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

CA (Writ) Application No: 215/2018

1. S.H. Hemapala,
   No. 59, Delduwa Road, Mahaambalangoda,
   Ambalangoda.

2. K.H. Siripala,
   No. 33, Nawa Patumaga,
   Madawalamulla, Galle.

3. J.D. Karunasiri,
   No. 246, Rajamuna Sewana, Hanwella.

4. G.S. Abeywickrama,
   No. 4/88, U.E. Perera Road, Rajagiriya.

5. D.P. Jayasara,
   No. 22/16/3, Mabagahalandawatta, Yakkala.

6. P.M.B.S. Lasantha,
   No. 20, Pitipana Street, Chilaw.

7. D.V. Sirisena,
   No. 6-2 A, Gahaboda Road, Badulla.

8. R.H. Jayarathna,
   No. 491, Peragahamula Road, Biyagama.

9. S. Karunarathna (deceased).

9(a) S.D. Chandrani,
   Mannaduwa Road, Panapitiya,Waskaduwa.

10. H.K. Somapala,
    No. 7-95, Station Road, Avissawella.

11. H.M.T.A. Bandara (deceased).

11(a) M. Bandara,
No. 301/1, High Level Road, Colombo 5.

12. K.J. Lionel,
No. 99, Araliya Road, Primrose Gardens,
Kandy.

13. T.W. Fernando,
No. 146-1 Kaludawala, Panadura.

14. H. Wijesoma,
No. 318, Awissawella Road, Kalanimulla,
Mulleriyawa.

15. P.S. Wasalamudali,
No. 166, Waliwita Junction, Malabe.

16. H.R.D. Fernando,
No. 72,-C-A, Udakanda Road,
Karavitiya,Balangoda.

PETITIONERS

Vs.

1. Secretary,
Ministry of Labour and Labour Relations,
P.O.Box 575, Colombo 5.

2. Commissioner of Labour,
Department of Labour, Narahenpita.

3. Ceylon Electricity Board,
No. 50, Sir Chittampalam A. Gardiner
Mawatha, Colombo 2.

4. Sarath Liyanage (Arbitrator),
No. 13/30, Sarvodaya Road, Piliyandala.

RESPONDENTS

Before:	**Mahinda Samayawardhena, J** **Arjuna Obeyesekere, J**
Counsel:	Chanaka Kulatunga for the Petitioners
	Dr. Charuka Ekanayake, State Counsel for the 3rd Respondent
Argued on:	24th July 2020
Written Submissions:	Tendered on behalf of the Petitioners on 1st July 2020
	Tendered on behalf of the 3rd Respondent on 23rd October 2019
Decided on:	16th November 2020

Arjuna Obeyesekere, J

All sixteen Petitioners retired from their employment with the 3rd Respondent, the Ceylon Electricity Board (**the CEB**), in December 2009 or during 2010. The Petitioners state that in 2009, the CEB had felicitated its employees who had completed forty years of service with the CEB as at 1st November 2009, and that the said employees were given a Gold medal (coin) and conferred with *certain other benefits*. The grievance of the Petitioners is that even though they too had completed forty years of service on that date, they were neither felicitated nor were they awarded the said medal and *other benefits*.

It is not in dispute that the 1st – 3rd Petitioners had lodged a complaint in this regard with the Department of Labour in September 2010. By a letter dated 21st April 2011 marked '**I**', the Assistant Commissioner of Labour had determined that the 1st – 3rd Petitioners have completed forty years of service, and had recommended that the 1st – 3rd Petitioners be issued with a gold medal.[1]

[1] This determination is based on Clause 6 of the letter of apprenticeship, and will be discussed later in the judgment.

While this Court has not been apprised of the steps taken by the CEB on the above letter, the Petitioners have produced a letter dated 29th March 2013 marked '**J**' addressed to the Commissioner General of Labour by which the 1st Petitioner had expanded the number of employees who were similarly circumstanced to sixteen. It is these sixteen former employees of the CEB who are the Petitioners in this application.

The Minister of Labour, acting in terms of Section 4(1) of the Industrial Disputes Act had issued an Order dated 11th July 2013, appointing the 4th Respondent as the Arbitrator to determine the following dispute:

> "*Whether any injustice has been caused to the (said) sixteen employees who were employed at the Ceylon Electricity Board by not considering their period of service at the Government Department of Electricity in the calculation of service period at the Ceylon Electricity Board, and if so, to what reliefs each of them is entitled.*"[2]

Although the dispute that was referred to the Arbitrator was wider in scope than the issue that had arisen at the outset, the Arbitrator was essentially required to determine whether the Petitioners had completed forty years of service as at 1st November 2009, either at the CEB alone, or cumulatively with the period of service that the Petitioners claimed they had at the Department of Government Electrical Undertakings (**the Department**).

Inquiry before the Arbitrator

The Inquiry before the Arbitrator had commenced on 1st November 2013. The 1st and 2nd Petitioners had given evidence, and had been subjected to cross examination on behalf of the CEB. Thereafter, on 17th March 2017, the learned Counsel appearing for the CEB before the Arbitrator had proposed that the inquiry be disposed of on the written submissions of the parties, instead of going through a long winded process of all

[2] In page 2 of the Award, the Arbitrator has identified the dispute before him in the following manner – '**සේවකයින් දහසය දෙනාගේ ලංකා විදුලි බල මණ්ඩලයේ සේවා කාලයට රජයේ විදුලි දෙපාර්තමේන්තුවේ සේවා කාලය සැලකිල්ලට නොගැනීම නිසා ඔවුන්ට යම් අසාධාරනයක් සිදුවුයේද, යන්න හා එලෙස අසාධාරනයක් සිදුවුයේ නම් ඔවුන් එකිනෙකාට කුමන සහනයක් හිමිවිය යුතුද, යන්න මෙම පරීක්ෂණයේදි ම විසින් විමසා බැලිය යුතු කරුණ විය** '

sixteen Petitioners giving, probably the same evidence.[3] Upon the agreement of the learned Counsel for the Petitioners, the parties had filed written submissions together with documents.

By an award dated 11th August 2017, the Arbitrator had answered the aforementioned question referred to him in the negative. Dissatisfied by the said Award, the Petitioners filed this application, seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the said award of the Arbitrator;

b) A Writ of Mandamus directing the Arbitrator to grant the Petitioners the relief as sought;

c) A Writ of Mandamus directing the Arbitrator to declare that the Petitioners have completed forty years of service, and are entitled to the benefits received by other employees who were similarly placed.

The role of the Arbitrator

Section 17(1) of the Industrial Disputes Act sets out the role of the Arbitrator in the following manner:

> "*When an industrial dispute has been referred under section 3(1)(d) or section 4(1) to an arbitrator for settlement by arbitration,*
>
> *he shall make all such inquiries into the dispute as he may consider necessary,*
>
> *hear such evidence as may be tendered by the parties to the dispute, and*
>
> *thereafter make such award* ***as may appear to him just and equitable***."

[3] "මෙම නඩුව කඩිනමින් අවසන් කිරීමේ සන්කල්පය මත අදාල ලේඛණ සමග ලිඛිත සැලකිරීම් ඉදිරිපත් කිරීමට යෝජනා කරයි"

In **Brown & Company v. Minister of Labour**,[4] Justice Saleem Marsoof, P.C., having analysed the wide powers and duties conferred on an arbitrator, held as follows:

> "*Arbitration under the Industrial Disputes Act is intended to be even more liberal, informal and flexible than commercial arbitration, primarily because the Arbitrator is empowered to make an award which is "just and equitable". When an industrial dispute has been referred under Section 3 (1)(d) or Section 4(1) of the Industrial Disputes Act to an Arbitrator for settlement by arbitration, Section 17(1) of the said Act requires such Arbitrator to "make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him just and equitable". In my view, the word "make" as used in the said provision, has the effect of throwing the ball into the Arbitrator's court, so to speak, and requires him to initiate what inquiries he considers are necessary. The Arbitrator is not simply called upon "to hold an inquiry", where the ball would be in the court of the parties to the dispute and, it would be left to them to tender what evidence they consider necessary requiring the arbitrator to be just a judge presiding over the inquiry, the control and progress of which will be in the hands of the parties themselves or their Counsel. What the Industrial Disputes Act has done appears to me to be to substitute in place of the rigid procedures of the law envisaged by the "adversarial system", a new and more flexible procedure, which is in keeping with the fashion in which equity in English law gave relief to the litigants from the rigidity of the common law. The function of the arbitral power in relation to industrial disputes is to ascertain and declare what in the opinion of the Arbitrator ought to be the respective rights and liabilities of the parties as they exist at the moment the proceedings are instituted. His role is more inquisitorial, and he has a duty to go in search for the evidence, and he is not strictly required to follow the provisions of the Evidence Ordinance in doing so. Just as much as the procedure before the arbitrator is not governed by the rigid provisions of the Evidence Ordinance, the procedure followed by him need not be fettered by the rigidity of the law*."

[4] [2011] 1 Sri LR 305.

In **Municipal Council Colombo vs Munasinghe**[5] it was held by Chief Justice H.N.G.Fernando as follows:

> "*I hold that when the Industrial Disputes Act confers on an Arbitrator the discretion to make an award which is 'just and equitable', the Legislature did not intend to confer on an Arbitrator the freedom of a wild horse. An award must be 'just and equitable' as between the parties to a dispute; and the fact that one party might have encountered 'hard times' because of personal circumstances for which the other party is in no way responsible is not a ground on which justice or equity requires the other party to make undue concessions. In addition, it is time that this Court should correct what seems to be a prevalent misconception. The mandate which the Arbitrator in an industrial dispute holds under the law requires him to make an award which is just and equitable, and not necessarily an award which favours an employee. An Arbitrator holds no licence from the Legislature to make any such award as he may please, for nothing is just and equitable which is decided by whim or caprice or by the toss of a double-headed coin*."

The Supreme Court, in **Singer Industries (Ceylon) Limited vs The Ceylon Mercantile Industrial and General Workers Union and others**[6] agreeing with the observations in Municipal Council Colombo vs Munasinghe[7] held as follows:

> "*It is a cardinal principle of law that in making an award by an arbitrator there must be a judicial and objective approach and more importantly the perspectives both of employer as well as the employee should be considered in a balanced manner and undoubtedly just and equity must apply to both these parties*."

In **All Ceylon Commercial and Industrial Workers Union vs Nestle Lanka Limited**[8] this Court held as follows:

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[5] 71 NLR 223 at page 225. Referred to with approval in Standard Chartered Grindlays Bank Limited vs The Minister of Labour [SC Appeal No. 22/2003; SC Minutes of 4th April 2008].
[6] SC Appeal No. 78/08; SC Minutes of 7th October 2010.
[7] Supra.
[8] [1999] 1 Sri LR 343 at page 348.

"*The arbitrator to whom a reference has been made in terms of section 4 (1) of the Industrial Disputes Act as amended is expected to act judicially. He is required in arriving at his determinations to decide legal questions affecting the rights of the subject and hence he is under a duty to act judicially. Although such arbitrator does not exercise judicial power in the strict sense, it is his duty to act judicially.*

It has been stressed that such an arbitrator's function is judicial in the sense that he has to hear parties, decide facts, apply rules with judicial impartiality and his decision is objective as that of any court of law, though ultimately he makes such award as may appear to him to be just and equitable. Vide the decision in Nadaraja Limited and Others. v. Krishnadasan and Others" [9].

The above authorities place a burden on the Arbitrator to take the role of an investigator and probe into the dispute, without leaving it entirely to the parties to place before him the necessary facts and material. I must state however that that does not take away the burden placed on the parties to prove their respective cases, which burden, very unfortunately, the Petitioners have failed to discharge. The Arbitrator is required to thereafter arrive at an award which appears to him to be just and equitable.

Duty of the Arbitrator to consider the case of the Petitioners

As agreed before the Arbitrator, the parties had tendered written submissions together with documents. The Arbitrator however had only considered the cases of the 1st and 3rd Petitioners, for the following reason:

"**මුලින්ම සඳහන් කළ යුතු කරුණ වන්නේ නඩු විභාගයේදි ඒ අය අතරින් සාක්ෂි දෙන ලද්දේ එස් එච්.හේමපාල හා පේ.ඩී.කරුණාසිරි යන දෙදෙනා පමණක් බවයි. ඔවුන් සාක්ෂි දෙන අවස්ථාවේ ලකුණු කර ඉදිරි පත් කරන ලද්දේ එම ඉල්ලුම් කරුවන් දෙදෙනාට අදාළ ලේඛණ පමණි. සෙසු ඉල්ලුම්කරුවන් අතරින් කිහිප දෙනෙකු වරින් වර විභාග අවස්ථාවේ පැමිණියේ නමුදු, ඔවුන් කිසිවෙකු සාක්ෂි දීම සඳහා නොකැඳවන ලද අතර ලේඛණ ලකුණු කර ඉදිරිපත් කළේද නැත. එසේ වුවද, එම ඉල්ලුම්කරුවන් වෙනුවෙන් සහන බලාපොරොත්තුවෙන් ඔවුන් වෙනුවෙන් පෙනී සිටි නීතිඥ මහතා සිය ලිඛිත දේශනයේ ඔවුන් වෙනුවෙන් ද කරුණු දක්වා ඇති අතර ඔවුන්ට අදාළ ලේඛණද X වශයෙන් ලකුණු කර ඉදිරිපත් කර ඇත. එම ඉල්ලුම් කරුවන්ට අදාළ ලේඛණ ප්‍රථම වරට අධිකරණය හමුවට**

[9] 78 NLR 255.

යොමු වන්නේ එම ලිඛිත දේශණයත් සමගය. එම ලේඛණ කිසිවක් නඩු විභාගයේදී ලකුණු නොකලා පමනක් නොව එම ලේඛණ පිළිබඳ හරස් ප්‍රශ්ණ ඇසීමට අනෙක් පාර්ශවයට අවස්ථාවක් ලැබුණේ නැත. එවැනි තත්ත්වයක් යටතේ එම ඉල්ලුම්කරුවන්ගේ ඉල්ලීම පිළිබඳ සලකා බැලීමට හැකියාවක් නොමැත. ඒ අනුව අධිකරණය හමුවේ සාක්ෂි දුන් එස්.එච්. හේමපාල හා පේ.ඩී. කරුණාසිරි යන ඉල්ලුම්කරුවන් දෙදෙනාගේ ඉල්ලීම් හැර අනෙකුත් ඉල්ලුම් කරුවන්ගේ ඉල්ලීම් පිළිබඳ සලකා නොලැබීමට තීරණය කරමි."

The Arbitrator has completely lost sight of the agreement reached before him by the parties that the matter can be disposed of on written submissions, with all parties being entitled to file the necessary documents with their written submissions. Hence, it is clear that the Arbitrator has misdirected himself on this ground when he arrived at the above conclusion.

I therefore have two options before me.

The first is to refer this matter for a fresh consideration of the positions of all Petitioners on the basis of the material that was available to the Arbitrator. I am however mindful that the 4th Respondent is *functus* the moment he gives his award, except to consider an application for interpretation under Section 34(1) of the Industrial Disputes Act. Therefore, even though any order for a fresh consideration of the matter must be directed to the Minister, the Petitioners have not sought any such relief from this Court.

The second option is for me to consider the arguments of the learned Counsel for the Petitioners and the learned State Counsel, examine the material that was available before the Arbitrator, and arrive at a determination whether the decision of the Arbitrator is arbitrary, irrational or illegal.

The latter option is preferred by me, for two reasons.

The first is that the cases of the Petitioners, as presented to the Arbitrator, were identical in most respects, subject to certain differences which would be referred to later in this judgment. The reasoning of the Arbitrator in respect of the 1st and 3rd Petitioners would therefore apply with equal force to the rest of the Petitioners. Thus,

the failure to consider the facts relating to each Petitioner separately has not prejudiced the Petitioners.

The second reason why I prefer the latter option is that the *alleged grievance* of the Petitioners arose over ten years ago. Two Petitioners have passed away since then. A fresh consideration by an Arbitrator and a possible challenge to the award will only mean more time and cost for all parties.

Therefore, in the interests of justice, I shall review the legality and the reasonableness of the award in the light of the material presented to the Arbitrator in respect of each Petitioner.

Material tendered by the CEB to this Court

The first part of this judgment shall consist of the above review.

In its Statement of Objections, the CEB has sought to differentiate or distinguish the cases of the 13th – 15th Petitioners from the rest of the Petitioners. This differentiation has not been presented to the Arbitrator by either party. Furthermore, in response to certain questions posed by Court, the General Manager of the CEB, together with his affidavit dated 27th January 2020 has tendered additional material pertaining to all Petitioners. In the second part of this judgment, I shall consider the fresh material that has now been presented to this Court by the CEB in order to decide whether the Petitioners are in any event, entitled to any relief. In this regard, I must state that the Petitioners have not presented any material to contradict the aforementioned fresh material.

Grounds for Judicial Review

In **Council of Civil Service Unions vs Minister for the Civil Service**,[10] Lord Diplock stated that:

[10] [1985] AC 374

"*Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'*.

The Petitioners are not claiming that there has been any procedural impropriety in the manner in which the proceedings before the Arbitrator were conducted, other than what I have already referred to. Nor are the Petitioners claiming that the decision of the Arbitrator is illegal. The complaint of the Petitioners is that the decision of the Arbitrator is unreasonable and irrational.

The test to determine the reasonableness of a decision was laid down by Lord Greene in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation**[11] when he defined unreasonableness as '*something so absurd that no sensible person could ever dream that it lay within the powers of the authority.'* In **Council of Civil Service Unions vs Minister for the Civil Service**[12] Lord Diplock, in describing *irrationality* referred to **Wednesbury**, when he stated that, "*By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*."

I shall now consider the position of the Petitioners and the CEB, as presented to the Arbitrator. The submission of the learned Counsel for the Petitioners that the Petitioners had completed forty years of service with the CEB as at 1st November 2009 is based on three letters that have been issued to the Petitioners.

[11] [1948] 1 KB 223 at 229.
[12] Supra.

The first letter – Letter of Apprenticeship

The first is the letter by which all Petitioners were offered a period of apprenticeship by the Department. There is no dispute that the 1st – 12th and 16th Petitioners were issued with a letter of apprenticeship dated 19th July 1968, informing them that their one year period of apprenticeship will commence on 16th August 1968. The other three Petitioners, namely the 13th - 15th Petitioners have been issued with letters of apprenticeship dated 26th July 1967 informing that their one year period of apprenticeship will commence on 8th August 1967. The contents of the said letters are identical, except of course the date of commencement of the period of apprenticeship.

I have examined the letter issued to the 1st Petitioner, marked 'A1' before the Arbitrator, the relevant parts of which are re-produced below:

> "වෘත්තිය ආධුනික තනතුර
>
> 1968 අගෝස්තු මස 16 වැනි දින සිට මෙම දෙපාර්තමේන්තුවේ කාසල්ට්හි වෘත්තිය අභ්‍යාස මධ්‍යස්ථානයේදී එක් අවුරුද්දක පුහුණු කිරීම සඳහා වෘත්තිය ආධුනිකයකු සේ ඔබ තෝරාගෙන තිබේ.
>
> 2. පුහුණුව ලබන කාලයේදී ඔබට රු. 1. 20 දෛනික දීමනාවක්ද, පීවනාධාර සහ විශේෂ පීවනාධාර ද ගෙවනු ලැබේ.
>
> 3. පුහුණුවීම සතුටුදායක ලෙස අවසන් කොට 1962 කේ V වැනි සැසි වාර්තාවේ තත්ත්වය පිළිබඳ උප ලේඛනයේ සඳහන් තත්ත්වය ලත් පසු **පුරප්පාඩු තිබේ නම්** කම්කරු ශ්‍රේණියේ 111 වැනි පංතියේ තනතුරුවලට **පත් කිරීම සඳහා සලකා බලනු ඇත.** 111 පංතියේ යටත් පිරිසෙයින් වර්ෂ තුනක් සම්පූර්ණ කිරීමෙන් පසුව 11 පංතියට උසස් කිරීම සඳහා ඔබගේ ඉල්ලුම් පත අනිත් අයගේ ඉල්ලුම් පත් සමඟ සලකා බලනු ඇත.
>
> 4. ආධුනිකත්වය පිළිබඳ අනිකුත් කොන්දේසි අංක 14,799 1968 අප්‍රේල් මස 25 වැනි දින දරණ ගැසට් පත්‍රයේ පළවූ දැන්වීම පරීදි වන්නේය.[13]
>
> 5. ඔබගේ මව්පියන්ගේ අයෙක් හෝ භාරකරු හෝ ණයකරු වශයෙන්, ඇප කරුවන් දෙදෙනෙකුද සහිතව රු. 2,000/- කට ගිවිසුමකට හා ඇප ඔප්පුවකට ඇතුලත් විය යුතුය. මෙම ගිවිසුම හා ඇප ඔප්පුව, මීට අමුණා එවන සටහන් අනුව මේ සමඟ එවන ආකෘතියේ පිටපත් 3 ක් සහිතව සම්පුර්ණ කර මා වෙත එවිය යුතුය.....

[13] Gazette No. 14,799 dated 25th April 1968 has been annexed to the petition marked 'B'

6. මෙම දෙපාර්තමේන්තුව මණ්ඩළයක් හෝ සංයුක්ත මණ්ඩලයක් බවට පත්වුවහොත් එවිට ඔබ එම මණ්ඩලයට හෝ සංයුක්ත මණ්ඩලයට මාරු කරනු ලබනාවත් හැර ඔබට සේවා කොන්දේසි අහෝසි කිරීමේ වාසි හිමි නොවනු ඇත.”

The Petitioners claim that the above letter issued by the Department is a letter of employment, and hence the period of employment of the 1st – 12th and 16th Petitioners with the Department commenced on 16th August 1968, while the period of employment of the 13th – 15th Petitioners with the Department commenced on 8th August 1967. The learned State Counsel has however taken up the position that the said letters are not letters by which the Petitioners were offered employment. The Arbitrator has considered the said letter and concluded that the said letter does not offer employment with the Department.

The Petitioners have sought to argue that the necessity to sign a security bond for a sum of Rs. 2000 was an indication that they were in fact employees. This position is not correct, as admitted by the 1st Petitioner himself in his evidence before the Arbitrator that the security bond was to ensure that the Petitioners completed their training, and that a failure to complete the training would give the Department the right to encash the security bond. [14]

The Petitioners claim, and this in fact formed the crux of their argument that ‘A1’ is a letter of employment, that paragraph 6 of ‘A1’ is a clear promise of employment to them. The Arbitrator has considered this clause and concluded that that clause does not mean that the period with the Department would be added to the period of employment with the CEB. I agree with this conclusion. To my mind, it appears that the writer of ‘A1’ was alive to the fact that the status of the Department may change. This paragraph makes it clear that in such an eventuality, other than a transfer to the newly created entity, the Petitioners will not be entitled to claim any benefits on the basis that their service terms have been abolished.

To my mind, it is clear that what was being offered by ‘A1’ was only a one year period of apprenticeship, or training, at the Training Centre of the Department, at no cost to the

[14] Vide page 3 of the proceedings of 17th October 2014 before the Arbitrator - evidence of the 1st Petitioner.

trainee. The Petitioners were not being offered employment in the Department, nor were they being promised employment at the Department, which fact has been very clearly set out in paragraph 3 of the said letter.

Taking into consideration the totality of the said letter, and especially paragraph 3, I am of the view that 'A1' is not a letter of employment and that the conclusion reached by the Arbitrator with regard to the letter of apprenticeship is therefore reasonable and rational. Therefore, the argument of the learned Counsel for the Petitioners that the 1st – 12th and 16th Petitioners were employees of the Department from 16th August 1968, and the 13th – 15th Petitioners from 8th August 1967 is not supported by the contents of 'A1'.

The second letter – Letter of Employment issued by the Department

The second letter that is relied upon by the learned Counsel for the Petitioners has been issued to the Petitioners by the Department a few weeks after they completed the period of apprenticeship. The letter issued to the 1st Petitioner, which is identical to the letters issued to all Petitioners (*except the letters issued to the 13th – 15th Petitioners*), has been marked 'A2' before the Arbitrator. The relevant parts of the said letter are re-produced below:

> "තුන්වන පංතියේ කම්කරු තනතුර
>
> 1969 සැප්තැම්බර් 15 වැනි දින සිට ඔබ ඉහත සඳහන් තනතුරේ **වැඩ බැලීමට** පත්කර තිබෙන බව මෙයින් දන්වනු ලැබේ. ඔබට වැඩ බැලීමේ වැටුප වශයෙන් රු. 1.50 ක දෛනික වැටුපක් හා ඊට අදාල පිවනාධාර දිමනා හා විශේෂ පිවනාධාර දිමනා ගෙවනු ඇත. එසේ ගෙවීමේදි, එම වැඩ බැලීමේ වැටුප (දිමනා ඇතුලුව) වෘත්තිය ආධුනිකයෙකුගේ වැටුපට (දිමනා ඇතුලුව) වඩා වෘත්තිය ආධුනිකයෙකුගේ වැටුපෙන් (දිමනා හැර) සියයට 33 1/3කට වඩා වැඩි වුවහොත් වෘත්තිය ආධුනිකයෙකුගේ වැටුපෙන් (දිමනා හැර) සියයට 33 1/3 ට සමාන අතිරේක දිමනාවක් ඔබට ගෙවනු ලැබේ.
>
> 2. මෙම කාලය තුල ඔබේ සේවය අසතුටුදායක වුවහොත් ඕනෑම අවස්ථාවකදි හෝ ඔබ සේවයෙන් අස් කරණු ලැබීමට යටත් වෙනවා ඇත.
>
> 3. රාජ්‍ය සේවා කොමිෂන් සභා ව්‍යවස්ථා, මුදල් රෙගුලාසි, කාර්ය සංවිධාන සංග්‍රහ රෙගුලාසි, දෙපාර්තමේන්තු විධාන සහ ආණ්ඩුවේ කලින් කල නිකුත් කරණ සෙසු විධාන වලට හෝ රෙගුලාසිවලට හෝ ඔබ යටත් වනවා ඇත.

6. ඔබ මාරු කරණු ලැබීමට යටත්වන අතර දිවයිනේ කුමන ප්‍රදේශයක හෝ ඔබ සේවය කළ යුතුයි.

9. මෙම දෙපාර්තමේන්තුව මණ්ඩලයක් හෝ සංයුක්ත මණ්ඩලයක් බවට පත්වුවහොත් ඔබ එම මණ්ඩලය හෝ සංයුක්ත මණ්ඩලයට මාරු කරණු ලබනවාත්හැර ඔබගේ සේවා කොන්දේසි අහෝසි කිරීමට ඔබ සුදුස්සෙකු නොවනු ඇත.

10. ඉහත සඳහන් සේවා කොන්දේසි උඩ මෙම පත්වීම භාර ගැනීමට ඔබ කැමැත්තේහි නම් මේ ලිපිය ලැබුණු බව දන්වා ..... විදුලි ඉංජිනේරු වෙත රාජකාරිය සඳහා ඉහත සඳහන් දිනයෙහි යා යුතුයි."

While the 13th – 15th Petitioners too have been issued with similar letters, they are different from the letters issued to the 1st – 12th and 16th Petitioners in respect of three matters.

The first is that the letters of appointment issued to the 13th – 15th Petitioners, to be effective from 15th September 1968, do not specify that the appointments are on an acting basis. The second is that the said letters specify that the 13th – 15th Petitioners will be confirmed in service at the end of the three year period of probation. The third, and perhaps the most significant difference is that the letters issued to the 13th – 15th Petitioners provide that once they complete six months of service, they shall be paid a monthly salary, as opposed to daily pay, and that 5% of their salary will be remitted to the Public Service Provident Fund.

The Arbitrator has taken the view that in terms of this letter, which is applicable only to the 1st – 12th and 16th Petitioners, the said Petitioners have not been employed on a permanent basis, and therefore the said letters are not letters of employment. I regret that I cannot agree with the conclusion of the Arbitrator. I take the view that all Petitioners had a letter of employment issued to them by the Department, subject to the aforementioned distinctions between the letters issued to the 1st – 12th and 16th Petitioners and the 13th – 15th Petitioners.

Paragraph 9 of 'A2' is identical to paragraph 6 of 'A1'. This clause once again formed the basis of the argument of the learned Counsel for the Petitioners that the Petitioners

were promised employment with the new entity, in the event of a change in the status of the Department. I cannot agree with this position for the same reason as with Clause 6 of 'A1'. The conclusion that I have reached with regard to paragraph 6 of 'A1' would apply to paragraph 9 of 'A2' too, as well. Thus, my view that 'A2' is a letter of employment does not make the case of the Petitioners any better, as no assurance of employment with the successor of the Department has been given to any of the Petitioners.

The third letter – Letter of Employment issued by the CEB

This brings me to the third letter relied upon by the learned Counsel for the Petitioners, which is the letter dated 9th November 1970 issued by the 3rd Respondent, the Ceylon Electricity Board, to all Petitioners. The letter issued to the 1st Petitioner has been marked 'A3' before the Arbitrator, and the relevant parts of the said letter are re-produced below:

> "තුන්වන පංතියේ කම්කරු තනතුර
>
> 1970.11.1 වැනි දින සිට ඔබ තුන්වැනි පංතියේ කම්කරු තනතුරට පත්කර තිබෙන බව මෙයින් දන්වනු ලැබේ. ඔබට රු: 2208-9x54-2694/= ඒකාබද්ධ වාර්ෂික වැටුපක් ගෙවනු ලැබේ. ඔබ විවාහකයකු නම් රජයේ නියමිත ප්‍රමාණයක් අනුව විවාහක දිමනාව ලැබීමට ඔබට හිමිකම් ඇත.
>
> 2. මෙම තනතුර ස්ථිරය. ඔබේ පත්වීම කලින් අවලංගු කළහොත් මිස, නැත්නම්, ඔබ පත් කරණු ලැබූ දින සිට අවුරුදු 3 ක් ගතවනතුරු ද, ඔබේ පත්වීම ස්ථිර කොට ලිපියක් ලැබෙන තුරුද, ඔබ පරීක්ෂණ කාලයක සිටිනවා ඇත.
>
> 4. පරීක්ෂණ කාලය තුළ ඔබේ සේවය සතුටුදායක වුවහොත් පරීක්ෂණ කාලය අවසානයේ දී ඔබේ පත්වීම ස්ථිර කරනු ලැබේ. "

There is no dispute between the parties that 'A3' is a letter of employment offered by the CEB. The date of appointment is the date specified therein, which is 1st November 1970. The post is permanent, although subject to a probation period of three years. Thus, I have no doubt that at least by 1st November 1970, all Petitioners were employees of the CEB.

The Arbitrator has concluded that the first time that the Petitioners received a permanent appointment, either with the Department or with the CEB, was when the CEB issued them the letter of appointment on 1st November 1970. The Arbitrator has thereafter proceeded to state that the Petitioners contributed to the Provident Fund only once they started employment with the CEB – i.e. from 1st November 1970 - and that the Petitioners have not contributed to the Provident Fund during the period they were with the Department. He had thereafter referred to the documents that were before him in support of this conclusion, which is borne out by the following paragraph:

> "A1 සහ A2 ලෙස ලකුණු කර ඉදිරිපත් කර ඇති ලිපිවල අර්ථසාධක අරමුදල් සම්බන්ධ කිසිදු සඳහනක් නැත. ඒ අනුව ඉල්ලුම්කරුගෙන් හා මණ්ඩලයෙන් අර්ථසාධක අරමුදලට දායක මුදල් අඩුකර ඇත්තේ 1970.11.01 දින සිට විදුලිබල මණ්ඩලයේ තුන්වන පන්තියේ කම්කරු තනතුරට පත් කිරීමෙන් පසුවය. ඉල්ලුම්කරු 1970.11.01 දිනට පෙර විදුලි දෙපාර්තමේන්තුවේ වෘත්තිය ආධුනික තනතුර හා තුන්වන පංතියේ කම්කරු තනතුර දැරූ කාලයේ විදුලිබල මණ්ඩලයේ සේවා කාලයට එකතු නොවන බවට විදුලිබල මණ්ඩලය දරන ස්ථාවරය පිළිගැනීමට සිදුවේ. තවද විදුලි දෙපාර්තමේන්තුවේ සේවය කළ සේවකයින් විදුලිබල මණ්ඩලයේ සේවකයින් ලෙස ඇතුළත් කර ගන්නා ලද බව දැක්වෙන ලේඛණයක් ඉල්ලුම්කාර පාර්ශවයෙන් ඉදිරිපත් වුයේද නැත.
>
> A3 ලේඛණයෙන් පැහැදිලි වන්නේ විදුලිබල දෙපාර්තමේන්තුවේ තුන්වන පන්තියේ කම්කරු තනතුර දැරූ ඉල්ලුම්කරු විදුලිබල මණ්ඩලය පිහිටුවීමෙන් පසු නැවතත් තුන්වන පංතියේ කම්කරු තනතුරකට පත්කර ඇති බවයි. කලින් සේවය කල වැඩ බැලීමේ කම්කරු තනතුර දැරූ ඉල්ලුම්කරු පරීක්ෂණ කාලයකට යටත් කර ස්ථිර කම්කරු තනතුරට පත් කිරීම සිදුකර ඇත්තේ 1970.11.01 දින සිටය. ඒ අනුව ඉල්ලුම්කරු 2009.12.26 දින විශ්‍රම යනවිට වසර 40 ක කාලයක් සම්පූර්ණ කල සේවකයෙකු හැටියට සැලකිය නොහැක. ඉහත කරුණු සියල්ල සලකා බලනවිට ඉල්ලුම්කරු ඉල්ලා ඇති සහන ප්‍රදානය කිරීමට නොහැකි බවට තීරණය කරමි."

This position is correct as far as the 1st – 12th and 16th Petitioners are concerned. As far as the 13th – 15th Petitioners were concerned, their letters of appointment issued by the Department in September 1968, were to a permanent post with entitlement to Provident Fund. I shall discuss the significance of this in respect of the 13th – 15th Petitioners later in this judgment.

Summary of the three letters relied upon by the Petitioners

The factual position with regard to the above three letters can therefore be summarised as follows.

a) All Petitioners have served a one year period of apprenticeship at the Department of Government Electrical Undertakings. While this period has ended on 8th August 1968 for the 13th – 15th Petitioners, the 1st – 12th and 16th Petitioners have completed their one year period of apprenticeship on 16th August 1969. This period is only a period of apprenticeship and is not a period of employment.

b) The 13th – 15th Petitioners have received permanent appointments as employees of the Department of Government Electrical Undertakings with effect from 15th September 1968, with an entitlement to Provident Fund.

c) The 1st – 12th and 16th Petitioners have received their appointment as employees, from the Department of Government Electrical Undertakings on 15th September 1969, although on an acting basis and without any entitlement to Provident Fund.

d) All Petitioners were employees, either permanent or acting, of the Department at the time the CEB came into existence on 1st November 1969.

e) All Petitioners, except the 13th Petitioner, have received their letters of appointment from the CEB only in November 1970, which is one year after the establishment of the CEB.

f) None of the above letters contain any provision that the period of employment with the Department can be added to the period of employment with the CEB.

In the above circumstances and having considered the aforementioned documents, I am of the view that the decision of the Arbitrator that the Petitioners have not completed forty years of service with the CEB, either at the CEB alone or cumulatively, is reasonable. It is certainly a decision which a sensible person who had applied his mind

to the question to be decided and very importantly had applied his mind to the documents and material presented to him, would have arrived at. Therefore, I do not see any merit in the arguments presented by the learned Counsel for the Petitioners based on the three letters.

Provisions of the CEB Act

This brings me to the second part of my judgment. It is unfortunate that neither the Petitioners nor the CEB referred the Arbitrator to the provisions of the Ceylon Electricity Board Act, which contained provisions relating to employees of the Department. Therefore, I shall now consider the crucial question whether the Petitioners became employees of the CEB by virtue of their employment with the Department, and/or whether their employment with the CEB is in effect a continuation of their employment that commenced with the Department on 1st November 1969, or 1st November 1968, as is the case with the 13th – 15th Petitioners.

The Ceylon Electricity Board has been established in terms of Section 2(1) of the Ceylon Electricity Board Act No. 17 of 1969 (the CEB Act). The assent of the Governor General for the said Act has been given on 6th June 1969. Section 18 of the Act provides that, '*As soon as may be convenient after the coming into operation of this Act, the Minister shall, by Order, transfer the Government Electrical Undertakings to the Board.*'

The Act was amended for the first time by the Ceylon Electricity Board (Amendment) Act No. 31 of 1969 (the Amendment Act), for which the assent of the Governor General has been given on 4th November 1969. There is no dispute between the parties that the CEB came into being on 1st November 1969.

Section 31A(1) was introduced by the Amendment Act, and the relevant parts of the said Section are re-produced below:

> *"Every public officer of the Department, not being any such officer in a transferable service of the Government, shall, before the date on which the Government Electrical Undertakings are transferred to the Board under* ***Section 18*** *(in this Act*

*referred to as the " **transfer date** "), give notice in writing to the General Manager of the Department that such officer intends, on that date-*

(c) to leave the public service and become an employee of the Board if, being a pensionable officer of the Department, he would on that date have less than ten years' pensionable service; or

*(d) to leave the public service and become an employee of the Board **if he is a contributor to the Public Service Provident Fund** established under the Public Service Provident Fund Ordinance; ...*"

I shall now consider **Section 31C(1)** introduced by the Amendment Act. The relevant parts of Section 31C(1) are set out below:

"*Any public officer of the Department who gives notice under any of the paragraphs (b) to (e) of subsection (1) of section 31A before the **transfer date** shall,*

*(b) if such notice is so given by him under paragraph (c) of that subsection, become an employee of the Board **on that date** and shall be deemed to have left the public service on that date and shall, subject to the provisions of section 32, be eligible for such an award under the Minutes on Pensions as would have been awarded to him if he had left the public service on the ground of abolition of office on that date; or*

*c) if such notice is so given by him under paragraph (d) of that subsection, become an employee of the Board **on that date**, and shall be deemed for the purposes of the Public Service Provident Fund to have left the service of the Government upon the determination of contract with the consent of the Government otherwise than by dismissal"*

Section 32 of the CEB Act was repealed by the Amendment Act, and replaced with the following:

"*The following provisions shall apply to and in relation to any employee of the Board* ***who became such an employee on the transfer date*** *by virtue of the operation of the provisions of section 31C:*

(1) Such employee shall be employed by the Board on such terms and conditions as may be agreed upon by such employee and the Board:"

Provided, however, that such terms and conditions shall be not less favourable than the terms and conditions on which such employee was previously employed in the Department.".

The above provisions could therefore be summarised as follows:

a) None of the Petitioners would qualify under Section 31A(1)(c) above as they were not holding a pensionable post in the Department;

b) The 13th – 15th Petitioners were contributing to the Public Service Provident Fund, and were eligible to give a notice in terms of Section 31A(1)(d) of the Amendment Act, seeking a transfer to the CEB;

c) The 1st – 12th and 16th Petitioners however would not be entitled to seek a transfer as they do not fall within paragraphs (c) or (d) of Section 31A(1);

d) Assuming the 13th – 15th Petitioners gave notice in terms of Section 31A(1)(d), they would have become employees of the CEB on the Transfer Date. As noted earlier, the Transfer Date is the date on which the Government Electrical Undertakings are transferred to the CEB in terms of Section 18;

(e) The CEB Act and the Amendment Act do not provide that the employment by the CEB of the 13th – 15th Petitioners is a continuation of the employment that they had with the Department and/or that the period of employment that the Petitioners had with the Department can be added to their period of employment with the CEB;

(f) The argument of the Petitioners that Clause 6 of 'A1' and paragraph 9 of 'A2' assured them of employment with the entity that was to be created to succeed to the Department is not supported by the provisions of the CEB Act or the Amendment Act;

(g) All Petitioners became employees of the CEB only on 1st November 1970.

Although none of the Petitioners have claimed that they acted in terms of Section 31A(1), in paragraph 3 of its Statement of Objections, the Respondents have stated as follows:

> *"(ii) that every Public Officer in service in the Department of Government Electrical Undertakings as at the said date, were required to give notice in terms of the provisions of the aforesaid Act No. 17 of 1969 indicating preferences from among the options for continuity in service or for termination made available in the said Act;*
>
> *(iii) it is only the 13th, 14th and 15th Petitioners who were in a position to benefit from this scheme as they were the only employees functioning in the capacity of public officers of the Department of Government Electrical Undertakings at the time of setting up of the 3rd Respondent Board.*
>
> *(iv) That the other Petitioners named in the petition were serving the Department only in the capacity of trainees/apprentices and not as part of the permanent cadre of public officers.*
>
> *(v) That therefore the possibility of 'absorption' vis-a-vis the provisions of the said Act was only available in regards to the 13th, 14th and 15th Petitioners and that they have not elected to take the option of remaining in public service* ***whilst being absorbed by the newly created entity.***
>
> *(vi) That the 1st – 12th and 16th Respondents were never employed as public officers of the Department and were not 'absorbed' into the newly established Board.*

(vii) That the 1st – 12th and 16th Petitioners were awarded contracts of service for the first time by the 3rd Respondent after it was established in 1969."

The position of the CEB that the 1st – 12th and 16th Petitioners were not absorbed into the CEB has not been contradicted by the Petitioners.

I shall now consider the cases of all Petitioners in the light of the material that has been tendered to this Court by the CEB with its Statement of Objections, the affidavit dated 27th January 2020 of the General Manager of the CEB and the motion dated 16th October 2020, in order to ascertain if the said documents displace the position that all Petitioners became employees of the CEB only on 1st November 1970.

I shall commence with the 13th Petitioner, T.W. Fernando. The 13th Petitioner has been issued with:

(a) A letter of appointment by the Department with effect from 15th September 1968, with the right to contribute to the Provident Fund;

(b) A letter of appointment dated 29th December 1969 marked '**3R13B**' by the CEB, with his date of appointment in the CEB being 1st November 1969.

Thus, there can be no doubt that the 13th Petitioner was an employee of the CEB with effect from 1st November 1969 and had completed forty years of service with the CEB as at 1st November 2009. The 13th Petitioner was therefore eligible to be felicitated for completing forty years of service and to be awarded a gold coin. The Pension and Provident Fund entitlement of the 13th Petitioner has been calculated on the basis of the date of appointment being 1st November 1969 – vide '**9XC**'. No further adjustment is therefore required to his Pension or Provident Fund.

Although a letter similar to '**3R13B**' has not been produced in respect of the 14th Petitioner, the position of the 13th Petitioner should apply to the 14th Petitioner H. Wijesoma, in view of the aforementioned position taken by the CEB in its Statement of Objections, and the 14th Petitioner being entitled to Provident Fund under the Department – vide document marked '**X14a**' tendered with the motion dated 16th October 2020. Even if the date of appointment of the 14th Petitioner could be taken as

1st November 1969, a period of two years has been deducted from his service as the 14th Petitioner has been on no-pay leave, thus reducing his period of employment to 38 years – vide '**14XA**'. The 14th Petitioner would therefore not be entitled to the benefits afforded to those who had completed forty years of service as at 1st November 2009.

The 15th Petitioner, P.S. Wasalamudali is similarly circumstanced as the 13th and 14th Petitioners,[15] except that his date of appointment in the CEB, as per the Pension Award '**15XB**' is 1st **December** 1969. The 15th Petitioner therefore was short of one month of forty years of service as at 1st November 2009. In any event, the 15th Petitioner has been on no pay leave for two years for employment abroad, which period has been deducted from his service, and therefore the 15th Petitioner has only completed 38 years – vide '**15XB**'. The 15th Petitioner too is therefore not entitled to the benefits afforded to those who had completed forty years of service as at 1st November 2009.

The 1st – 12th and 16th Petitioners have not produced any material to prove that they had been absorbed to the CEB, nor have they produced a letter of appointment issued to them by the CEB, appointing them to a post within the CEB with effect from 1st November 1969. The only letter of appointment issued to the 1st – 12th and 16th Petitioners by the CEB is the letter of appointment dated 1st November 1970 (i.e. the third letter).

Even in the absence of letters of appointment issued by the CEB offering employment with effect from 1st November 1969, and even though the 1st – 12th and 16th Petitioners were issued with letters of appointment only in November 1970, the 1st – 12th and 16th Petitioners could still have presented evidence to demonstrate that they in fact worked at the CEB with effect from 1st November 1969. The Petitioners have however failed to do so.

I shall now consider the Pension Award and the Provident Fund Form submitted with the affidavit of the General Manager of the CEB, in order to determine if the position would have been different had that material been presented to the Arbitrator. I shall commence with the 2nd, 4th, 6th, 8th and 9th Petitioners, whose position is demonstrated by the following table:

[15] A letter similar to '3R13B' has not been produced in respect of the 15th Petitioner.

Petitioner	Date of Appointment in the CEB – per Pension Award	Date of Appointment in the CEB – per Provident Fund Form
2nd – K. H.Siripala	1st November 1969 - vide '**2XB**'	1st November 1969 - vide '**2XC**'
4th – G.S. Abeywickrama	1st November 1969 - vide '**4XC**'	16th August 1968 - vide '**4XD**'[16]
6th – P.M.D.B.S.Lasantha	1st November 1969 - vide '**6XC**'	1st November 1969 - vide '**6XD**'
8th – R.H.Jayaratne	1st November 1969 - vide '**8XC**'	-
9th – S. Karunaratne	1st November 1969 - vide '**11XC**'	1st November 1969 - vide '**11XD**'

Thus, in the preparation of the Pension Award, the CEB has acted on the basis that the date of appointment of the 2nd, 4th, 6th, 8th and 9th Petitioners is 1st November 1969. While this Court has not been apprised of the reason for taking the date as 1st November 1969, the Pension and Provident Fund entitlements have been calculated on the basis of the date of appointment being 1st November 1969 for a period of forty years. The 2nd, 4th, 6th, 8th and 9th Petitioners would therefore be entitled to be felicitated with a gold coin, in view of the said acknowledgement by the CEB that the 2nd, 4th, 6th, 8th and 9th Petitioners have completed forty years of service with the CEB as at 1st November 2009. No adjustment is required to the Provident Fund and Pension entitlements of these Petitioners as their period of service has been taken as forty years. The 2nd, 4th, 6th, 8th and 9th Petitioners would not be entitled to gratuity as they have agreed to forfeit their right to gratuity by accepting the commuted pension.

According to the Pension Award marked '**16XC**' of the 12th Petitioner, K.J. Lionel, his date of Appointment in the CEB is 1st November 1969. He has been on no pay leave for six years for employment abroad, which period has been deducted, and therefore the 12th Petitioner has only completed 34 years. The 12th Petitioner would therefore not be entitled to the benefits of those who had completed forty years of service.

[16] This date is erroneous for the reasons that I have already given.

The Pensions Award and the Provident Fund Award pertaining to the 1st Petitioner ('**1XC**' and '**1XE**'), 3rd Petitioner ('**3XC**' and '**3XD**'), 5th Petitioner ('**5XC**' and '**5XD**'), 7th Petitioner ('**7XC**' and '**7XD**'), 10th Petitioner ('**12XC**' and '**12XD**'), 11th Petitioner ('**13XC**' and '**13XD**') and the 16th Petitioner ('**10XB**' and '**10XC**') gives their date of appointment in the CEB as 1st November 1970. Thus, there is no change to the conclusion reached by the Arbitrator with regard to the 1st, 3rd, 5th, 7th, 10th, 11th and 16th Petitioners.

I therefore direct the CEB to present the 2nd, 4th, 6th, 8th, 9th and 13th Petitioners with a gold coin, within three months of today. Subject to the above, this application is dismissed, without costs.

Judge of the Court of Appeal

Mahinda Samayawardhena, J

I agree

Judge of the Court of Appeal