

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 a Writ of
Certiorari and Prohibition in
terms of Article 140 of the
Constitution.*

CA(Writ) Application 242/19

Seylan Bank PLC
90,
Galle Road,
Colombo 3.

Petitioner

Vs.

1. Commissioner General of
Labour
7th Floor,
Labour Secretariat,
Colombo 5.
2. Aminudeen Abdul Hafeel
No 46, Chetty Street,
Puttalam.

Respondents

Before : Dhammika Ganepola, J.

Counsel : Dr. Romesh de Silva P. C. with Sugath
Caldera, Niran Anketell and Wasantha
Kumar Niles for the Petitioner.
Manohara Jayasinghe, D.S.G. for the 1st
Respondent.

Argued On : 26.06.2024, 02.09.2024

Written Submissions : Petitioner : 16.10.2024
tendered On 1st Respondent : 25.11.2024

Decided On : 29.11.2024

Dhammika Ganepola, J.

Position of the Petitioner

The Petitioner in this application seeks a writ in the nature of a Writ of Certiorari to quash the decision of the 1st Respondent contained in the document marked X6 to the Petition. The 2nd Respondent was an employee of the Petitioner bank who was employed under the letter of appointment marked X1. As per Clause 13 of the said letter of appointment, the age of retirement of the 2nd Respondent was 55 years of age. The Petitioner states that as per the Circular bearing no. SCL 2008/043 dated 19th September 2008 [X2] issued by the founder Chairman of the Petitioner bank, the age of retirement of all categories had been extended to 58 years of age without consulting the 2nd Respondent, any other employee of the Petitioner bank or the relevant trade unions.

However, following the crisis faced by the Petitioner Bank, commonly referred to as the 'Golden Key' crisis, the Board of the Petitioner Bank issued another Circular, No. SCL2009/003 dated 19 March 2009[X3], which amended the retirement age to 55 years and introduced an evaluation

criterion to grant limited extensions up to age of 57 and 60 years. Accordingly, the Petitioner states that the 2nd Respondent ceased to be an employee of the Petitioner Bank reaching the age of 55 years by or about 06th April 2015. However, the Petitioner made an application to the Termination of Employment Branch of the Department of Labour on the basis that his services were terminated by the Petitioner Bank. After an inquiry held by the 1st Respondent, by the Order dated 10th December 2018 [X6], the Petitioner had been asked to pay back wages. The Petitioner pleads that the said Order X6 is ultra vires, unreasonable, and is in breach of the legitimate expectation of the Petitioner in view of the reasons set out in the Petition.

Position of the 1st Respondent

The 1st Respondent states that it was revealed at the inquiry before him that the Employee's trade union had made representation to the Petitioner Bank and pursuant to the discussion between employees and the Chairman of the Petitioner, Bank Circular No. SCL 2008/043 had been issued extending the age of retirement to 58 years. The Circular No. SCL 2009/003 had been issued unilaterally without the employees' consent. The 1st Respondent's position is that the age of retirement is determined by the letter of appointment and mutually revised by Circular No. SCL 2008/043. Therefore, this age of retirement cannot be unilaterally changed by the issuance of Circular No. SCL 2009/003. Consequently, it is claimed that the 2nd Respondent does not cease to be an employee of the Petitioner Bank upon reaching the age of 55 years. Hence, the decision of the Petitioner bank to send the 2nd Respondent on retirement at the age of 55 years was made without *consensus ad idem* and amounted to a termination of employment.

As per the journal entry dated 15.05.2024, all parties agreed to present the same argument which was made to the application bearing No. Writ 243/19 to the instant application.

Position of the 2nd Respondent

The 2nd Respondent asserts that Circular No. SCL 2001/10 dated 13th March 2001[X4] expressly amended the age of retirement indicated in Clause 13 of the letter of appointment[X1] allowing the employees to apply for extensions on reaching the age of 55 years annually until they reach the age of 60 years. Further, Circular No. SCL 2008/043 increased the age of

retirement of all categories of staff to 58 years giving away the requirement of requesting extensions annually as per Circular No. SCL 2001/10 without repealing such Circular. The 2nd Respondent states that Circular No. SCL 2008/043 was introduced in accordance with requests made by the Employees Union. However, Circular No. SCL 2009/003 was issued rescinding Circular No. SCL 2008/043 unilaterally by the Petitioner without obtaining any consent from the employees. Accordingly, it is submitted that neither paragraph 13 of the letter of appointment [the age of retirement 55 years] nor Circular No. SCL 2009/003 applies to the contracts of employment of the employees which they had with the Petitioner. Further, it was the practice of the Petitioner Bank to grant extensions for all employees who sought extensions after the age of 55 years and there was no process of evaluation or discretion involved. It is further claimed that the 1st Respondent is not bound by the limitations contained in the Termination of Employment of Workmen (Special Provisions) Act [TEWA] when an employee makes an application to the Commissioner of Labour in respect of an unjustifiable termination of services.

Decision of the 1st Respondent

The Petitioner in this application seeks a Writ of Certiorari to annul the decision of the 1st Respondent marked X6 where the Petitioner was ordered to pay back wages. By said decision, the 1st Respondent has come to a finding that the Petitioner has terminated the services of the 2nd Respondent contrary to the provisions of the TEWA. Concerns were raised on the issuance of Circular X3 unilaterally by the Petitioner Bank without obtaining any views on it from its employees. Therefore, it is claimed that Circular X3 is neither an effective agreement nor a confirmatory document to that extent. Hence, it is contended that the contractually valid retirement age is 58 years as reflected in X2. This Court has to consider whether the reasons given by the 1st Respondent in arriving at his conclusion bear any illegality or irrationality which comes under the purview of writ jurisdiction.

Circular Pertinent to the Age of Retirement of the Employees of Petitioner Bank

As per the letter of appointment[X1] of the 2nd Respondent, the age of retirement is 55 years. However, subsequently, the age of retirement was amended or varied by Circulars bearing No. SCL 2001/10 dated 13th March

2001[X4], No. SCL 2008/043 dated 19th September 2008[X2] and No. SCL 2009/003 dated 19 March 2009[X3]. It is on common ground that the 2nd Respondent reached the age of 55 years on the 19th of April 2016. At the time when 2nd Respondent reached the age of 55 years, the existing Circular applicable on the age of retirement of the employees of the Petitioner Bank was Circular X3. As per Circular X3, the age of retirement was set as 55 years giving effect to the relevant Public Administration Circular. Further, Circular X3 stipulates that extensions would be granted to the employees annually until they reach the age of 57 years subject to evaluation of performances and the discretion of the Management. The extension for highly skilled employees who could not be easily replaced and who will contribute to the bottom line directly could be granted annually until they reach the age of 60 years. Further, Circular X3 expressly rescinded Circular X2 by which the age of retirement was extended to the age of 58 years. Therefore, the Petitioner contends that the 2nd Respondent ceased to be an employee of the Petitioner Bank upon reaching the age of 55 years as per Circular X3 and no termination of services had occurred.

Public Administration Circular

The Respondents argue that Circular X3 does not determine the Petitioner's retirement age for several reasons. The Respondents point out that Circular X3 was introduced to the Petitioner Bank to give effect to a Public Administration Circular and was issued unilaterally by the Petitioner without consulting or obtaining consent from the employees. It is stated that the Public Administration Circulars do not apply to the Petitioner Bank.

Though the 2nd Respondent has taken up the position that the Public Administration Circulars do not apply to the Petitioner Bank, it is significant to observe the employee's union has taken a contrary stand and has requested the Bank to act in line with another Public Administration Circular by letter R2(1). However, the Petitioner Bank conceded that being a private sector Bank it need not be guided by Public Administration Circulars issued from time to time and the decision to give effect to Public Administration Circular by Circular X3 does not necessarily create a precedent. Accordingly, it is apparent that the Petitioner Bank has refused to change the age of retirement as specified in Circular X3 and decided to continue the age of retirement at 55 years. As a result, the effectiveness of the Circular X3 remains unchanged. The 2nd Respondent in his Written

Submissions states that *'the series of circulars issued by the Petitioner Bank, particularly X2 Circular, clearly indicates that the 2nd Respondent was entitled to continue his employment until the age of 58, following established practices and collective agreements with the Employees Union.'* However, no such Collective Agreement was brought to the notice of this Court.

Unilateral issuance of Circular X3

The 1st Respondent, Commissioner General of Labour by his decision X6 has come to a finding that Circular X3 has been issued unilaterally by the Petitioner Bank. Such findings are based on the footing that the employees have not accepted the same and have objected to such. Accordingly, it is claimed that Circular X3 is not an effective or valid agreement. As a result, the Petitioner lacked the authority to terminate the employment of the employees based on Circular X3. The 2nd Respondent provided some correspondence between the Petitioner Bank and the employee's union marked R2(1), R2(2), R2(3) and R2(4) in proof of the discussions and/or negotiations between them on the retirement age as specified under Circular X3. Although the employees' union requested the Petitioner to make the age of retirement 57 years and to withdraw the Circular X3, the Petitioner Bank had not been amenable to such a request. Further, the Petitioner Bank has specifically informed the employees union of its stand to continue the age of 55 years as the retirement age by letter R2(2).

Unilateral amendment.

The 1st Respondent Commissioner General of Labour asserts that Circular X3 represents a unilateral amendment to the retirement age as the employees have not expressed their consent to the same. Therefore, it has been decided that the Circular X3 lacks any legal effect. Anyhow, it is pertinent to note that as per Clause 10(a) of the letter of appointment[X1], the 2nd Respondent is *inter alia* obliged to observe, comply with, carry out and perform all orders, rules, regulations and directions whether written or oral that may be given to the 2nd Respondent from time to time by the Petitioner Bank. At this instant, it is noteworthy to observe that the 2nd Respondent in his Written Submissions conceded the implementation of rules and regulations via Circulars in the Bank. Said part of the submission is reproduced as follows.

“...However, it is respectfully submitted on behalf of the 2nd Respondent that all rules and regulations of the Bank have consistently been implemented through circulars, which is the Bank’s established practice concerning employee conditions. There is no requirement for obtaining individual signatures from all employees, particularly in a matter that pertains to an increase in employee benefits.”

Further, it is observed that the age of retirement of the 2nd Respondent has been amended in several instances, i.e. by Circulars marked X2, X3 and X4. Although the Respondents state that Circular X2 on which the Respondents rely upon was issued following the consultations with the employees, they have failed to demonstrate or produce any documentary evidence to the effect that there had been any consultations and /or negotiations with the Bank prior to the issuance of X2 and X4 also.

Although the employees' union informed the Petitioner Bank to resort to legal actions to resolve the matter, it appears that Circular X3 has not been quashed or rescinded as of this date. Mere protest or disagreement expressed by the Employee’s Union would not render Circular X3 ineffective or legally invalid. At this point, it is important to observe the reference which appears in Circular X3 *“Please treat our Circular No. SCL 2008/043 dated 19th September 2008 [X2] as rescinded”* which exhibits the stance of the Petitioner Bank. Accordingly, without formal or authorized cancellation of X3, no effect would be given to the former Circular X2.

It is observed that nobody has taken steps to challenge the validity of Circular X3 for nearly 15 years before an appropriate forum since its implementation in March 2009. The first available document to this Court, which speaks about the employees' concerns regarding retirement age as per Circular X3 is the letter marked R2(1) dated 24.05.2011. By the said letter, the employee’s union had requested the Petitioner Bank to make arrangements to make the retirement age of the Bank 57 years in line with the Public Administration Circular. I am of the view that such correspondence would not render the Circular X3 invalid.

In any case, regardless of whether there is any acceptance or agreement between the parties in respect of Circular X3, the 1st Respondent cannot arrive at the conclusion that the said Circular X3 is invalid without the same being declared null and void by a competent court of law. Under such circumstances, this Court is not inclined to accept the 1st Respondent’s

decision that Circular X3 is not a legally valid document on the grounds relied upon by him.

Applicability of TEWA

The 1st Respondent Commissioner has come to a conclusion that the services of the 2nd Respondent have been terminated without the prior written consent of the employee or without prior written approval of the Commissioner General of Labour and contrary to the provisions under TEWA. At this stage, it is pertinent to consider the applicability of TEWA. Section 3(1)(c) of the TEWA is as follows.

3. (1) The provisions of this Act, other than this section, shall not apply:

(c) to the termination of employment of any workman who has been employed by an employer where such termination was effected by way of retirement in accordance with the provisions of

(i) any collective agreement in force at the time of such retirement; and

(ii) any contract of employment wherein the age of retirement of such workman is expressly stipulated

In the instant application, the age of retirement has been specifically given in the letter of appointment X1 and Circular X3 as 55 years. Accordingly, it is observed that the 2nd Respondent has ceased to be an employee of the Petitioner Bank by the age of 55 years as specified in Circular X3 by 06.04.2015 reaching the age of retirement. Hence, the provisions of TEWA do not apply, and the 2nd Respondent Commissioner lacks jurisdiction to inquire into the complaint made by the 1st Respondent in terms of Section 3(1)(c)(ii) of TEWA.

Conclusion

In the circumstances and the reasons given above, I am of the view that the decision arrived at by the 1st Respondent is ultra-virus, irrational and unreasonable. Accordingly, I am inclined to grant the relief sought by the petitioner and issue a Writ of Certiorari quashing the decision marked X6 to the Petition. I order no cost.

Application is allowed.

Judge of the Court of Appeal