

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

In the matter of Application under and in terms of
Article 140 of the Constitution for mandates in the
nature of Writs of Certiorari, Prohibition and
Mandamus.

G. A. Nandawathie

‘Bedigama Gedara’, Ihala Guruwala,

Agunukolapelessa.

Petitioner

C. A. (Writ) Application No. 231/2022

Vs.

1. A. Jagath D. Dias
Director General of Pensions,
Department of Pensions,
Maligawatta,
Colombo 10.
2. Buddhika Jayathissa
Director (Pensions),
Department of Pensions,
Maligawatta,
Colombo 10.
3. Chandana Ranaweera Arachchi
Director,
Department of Social Services,
2nd Floor, ‘Sethsiripaya’ Stage II,
Battaramulla.

4. Secretary
Ministry of Health,
No. 385, Ven. Baddegama Wimalawansa Thero
Mawatha,
Colombo 10.
5. Secretary
Ministry of Public Administration, Home Affairs,
Provincial Councils and Local Government,
Independence Square,
Colombo 07.
6. Superintendent
Vocational Training Institute,
Thelambuyaya,
Angunakolapelessa.

Respondents

Before : Sobhitha Rajakaruna, J.
Dhammika Ganepola, J.

Counsel : Nilshantha Sirimanna for the Petitioner.
Suranga Wimalasena, D.S.G. for the Respondents.

Written Submission : Tendered by Petitioner on 02.10.2023

Decided On : 14.11.2023.

Dhammika Ganepola, J.

The Petitioner was employed at the Vocational Training Centre of Telabuyaya, Angunakolapelaessa from June 2002 on temporary basis. On 26.12.2005, by the letter of appointment dated 23.11.2006 marked P4 to the Petition, the Petitioner was appointed as a cook in the Department of Social

Services. In view of the above letter of appointment, the Petitioner's employment is permanent and pensionable. The said appointment of the Petitioner was confirmed with effect from 26.12.2009 as at the age of 46 by the letter dated 29.12.2009 marked P5 to the Petition. Throughout her tenure of employment, the Petitioner secured membership in the Widows and Orphans Pension Scheme and the Agrahara Medical Scheme, for which only permanent employees are eligible. A few months before her retirement, the Petitioner submitted necessary documents to the Department of Social Services and the Department by the letter dated 22.10.2019 marked P17 confirmed the Petitioner that her retirement was approved in accordance with the Rules of the Public Service Commission, and Sections 2 & 17 of the Minutes of Pension. Accordingly, after nearly fourteen years of service, the Petitioner retired on 17.10.2019 upon reaching the age of 60 years.

Due to the delay in getting her pension and the financial difficulties experienced, a few months after her retirement in June 2020, the Petitioner visited the Department of Pension and the Department of Social Services to inquire about the progress of her pension. To her utmost shock and dismay, the Petitioner has been informed that her service in the post of Cook had been made permanent after she reached the age of 45 years and therefore the Department was facing difficulty in processing her pension. However, in view of the above-purported concern in respect of the Petitioner's entitlement to the pension, the Department of Social Services sought advice from the Director General of Pensions by its letter dated 14.09.2020 marked P19 to the Petition in respect of the possibility of paying the pension after amending and/or ante-dating the Petitioner's date of appointment to 01.07.2005 as the Petitioner has completed all relevant requirements required to be fulfilled for the Petitioner to obtain such appointment as at 01.07.2005. In response, the Director General of Pension has informed the Director of Social Services by his letter dated 05.04.2021 marked P20, that the pension entitlement to the Petitioner cannot be granted to the Petitioner on an irregular appointment as Clause 31 of the Public Service Commission precludes the anti-dating of an appointment for any reason. The Petitioner submits that the above decision to refuse her pension is illegal, irrational, and procedurally defective. Accordingly, the Petitioner is seeking *inter alia* Writs of Certiorari quashing the decision of the 1st, 2nd and 3rd Respondents' to refuse the pension due and payable to the Petitioner and to the effect that the Petitioner is not eligible to the pension, Writs of Mandamus directing the 1st to 5th Respondents to process the Petitioner's application for pension and grant the pension and Writ of Prohibition restraining the 1st, 2nd and 3rd Respondents giving effect to the decision reflected in P20.

The Respondents contend that the pension entitlement of the public servant cannot be claimed as an absolute right and is governed by the provisions of Minutes of Pension. As per the policy decision taken by the Cabinet of Ministers on 04.05.1994 (1R1) maximum age for the recruitment of Public Servants is determined as 45 years. Such policy decision has been given effect by the

Public Administration Circular No.23/1994 (1R2) issued by the 5th Respondent. As the matters may remain as such, the Public Administration Circular No.13/2005 (P21/1R3) issued by the 5th Respondent provides for the grant of permanent status to the employees recruited to the Government Institutions, Cooperations, and Statutory Bodies on temporary, casual, substitute, relief or contract basis with effect from 01.07.2005, even if at the time of recruitment of such employees, they were above the age of 45 years, subject to the fulfilment of remaining criteria specified in that Circular. Availability of vacancies to the relevant post is a requirement to be taken into consideration in issuing an appointment on the basis of said Circular P21/1R3. However, it is contended that as at 01.07.2005, there were no vacancies to the post to which the Petitioner has been appointed. Accordingly, it is claimed that the Petitioner's permanent appointment to the public service is invalid as it is in contravention of the said Cabinet Decision 1R1 and the Circulars 1R2 & 1R3/P21. Therefore, the Petitioner is disentitled from seeking a pension.

When this matter was taken up for hearing on 12.09.2023 parties agreed that this matter may be dealt with and determined solely on the basis of written submissions. The Petitioner filed written submissions on 02.10.2023. However, no written submissions on behalf of the Respondents have reached me so far.

Applicability of Public Administration Circular No. 13/2005 (P21/1R3)

The assertions of the Respondents are primarily based on the Public Administration Circular No. 13/2005 (P21/1R3). The Respondents submit that the Petitioner's appointment to the permanent post of Cook at an age above 45 years by letter P4 is alleged to have been made in terms of the Public Administration Circular No. 13/2005 (P21/1R3). The said Circular allowed employees who were above 45 years of age to be appointed to permanent positions subject to criteria specified therein. Such criteria *inter alia* included the following:

- I. There should be vacancies in the approved cadre.*
- II. Should possess satisfactory and continuous service of 180 working days as at 30.06.2005 in a permanent post presently vacant and belonging to the approved cadre.*
- III. In the case of employees who are qualified to be made permanent as above, they can be made permanent in the service although they have completed the age of 45 years as at 30.06. 2005 if they were below the age of 45 at the time they were appointed on Temporary, Casual, Substitute, Relief, and Contract basis.*

The Respondents submit that according to the criteria mentioned above, an employee working on a substitute basis in a government institution can only benefit from the aforementioned Circular if the relevant permanent post has been vacated as of 30.06.2005. The Respondents claim that the post of Cook at the Department of Social Services (Vocational Training Centre in Telabuyaya), where the Petitioner worked as a substituted cook, became vacant only on 26.12.2005, with the retirement of one Mrs. R.K. Leelawathie, who was the Permanent Cook at that time. Hence, it is

claimed that there was no vacancy in the approved cadre for the post of Cook where the Petitioner was functioning as at 30.06.2005.

It is the responsibility of the Respondents to provide adequate material to this Court to satisfactorily support their stand. It is observed that the Respondents have failed to place any satisfactory evidence to the effect that there were no vacancies to the post of Cook as at 30.06.2005. No evidence regarding the approved cadre for the relevant post and the number of employees employed in the post of Cook during the applicable period were placed before this Court to support such a stance. A mere statement that one Leelawathie was the Permanent Cook and that she only retired on 26.12.2005 is not sufficient to support the stand taken by the Respondents. Moreover, contrary facts are evident from the letter dated 14.09.2020 marked P19/P19(a) sent by the 3rd Respondent, Director of Social Service to the 1st Respondent, Director General of Pensions. Said letter P19 provides that the Petitioner has been recruited for the post of Cook on a substitute basis to fill the requirements in the approved cadre which was vacant from 20.06.2002. The documents marked P2 & P3 also support the Petitioner's tenure of service as substitute cook in the Vocational Training Centre. Such reference in the P19/P19(a) is reproduced as follows.

“මෙම නිලධාරියා එවකට පුරප්පාඩුවක් පැවති ස්ථීර කායාර් මණ්ඩලයේ අරක්කුම් තනතුරට 2002.06.06 දින අදේශක පදනම මත බඳවා ගෙන ඇති අතර 2005.12.26 දින සිට ස්ථීර පත්වීම් ලබා දී ඇත.”

The Respondents have admitted the document marked P19/P19(a) in their objections. Hence, the above annotation in the letter P19/P19(a) repudiates the stance taken by the Respondents that there were no vacancies for the post of Cook in the approved cadre as at 30.06.2005. As such the Respondents are estopped from deviating from their original stand in P19/P19(a) at present without any substance. Under such circumstances, I am not inclined to accept the submission of the Respondent that the post of substitute cook only became vacant on 26.12.2005, with the retirement of one Mrs. R.K. Leelawathie, who was the Permanent Cook at the Vocational Training Centre.

As per the letter P19/P19(a), it is evident that the Petitioner has been recruited to the post of Cook on a substitute basis from 20.06.2002. Therefore, I am satisfied that the Petitioner has possessed continuous service of 180 working days as at 30.06.2005 as a substitute cook as required by the Public Administration Circular No.13/2005 (P21/1R3).

Public Administration Circular No.13/2005 (P21/1R3) permits the employees who are qualified to be made permanent in their service despite the fact that such employees have attained the age of 45 years as at 30.06.2005 provided such employees were below the age of 45 years at the time, they were appointed on Substitute Basis. It is not disputed that the Petitioner retired on 17.10.2019 upon reaching the age of 60 years. The Petitioner was recruited to the post of Cook on a Substituted Basis on 20.06.2002 at the age of 43 years and she continued to serve until her appointment to the permanent position on 26.12.2005. Accordingly, it is evident that the Petitioner was below 45 years of age at the time she was appointed as a Cook on a substitute basis.

In view of the above, I am satisfied that the Petitioner has completed the required prerequisites to have been granted an appointment under the existing circulars/rules/laws.

The Public Administration Circular No.13/2005 (P21/1R3) was issued by the Secretary to the Ministry of Public Administration and Home Affairs aiming to grant permanent status to employees recruited to Government Institutions Corporations and Statutory Bodies on temporary, substitute, relief, and contract basis. In terms of the said Circular, the burden lies on the 3rd Respondent who is the Appointing Officer to take necessary steps to grant permanent status to the Petitioner who fulfilled the relevant requirements. As the requirements set out in Public Administration Circular No.13/2005 (P21/1R3) pertinent to the Petitioner had been duly fulfilled, the Petitioner should have been confirmed in the post of Cook with effect from 01.07.2005, if the relevant factors would have been considered by the 3rd Respondent correctly. However, due to a failure on the part of the 3rd Respondent to take relevant consideration into account, the Petitioner's appointment had not been granted timely. Hence, the Petitioner has only been appointed to the post of Cook with effect from 26.12.2005 and thereafter has only been confirmed on that position by letter dated 29.12.2009 marked P5.

In the instant application, it appears that this situation arose due to an administrative lapse of the Department of Social Service and not due to any fault of the Petitioner whatsoever. The occurrence of such an administrative lapse has been admitted by the 3rd Respondent in his letter P19. Further, the 3rd Respondent was of the view that the Petitioner would have been appointed for the permanent post of Cook from 01.07.2005 as she had completed all necessary requirements as prescribed in the relevant Circulars. Said letter P19 reads as follows.

“ මෙම නිලධාරිනිය එවකට පුරප්පාඩුවක් පැවති ස්ථීර කායාර් මණ්ඩලයේ අරක්කැම් තනතුරට 2002.06.06 දින අදේශක පදනම මත බඳවා ගෙන ඇති අතර 2005.12.26 දින සිට ස්ථීර පත්වීම් ලබා දී ඇත 2005.07.28 දිනැති රාජ්‍ය පරිපාලන චක්‍රලේඛ අංක 13/2005 දින ආදේශික පදනම මත බඳවාගෙන ඇති අතර 2005.06.30 දිනට අවු 45 ක්මවා තිබුනද ඔවුන් ආදේශික පදනම මත සේවයට බඳවා ගන්නා අවස්ථාවේ වයස අවු 45 සම්පූර්ණ කර නොතිබුනේ නම් සේවය ස්ථීර කිරීමේ හැකියාව ඇත. නමුත් එම සේවකයන් 2005.07.01 දින සිට ස්ථීර කල යුතු බවට රාජ්‍ය තීරණය කර ඇත.

මෙම චක්‍රලේඛය නිකුත් කල දිනයත් නිලධාරිනියට ස්ථීර පත්වීම පෙරදානම කර ලබාදුන් දිනය වන 2006.11.22 දිනයත් අතර වෙනත් මෙවැනි චක්‍රලේඛයක් නොතිබූ බැවින් උක්ත චක්‍රලේඛය යටතේ මෙම නිලධාරිනියට ස්ථීර පත්වීම් ලබාදී ඇති බව නිරීක්ෂණය වන අතර පරිපාලනමය අතපසුවීමකින් 2005.12.26 දිනට පෙරදානම කර ලබා දී ඇති බව නිරීක්ෂණය කරන අතර 2005.07.01 දින සිට අදාළ චක්‍රලේඛ ප්‍රකාර මෙම පත්වීම් ලබා දීම සඳහා වන සියළු සුදුසුකම් සපුරා ඇත.”

In the above circumstances, this court unequivocally asserts that the administrative lapse of the 3rd Respondent does not render the appointment of the Petitioner invalid.

Entitlement of a pension

Every public officer who holds permanent office for over 120 months and is declared as being pensionable is entitled to receive a pension upon her/his retirement in terms of Section 2 of Minutes of Pension.

It is observed that the Petitioner served more than 13 years in the post of Cook permanently until she retired from the service on 17.10.2019. In terms of the letter of appointment P4, the Petitioner's appointment is permanent and pensionable. The Petitioner has been confirmed in her service by letter dated 22.10.2019 marked P5. The Petitioner's retirement was approved by the Director of Social Services in accordance with the Rules of the Public Service Commission and Sections 2 and 17 of Minutes of Pension upon attaining the retirement age of 60 and the same is reflected in P17. It is further observed Contributions made to the Pension Scheme from the monthly salary of the Petitioner are not in dispute. Under such circumstances, the pension entitlement of the Petitioner is established. Hence, I hold that there is no bar for the 1st Respondent to grant the Petitioner her pension. Further, any requirement of antedating of appointment of the Petitioner to grant her the pension does not arise.

The 1st Respondent's decision not to grant the Petitioner a pension entitlement was on the basis that her appointment was granted after she attained the age of 45 years. Given the fact that a public officer was above the age of 45 years at the time of recruitment is not a consideration that should be taken into account in granting a pension entitlement provided all other relevant requirements under the law are satisfied, I am of the view that the decision to not award the pension entitlement to the Petitioner is ultra vires.

For the above reasons and the circumstances pertinent to this case, it is unlawful to decide that the Petitioner is not entitled to a pension. Therefore, I am inclined to issue a Writ of Certiorari quashing the decision reflected in the letter marked P20, a Writ of Prohibition restraining the 1st to 5th Respondent from making any further decision pursuant to the decision reflected in P20 and a Writ of Mandamus directing the 1st to 5th Respondents to forthwith process and compute the Petitioner's application for pension and pay her the pension due from the date of her retirement. I order no cost.

Judge of the Court of Appeal

Sobhitha Rajakaruna J.

I agree.

Judge of the Court of Appeal