate the applicant beyond the date which the Political Committee Report recommended which has been approved by the cabinet cannot sustain inasmuch as the Board has acted contrary to the said stand in a different manner with regard to other officers and no explanation has been given with regard to such promotions.”*

With regard to the said promotions of the other three officers, the Arbitrator refers to the documents marked R23-R26.¹⁰ However when I read these documents, it is clear the Arbitrator has manifestly misconstrued them. The recommendation of the Human Rights Commission in respect of the said three officers is as follows:

The said [political victimisation] committee explored their grievances and recommended very clearly that the appointments of the complainant and others in the same batch be backdated to 02.05.1995 the date on which they would complete the six years. (P1)

But the management of the CEB amended the said recommendation and implemented from 01.04.1998. (P2)

By considering the foregoing the Human Rights Commission observes that the Respondent Board treated the employees in the two batches differently and thereby created an

¹⁰ Vide pages 530-541 of X1.

anomaly among the said employees and the said anomaly had violated the fundamental rights of equal protection of law guaranteed under Article 12(1) of the Constitution. In the circumstances, the Human Rights Commission recommends that the complainant's appointment which carries the salary scale of K4 be backdated to be effective from 02.05.1995 and adjust the salary accordingly.¹¹

It appears, contrary to what the Arbitrator states, the Human Rights Commission recommended that the Ceylon Electricity Board implement the Cabinet decision without varying it. In other words, the Human Rights Commission recommended backdating the relevant promotions strictly in line with the Cabinet decision made on the recommendations of the Political Victimisation Committee. The Ceylon Electricity Board enforced the said recommendations of the Human Rights Commission and the promotions of the three officers were backdated accordingly. This misconstruction of the Human Rights Commission recommendations with regard to the said three officers has largely influenced the Arbitrator to hold against the Ceylon Electricity Board in the instant dispute.

The above quoted recommendation of the Human Rights Commission further highlights that the Political Victimisation Committee made recommendations based on the unique facts and circumstances of each individual case. This is clear from the report of the Political Victimisation Committee found in the record.¹² In respect of the other three employees, who were not

¹¹ *Vide* page 534.

¹² *Vide* page 500-517 of X1.

in the same service as the 3rd Respondent (i.e. the three employees highlighted by the Arbitrator and the 3rd Respondent), the Political Victimisation Committee recommended they be promoted upon completion of six years of service. The Political Victimisation Committee did not make the same recommendation in respect of the 3rd Respondent, perhaps for different reasons. This Court is not mandated to look into that matter.

In light of the Cabinet decision already made in respect of the effective date of promotion of the 3rd Respondent, the Minister could not have referred the matter for arbitration and the Arbitrator could not have backdated the said promotion, thereby overriding the Cabinet decision.

The 3rd Respondent has taken up two preliminary objections.

The 1st preliminary objection is the former Minister who referred the dispute for arbitration has not been cited by name and instead the present Minister has been made a party, and therefore the application of the Petitioner shall be dismissed *in limine*. The Minister was performing an official act; he cannot be held personally liable for such an act and therefore naming his successor is sufficient compliance in terms of the Court of Appeal Rules. In any event, the relief sought is certiorari quashing the reference for arbitration by the Minister; mandamus is not sought.

The second preliminary objection is “*Petition of Appeal has not been filed by the Attorney-at-Law on record; therefore no valid Petition of Appeal is before Court.*” There is no Petition of Appeal

in the instant case. This is a writ application. The names of several Attorneys-at-Law appear on the proxy and it has been signed by one of them. This is sufficient compliance. In any event, such a defect of the proxy is curable.

I overrule the above preliminary objections.

I quash the reference for arbitration by the Minister in P1(a) and the award of the Arbitrator marked P2 and P3 by way of a writ of certiorari, on the basis that both acts are *ultra vires*.

The reliefs as prayed for in paragraphs (b) and (c) of the prayer to the petition dated 14.01.2016 are granted. The application of the Petitioner is allowed but without costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.

I agree.

Judge of the Court of Appeal