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

In the matter of an Application for a Mandate in the nature of a Writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 98/2017

S.L.A.Palihena,
Owner and Proprietor of
Inter Ocean Maritime Enterprises,
Unit F – 32, 1st Floor, Lucky Plaza,
St. Anthony Mawatha, Colombo 3.

Petitioner

Vs.

1. M. D. C. Amaratunga,
   Commissioner General of Labour,
   Department of Labour, Colombo 5.

2. Mr. M.W. Viraji,
   Assistant Commissioner of Labour,
   Department of Labour, Colombo 5.

3. D.K. Prasanna Manjula,
   No. 178/A, Walgama, Yatagama,
   Rambukkana.

4. P.C. Premachandra,
   115/4, Koskandawala, Yakkala

5. W.H. Piyal de Silva,
   No. 81/2, Ariyarathnarama Road,

Walapala, Panadura.

6. H.P.M.P. Mahinda Kumara,
   No. 53B, Pansala Road, Ganemulla.

7. Bandula Munasinghe,
   Thannehena, Denagama North, Hakmana.

8. B.K. Ranjith Nayanasiri,
   142/1, Bogaha Koratuwa,
   Wewala, Hikkaduwa.

9. A.D. Indika Gunawardena,
   No. 342/1A, Meemana, Pokunuwita

10. M.H.P.D. Ranaweera,
    No. 505, Munasinghepura, Kiriella.

11. M.W.T.C. Perera,
    T/151/B, Serpentine Road,
    Borella, Colombo 8.

12. A.W. Sanjaya Chamil,
    No. 146/30, Thalgasgoda, Ambalangoda.

13. K.S.S. Prasath Kumara,
    'Prasad', Puwakdolawaththa,
    Batadola, Denagama.

14. S.J. de Silva,
    Pansalapara, Wahakarawa, Balapitiya.

15. H.A. Chamila Sri Buddhika,
    No. 847/1, Ambawala,
    Welipenna, Gagumulla.

16. N.P.P. Gunasekera,
Ruwandeniya,
Dewanagala, Ellegodapara.

17. G.K. Asanka Udayakumara,
No. 25/1, National Houses,
Mada Uyangoda, Yatiyana.

18. W. Sarath Kumara,
Galle Road, Kudawaskaduwa, Waskaduwa.

19. P.D. Ajith Priyantha,
89A/3, Walpola, Ragama.

20. W.A.A. Gunarathne Wanasinghe,
C 101/1, Hapuwita, Udagama, Moronthota.

Respondents

Before: **Arjuna Obeyesekere, J**

Counsel: Rohan Sahabandu, P.C., with Ms. Surekha Withanage for the Petitioner

Sobhitha Rajakaruna, Senior Deputy Solicitor General for the Respondent

Written Submissions: Tendered on behalf of the Petitioner on 30th July 2018 and 25th June 2019

Tendered on behalf of the Respondent on 8th August 2018 and 4th September 2019

Decided on: 10th March 2020

Arjuna Obeyesekere, J

When this matter was taken up for argument on 4th June 2019, the learned Counsel for the parties moved that they be permitted to file further written submissions and for this Court to pronounce its judgment on the written submissions tendered by the parties.

The facts of this application very briefly are as follows.

The Petitioner states that in terms of an agreement that it had with Sri Lanka Port Management and Consultancy Services (Private) Limited, a subsidiary of the Sri Lanka Ports Authority, the Petitioner had undertaken to provide a service known as 'Seal checking and Container Survey Services'. The said agreement, apparently entered into in 2004, had been extended several times and was valid until 31st December 2017.

The Petitioner states further that by a letter dated 8th June 2015, annexed to the petition marked '**P2**', the Sri Lanka Port Management and Consultancy Services (Private) Limited had informed the Petitioner that a decision had been taken to stop the provision of the said services obtained through third parties and that the provision of such services in terms of the said agreement shall be terminated with immediate effect. The Petitioner in turn had terminated the services of the 3rd – 20th Respondents who had been employed by the Petitioner to provide the said services under the said agreement.

The 3rd – 20th Respondents had thereafter complained to the Department of Labour that the termination of their employment is contrary to the provisions

of the Termination of Employment (Special Provisions) Act No. 45 of 1971, as amended, (the TEW Act).

It would perhaps be appropriate to consider at the outset, the provisions of the TEW Act. Section 2(1) of the TEW Act provides that:

> *"No employer shall terminate* ***the scheduled employment*** *of any workman without-*
>
> *(a) the prior consent in writing of the workman; or*
>
> *(b) the prior written approval of the Commissioner."*

Section 5 of the TEW Act, which reads as follows, sets out the consequences of terminating the employment of a workman outside the above procedure:

> *"Where an employer terminates the* ***scheduled employment*** *of a workman in contravention of the provisions of this Act, such termination shall be illegal, null and void, and accordingly shall be of no effect whatsoever."*

Section 6 of the TEW Act sets out the power of the 1st Respondent where the employment of a workman is terminated in contravention of the Act. Section 6 reads as follows:

> *"Where an employer terminates the* ***scheduled employment*** *of a workman in contravention of the provisions of this Act, the Commissioner may order such employer to continue to employ the workman, with effect from a date specified in such order, in the same capacity in which the*

workman was employed prior to such termination, and to pay the workman his wages and all other benefits which the workman would have otherwise received if his services had not been so terminated; and it shall be the duty of the employer to comply with such order. The Commissioner shall cause notice of such order to be served on both such employer and the workman."

It is not in dispute that the Petitioner did not have the prior consent in writing of the employees nor had the Petitioner sought approval from the Commissioner General of Labour, and therefore, on the face of it, the provisions of Section 2(1) of the TEW Act have been violated by the Petitioner.

It would however appear that Sections 2, 5 and 6 contain an important limitation to the application of the TEW Act, namely that the workman must be in a **scheduled employment**. The phrase, 'scheduled employment' has been defined in Section 19 of the TEW Act and reads as follows:

"Scheduled employment means employment in -

(a) any trade, in respect of which a notification has been published in the Gazette under subsection (2) of section 6 of the Wages Boards Ordinance of an order made under subsection (1) of that section and shall include the work of any worker referred to therein but excluded from the provisions of such order;

(b) every shop and every office within the meaning of the Shop and Office Employees (Regulation of Employment and Remuneration) Act; or

(c) every factory within the meaning of the Factories Ordinance."

The Department of Labour had initiated an inquiry into the said complaint of the 3rd – 20th Respondents. At the commencement of the inquiry, the Petitioner had raised the following two preliminary objections:

(a) The Petitioner is not the employer of the 3rd – 20th Respondents;

(b) The provisions of the TEW Act does not apply to the Petitioner, as the employees were not in a scheduled employment.

By his decisions annexed to the petition marked '**P12**' and '**P13**', the Inquiry Officer had overruled the said objections, and proceeded with the inquiry, at which the employees and the Petitioner had been provided with an opportunity of leading evidence. This Court must observe at this stage that the Petitioner is not complaining of any irregularity in the manner in which the inquiry was conducted.

After the conclusion of the inquiry, the Commissioner General of Labour had conveyed his decision to the Petitioner by letter dated 13th December 2016, annexed to the petition marked '**P9**'. By the said decision, the Petitioner was directed to pay a sum of Rs. 3,050,000 to the employees as compensation in terms of Section 6D of the TEW Act. The relevant portions of the said letter are re-produced below:

"02. මෙම උපලේඛනයේ නම් සඳහන් සේවකයන් නොකා, තටාක තොටුපල සහ වරායන්හි ප්‍රවාහන කර්මාන්තයට අදාළ පඩිපාලක සභාවෙන් ආවරණය වන බව

පරීක්ෂණයේ දී තහවුරු වී ඇති හෙයින් මෙම සේවකයින් 1971 අංක 45 දරණ කම්කරුවන්ගේ රක්ෂාව අවසන් කිරීමේ (විශේෂ විධිවිධාන) (පසුව සංශෝධිත) පනතේ දක්වා ඇති පරිදි උපලේඛන ගත රුකියාවක නියුතු සේවකයන් වේ. එබැවින් මෙම සේවකයන් 1971 අංක 45 දරණ කම්කරුවන්ගේ රක්ෂාව අවසන් කිරීමේ (විශේෂ විධිවිධාන) (පසුව සංශෝධිත) පනතින් ආවරණය වන සේවකයන් බව තහවුරු වී ඇත.

03. මෙම සේවකයින්ගේ සේවායෝජක විසින් මෙම සේවකයන්ගේ සේවය 2015.06.10 දින අවසන් කර ඇති බවත් එසේ සේවය අවසන් කිරීමේ දී මෙම සේවකයින්ගේ පූර්ව ලිඛිත කැමැත්ත හෝ කම්කරු කොමසාරිස් ජනරාල් ගේ පූර්ව ලිඛිත අනුමැතිය ලබාගෙන නොමැති බවත් තහවුරු වී ඇත. එබැවින් මෙම සේවකයින්ගේ සේවය කොළඹ 03, සෙන්ට් ඇන්තනිස් මාවත, ලකී ප්ලාසා පළමු මහල, යුනිට් එෆ්ජ් 32 හි පිහිටි ද ඉන්ටර්ඔෂන් මෙරිටයිම් එන්ටර්ප්‍රයිසස් ආයතනයේ අයිතිකරු වන එස්.එල්.ඒ. පලිහේන මහතා විසින් 1971 අංක 45 දරණ කම්කරුවනගේ රක්ෂාව අවසන් කිරීමේ (විශේෂ විධිවිධාන) (පසුව සංශෝධිත) පනතේ විධිවිධානයන්ට පටහැනි ලෙස අවසන් කර ඇති බව තහවුරු වී ඇත.

04. ශ්‍රී ලංකා පෝට් මැනේජ්මන්ට් කන්සල්ටන්සි සර්විසස් (ප්‍රයිවට්) ලිමිටඩ් විසින් සිල් පරීක්ෂා කිරීම හා බහාලුම් පරීක්ෂා කිරීමේ සේවාව ද, ඉන්ටර්ඔෂන් මෙරිටයිම් එන්ටර්ප්‍රයිසස් ආයතනයේ අයිතිකරු වන එස්.එල්.ඒ. පලිහේන මහතාගෙන් ලබා ගැනීම 2015.06.08 දින සිට නතර කර ඇති බැවින් මෙම සේවකයින් නැවත සේවයේ පුනපත් කිරීමට නියෝග කිරීම ප්‍රායෝගික නොවේ. එබැවින් මෙම සේවකයින් නැවත සේවයේ පුනපත් කිරීමට විකල්ප වශයෙන් 1971 අංක 45 දරණ කම්කරුවන්ගේ රක්ෂාව අවසන් කිරීමේ (විශේෂ විධිවිධාන) (පසුව සංශෝධිත) පනතේ 6(අ) වගන්තිය යටතේ මා වෙත පැවරී ඇති බලතල ප්‍රකාරව මෙම සේවකයින්ගේ රක්ෂාව අවසන් කිරීම වෙනුවෙන් එම පනතේ 6(ඈ) වගන්තිය යටතේ 2005.03.15 දිනැති අංක 1384/07 දරණ අතිවිශේෂ ගැසට් නිවේදනයේ දැක්වෙන වන්දි සූත්‍රයට අනුව ගණනය කරන ලද උපලේඛනයේ සඳහන් වන්දි මුදල කම්කරු කොමසාරිස් ජනරාල් වෙත තැන්පත් කිරීමට නියෝග කර ඇත.

05. මෙම සේවකයන්ගේ වන්දි ගණනය කිරීමේ දී නෞකා, තටාක, තොටුපල සහ වරායන්හි ප්‍රවාහන කර්මාන්තයට අදාළ පඩිපාලක සභාවේ අවම වැටුප වන රු.10,000.00 පදනම් කරගනිමින් වන්දි ගණනය කර ඇත."

Aggrieved by the decision in '**P9**', the Petitioner filed this application seeking *inter alia* a Writ of Certiorari to quash the decision contained in '**P9**'.

The only ground urged by the learned President's Counsel for the Petitioner at the hearing before this Court was that the provisions of the TEW Act does not apply to the Petitioner for the reason that the services provided by the said employees do not fall under a Wages Board established under the Wages Board Ordinance. The issue that arises for the determination of this Court therefore is whether the 3rd – 20th Respondents are in a Scheduled Employment and if so, whether the provisions of the TEW Act would apply to the 3rd – 20th Respondents.

The starting point in determining the above issue is the aforementioned definition of 'scheduled employment'. There is no dispute that paragraphs (b) and (c) of the said definition do not apply to the employees of the Petitioner. It is the contention of the learned President's Counsel for the Petitioner that its employees do not fall under paragraph (a) as well, for the reason that, even though a Wages Board has been established in 1947 for the "Dock, Harbour and Port Transport Trade" in terms of the Wages Board Ordinance in 1948, there is no specific category in the said Order covering employees who carry out 'Seal checking and Container Survey Services' and therefore, the work carried out by the said employees do not come within the notification made under the Wages Board for the 'Dock, Harbour and Port Transport Trade' set up under the Wages Board Ordinance. The learned President's Counsel for the Petitioner relied on the evidence of the Assistant Commissioner of Labour, Ms. Sandamali Walpita who had stated that the relevant order under the Wages

Board Ordinance, annexed to the petition marked '**P11**' does not have a specific category of employees by the name of seal checkers.

In support of his argument that the work carried out by the 3rd – 20th Respondents was not covered by '**P11**', the learned President's Counsel for the Petitioner referred to the fact that '**P11**' was introduced in 1947 at a time when containerized cargo was not even dreamt of, and all goods were loaded on board manually, whereas today, hardly does any shipment of break bulk cargo takes place, with almost everything being packed in containers. He therefore submitted that the services performed by the 3rd – 20th Respondents have not been contemplated by '**P11**', and that it is not the function of this Court to usurp the function of the legislature in the thin guise of interpretation.

The learned Senior Deputy Solicitor General appearing for the Commissioner General of Labour drew the attention of this Court to the document annexed to the petition marked '**P11**' which the Petitioner admits is the Gazette Notification published when the Wages Board relating to *"Dock, Harbour and Port Transport Trade"* was established. The Order under Section 6 of the Wages Board Ordinance declaring the *"Dock, Harbour and Port Transport Trade"* as a Trade to which the Ordinance would apply had been published in Gazette No. 9790 dated 24th October 1947. The Order under Section 8 of the Ordinance establishing a Wages Board for the said Trade had been published in Gazette No 9863 dated 14th May 1948.

The relevant portions of '**P11**' are re-produced below:

> "1941 අංක 27 දරණ පඩිපාලක සහ ආඥාපනතේ II වන කොටසේ එන විධිවිධානයන් මෙහි පහත දැක්වෙන කර්මාන්තයට අදාළ වන්නේය.

රේගු ආඥාපනතේ (185 වන පරිච්ඡේදය) විස්තර කර ඇති පරිදි කොළඹ, ගාල්ල සහ ත්‍රිකුණාමලය යන නැව් තොටුපළවල සීමාවන් ඇතුළත කරගෙන යනු ලබන පහත සඳහන් කාර්යයන්ගෙන් යුක්ත වන නෞකා තටාක, නැව් තොටුපල් සහ වරායයන් හි ප්‍රවාහන කර්මාන්තය:-

(1) .....
(2) .....
(3) .....
(4) .....
(5) .....
(6) .....
(7) .....
(8) .....
(9) **පහත සඳහන් සේවකයින්ගේ කාර්යයන්ද, ඇතුළත්ව, නැව්වල හෝ යාත්‍රාවල ආරක්ෂාවට හෝ පහසුවට හිතකර වන්නා වූ හෝ නැවුවලට බඩු පැටවීමට හෝ නැව්වලින් බඩු බැමට ආධාර වන්නාවූ කවර හෝ කාර්යයන් හෝ ක්‍රියාවක් ඉටුකිරීම.**

වෙරලෙදි

(1) ගබඩාකරුවෝ සහ සහකාර ගබඩාකරුවෝ [1]

(2) ගොඩබාන ලිපිකරුවෝ, සසඳන ලිපිකරුවෝ, පරීක්ෂක ලිපිකරුවෝ, වාප්පු ලිපිකරුවෝ, සහකාර වාප්පු ලිපිකරුවෝ, ගුදම් ලිපිකරුවෝ [2]

(3) ගොඩබාන්නෝ, බාරදෙන්නෝ, ගුදම්වල අඩුක්කරන්නෝ, හරිවැරදි බලන්නෝ [3]

Prior to considering the submission of the learned Senior Deputy Solicitor General on the applicability of '**P11**' to the 3rd – 20th Respondents, it would be useful to understand the nature of the employment of the 3rd – 20th

[1] Storekeepers, Assistant Storekeepers (wharf and warehouse), Supervisors and Assistant Supervisors (exports and imports).
[2] Landing Clerks, **Tally Clerks**, **Examining Clerks**, Wharf Clerks, Lighter Clerks, Cart chit Clerks, Warehouse clerks, muster Clerks, Shipping Clerks, Pass writers, delivery, dispatch, clearing, receipt and Store Clerks.
[3] Landing men, delivery men, slingers, warehouse stackers, **Checkers** and kanganies (bag and general cargo).

Respondents. Such an exercise would also assist this Court to ascertain if the conclusion reached by the Inquiry Officer is supported by the evidence that was led before him. This Court has therefore examined the evidence given by the workmen as well by the Petitioner. The answers given by some of the witnesses with regard to the nature of the work carried out by them is re-produced below:

ප්‍ර : මොනවා ද ඒ වැඩේ?

පි : අපි නැවෙන් බඩු ගන්න කන්ටේනර් බාන විට එහි සිල් නම්බර් එක හා කන්ටේනර් නම්බර් එක ලිඛිතව හා ඩැමේජ් අරගෙන ඒක සටහන් කිරීම. මට එය ලිඛිතව ඉදිරිපත් කල හැකි කොපියක් තියෙනවා.[4]

ප්‍ර : කන්ටේනර් නැවෙන් බැවට පසුව ද, ඔබලාගේ රාජකාරිය තියෙන්නේ?

උ : ඔව්. දොඹකරෙන් අරගෙන ප්‍රයම් මෝවර් එකෙන් තැබුවට පසුව තමයි අපේ රාජකාරිය තිබෙන්නේ

ප්‍ර : ඔබ කරන රාජකාරිය කුමක් ද?

උ : දොඹකරෙන් ප්‍රයම් මෝවර් එකේ තිබ්බට පසුව පිටුපස තිබෙනවා සිල් එකක් එය නිවැරදිව වෙක් කරන්න ඕන. ඩැමේජ් තිබෙනවාද කියලා බලලා ආයතනයේ තිබෙන ඩැමේජ් රිපෝට් එකක් අරගෙන ඩැමේජ් රිපෝට් එකක් දානවා. කන්ටේනර් එකේ නම්බර් එකක් තිබෙනවා අකුරු ටිකක් තිබෙනවා එය අපේ තිබෙනවා ශිට් එකක් එහි ලියන්න ඕන. මුලින් අකුරු 04 ලියලා, නම්බර් එක ලියලා සිල් එකක් තිබෙනවා එය සඳහන් කරන්න ඕන.[5]

The above answers makes it clear that the containers, once off loaded from the vessel, are examined by the 3rd – 20th Respondents to verify if the seals are intact, prior to being released by the port operator. The employees are also required to prepare a report where they would record details of the containers where the seals are damaged. Thus, the task performed by the said Respondents is to **examine** and/or **check** the containers and prepare a report.

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[4] Vide proceedings of 2nd November 2015.
[5] Vide proceedings of 2nd February 2016; page 176.

The submission of the learned Senior Deputy Solicitor General for the 1st and 2nd Respondents was two-fold.

His first argument was that it is not necessary for each and every category of employee who may be performing a service referred to in such Order, to be referred to specifically by designation, and that all that is required to be covered by '**P11**' is for the type of service performed by an employee to be related to the loading and unloading of cargo. In support of this argument, he referred to the following wording at Item (9) above of '**P11**' – "නැව්වලට බඩු පැටවීමට හෝ නැව්වලින් බඩු බැමට ආධාර වන්නාවූ කවර හෝ කාර්යයන් හෝ ක්‍රියාවක් ඉටුකිරීම".

His second argument was that Landing Clerks, Tally Clerks, Examining Clerks, Checkers etc are specifically covered by '**P11**' – vide page 3 of '**P11**' – and that the 3rd – 20th Respondents, by carrying out *Seal checking and Container Survey Services* are in fact functioning as Examining Clerks or Checkers. He submitted further that the 3rd – 20th Respondents can be categorized under 'Examining Clerk', as well as under 'Checkers', which categories of employees are provided in '**P11**', and therefore submitted that the 3rd – 20th Respondents are well within the categories of workers referred to in '**P11**'. Therefore he submitted that the said employees belonged to a 'scheduled employment' and the provisions of the TEW Act applied to the 3rd – 20th Respondents.

This Court is in agreement with the submission of the learned Senior Deputy Solicitor General for two reasons. The first is this Court is satisfied that the work carried out by the 3rd – 20th Respondents is to examine and/or check the

containers on shore, once they are taken off the vessel. The said employees are performing the task of an 'Examining Clerk' or a 'Checker' which is specifically referred to in page 3 of '**P11**', and therefore the provisions of '**P11**' would apply to the 3rd – 20th Respondents.

The second is that it is impossible to specify by designation, the categories of workers who should come within a particular Wages Board, for the reason that a trade may evolve over a period of time. In fact, the Assistant Commissioner of Labour, Mrs. Walpita, while admitting that there is no specific designation for 'seal checkers' has stated as follows:[6]

> " පඩිපාලක සහාවක සේවා ආවරණය ලබා දෙන්නේ පඩිපාලක සභාවේ නම් කර තිබෙන සේවා කාණ්ඩ සහ එම පඩිපාලක සභාවේ කාර්යයන් ඉටු කරනු ලබන ස්ථානයේම එයට අදාලව රාජකාරි ඉටුකරනු ලබන සේවකයන් සියලු දෙනාම ඇතුලත්ව. සමහර අවස්ථාවල අපදාවේ සඳහන් නොවුනත් අපගේ පඩිපාලක සභාවේ සේවා කණ්ඩ සඳහන් කිරීමේ දී එම කාණ්ඩවලට අදාලව සිදුකරනු ලබන වෙනත් කාර්යයන් කියලා හදුන්වන ලබන සේවකයන් ද මෙම පඩිපාලක සභාවට අයිතිවෙනවා."

In the above circumstances, this Court is of the view that the decision of the Inquiry Officer in '**P12**', and conveyed by '**P9**', that the Wages Board for the *Dock, Harbour and Port Transport Trade* applies to the 3rd – 20th Respondents is supported by '**P11**'. It is the view of this Court that the said decision is therefore not only legal, but is also reasonable rationale. It is a decision that any *sensible person who had applied his mind to the question to be decided could have arrived at it.*[7]

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[6] Vide proceedings of 9th February 2016.

[7] Council of Civil Service Unions vs Minister for the Civil Service; 1985 AC 374.

Having come to the conclusion that the aforementioned decision of the Commissioner General of Labour that the 3rd – 20th Respondents were engaged in a scheduled employment is legal and reasonable, this Court shall now consider the provisions of the TEW Act in order to determine whether the decision of the 1st Respondent to pay compensation is legal and reasonable.

In **Mahaweli Reach Hotels PLC vs Wijeweera, Commissioner General of Labour and Others**[8] this Court considered the question of whether the only consequence of a termination of employment in violation of Section 2(1) of the TEW Act is reinstatement with back wages, or whether the Commissioner General of Labour has in fact been conferred a discretion by Section 6; and if so, whether in exercising that discretion, the Commissioner of Labour can order the payment of compensation as opposed to reinstatement.

Having considered the judgments of this Court that had taken a very strict view of Section 6 of the TEW Act[9] - i.e. reinstatement follows a termination of service contrary to Section 2(1) - and the judgments of this Court and the Supreme Court that have taken a more liberal or practical view that reinstatement is not mandatory,[10] this Court held as follows:

> *"Applying the rationale laid down in the judgments referred to above, this Court is of the view that the use of the word 'may' in Section 6 of the TEW Act does in fact confer the Commissioner General of Labour a discretion on whether to order reinstatement with back wages or to limit the relief to*

[8] CA (Writ) Application No. 167/2010; CA Minutes of 18th December 2018.
[9] Eksath Kamkaru Samithiya vs Commissioner of Labour [2001 (2) Sri LR 137]
[10] Ceylon Mercantile Union vs Vinitha Limited and the Commissioner of Labour [SC Application No. 884/75; SC Minutes of 29th March 1976]; Lanka Multi Moulds (Pvt) vs. Wimalasena [2003 (1) Sri LR 143]; J.P Alensu vs. Mahinda Madihahewa [CA (Writ) 455/2006; CA Minutes of 14th February 2011]

compensation. This Court is further of the view that the termination of employment of an employee contrary to the provisions of Section 2(1) of the TEW Act would under normal circumstances attract reinstatement with back wages, as provided for in Section 6. However, there can be exceptional situations as have arisen in the judgments referred to above, which justify the Commissioner General of Labour making an order for compensation. This Court is therefore of the view that while reinstatement with back wages should be the norm, awarding of compensation, depending on the facts and circumstances of each case, should be the exception."

The decision of the 1st Respondent to award compensation in lieu of reinstatement has been taken in view of the fact that the Petitioner no longer has a contract to provide the services that it had undertaken to provide in terms of the agreement it had with Sri Lanka Port Management and Consultancy Services Limited, and would fall under the exception referred to above. In this background, this Court is in agreement with the decision that reinstatement is not practical, nor feasible. Furthermore, the 1st Respondent has taken Rs. 10,000 as the monthly salary of the said employees, which is the minimum salary stipulated by the Wages Board for the Dock, Harbour and Port Transport Trade, whereas the evidence at the inquiry revealed that the employees were drawing a salary of approximately Rs. 21,000. In these circumstances, this Court is of the view that the decision of the 1st Respondent to award compensation in terms of Section 6D, and the quantum of compensation, is reasonable.

In the above circumstances, this Court is of the view that the Petitioner is not entitled to the relief sought. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal