

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

In the matter of an application under Article 140 of the Constitution for a mandate in the nature of a Writ of Certiorari.

Kumudinie Kariyapperuma Athukoralage  
No. 34/28 A, Baseline Avenue, Colombo 08.

**Petitioner**

**Case No. CA (Writ) 545/2010**

**Vs.**

1. Prof. Mahinda S. Rupasinghe  
The Vice Chancellor,  
Sabaragamuwa University of Sri Lanka,  
P. O. Box 02, Belihuloya 70140.
2. Sabaragamuwa University of Sri Lanka  
P. O. Box 2, Belihuloya 70140.
3. University Services Appeals Board  
University Grants Commission,  
No. 20, Ward Place, Colombo 07.
4. University Grants Commission  
No. 20, Ward Place, Colombo 07.
5. G. W. Edirisuriya  
The Chairman,  
University Services Appeals Board,  
No. 20, Ward Place, Colombo 07.
6. E. M. G. Edirisinghe  
The Vice Chairman,  
University Services Appeals Board,  
No. 20, Ward Place, Colombo 07.

7. Anton Alfred  
Member,  
University Services Appeals Board,  
No. 20, Ward Place, Colombo 07.
8. Hon. Attorney General  
Attorney General's Department, Colombo 12.

**Respondents**

**Before:** Janak De Silva J.

N. Bandula Karunarathna J.

**Counsel:**

K.G. Jinasena for the Petitioner

Chaya Sri Nammuni SSC for the Respondents

**Argued On:** 10.05.2019

**Written Submissions Filed On:**

Petitioner on 23.01.2012 and 30.10.2018

Respondents on 03.04.2019

**Decided On:** 20.05.2020

**Janak De Silva J.**

The Petitioner was appointed as a Probationary Lecturer in Export Agriculture at the 2<sup>nd</sup> Respondent University w.e.f. 01.12.1998 (P1). The Petitioner applied and was granted overseas study leave from 01.01.2004 to 31.01.2007 to follow a course at the University of Guelph, Canada leading to the Ph.D. which was granted.

The Petitioner and the 2<sup>nd</sup> Respondent entered into an agreement (P2) by which the Petitioner was granted the overseas leave. Later the Petitioner applied for maternity leave from 26.12.2006 to 07.05.2007 which was granted.

Thereafter, the Petitioner sought to extend her leave on three occasions which was granted. Accordingly, she was granted an extension of study leave with pay from 08.05.2007 to 14.08.2007, without pay from 15.08.2007 to 07.05.2008 and a final extension of study leave without pay from 08.05.2008 to 31.12.2008.

By letter dated 06.10.2008 (1R7), the 2<sup>nd</sup> Respondent informed the Petitioner that the extension of leave up to 31.12.2008 was the last extension to be given. In fact, previously by letter dated 18.06.2008 the 1<sup>st</sup> Respondent informed the Petitioner that the Council of the 2<sup>nd</sup> Respondent had decided to limit the maximum period of study leave to read for a Ph.D. to four years and that extension beyond four years is at the sole discretion of the 2<sup>nd</sup> Respondent.

The study leave granted to the Petitioner was to expire on 31.12.2008. By letter dated 12.12.2008 (P6) and e-mail dated 18.12.2008 (P7) the Petitioner sought medical leave from 01.01.2009 to April 2009 until the birth of her second child. In support of her application a medical certificate dated 08.12.2008 (P9) issued by an Obstetrician in Canada was sent direct on a letterhead without a seal. By letter dated 09.12.2008 (P8) the University of Guelph, Canada informed that the Petitioner had defended her dissertation on 03.12.2008 and is making editorial changes.

The 1<sup>st</sup> Respondent by letter dated 04.03.2009 informed the Petitioner that the 2<sup>nd</sup> Respondent had decided to treat her as having vacated her employment with effect from 01.01.2009. The Petitioner appealed to the 3<sup>rd</sup> Respondent University Services Appeal Board seeking a change of the vacation of post notice. The appeal was dismissed (P14).

In this application, the Petitioner has sought the following reliefs:

- (a) Writ of Certiorari to quash order (P14) dated 06.07.2010 made by the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents of the University Services Appeals Board;

- (b) Writ of Certiorari to quash decision (P10) made by the Governing Council of the 7<sup>th</sup> Respondent University at its meeting held on 01.03.2009 to serve the vacation of post notice on the Petitioner.

The Petitioner contends that the decision to consider her as having vacated post is arbitrary, unreasonable and ultra vires the powers of the 2<sup>nd</sup> Respondent.

In *Nelson De Silva v. Sri Lanka Engineering Services Corporation* [(1996) 2 Sri.L.R. 242] it was held that vacation of post had both a mental and physical element. The Petitioner contends that in her case the mental element was not present.

However, the Respondents submitted that the mental element is present given that the Petitioner had her first child abroad and planned to have a second child to be born soon after the end of her final leave and having her family with her can lead to an inference that the Petitioner was not intending to return.

These facts taken in isolation cannot in my view lead to an inference of the required mental element to establish vacation of post. However, when these facts are taken together, they can establish the required mental element.

Furthermore, it is observed that even before the University Services Appeal Board, the Petitioner did not produce evidence to establish she had successfully completed the Ph.D. program. Further, the Petitioner has given a power of attorney dated 23.10.2017 giving authority to her sister to proceed with this case. The address of the Petitioner is given as No. 2 Dudley Drive, Guelph, Ontario, N1G OE5, Canada. All these factors no doubt further establish the mental element.

In terms of the Agreement (P2) clause (12), any application by the Petitioner to extend the Ph.D. course on the grounds of illness should have been supported by a certificate from a medical officer approved by the Sri Lankan Embassy in Canada. The medical certificate (P9) tendered by the Petitioner does not conform to this requirement.

In *Building Materials Corporation v. Jathika Sevaka Sangamaya* [(1993) 2 Sri.L.R. 316] it was held that illness not supported by a medical certificate is a mere ruse to avoid reporting to work. The medical records submitted by the Petitioner to the University Services Appeals Board indicates that she had gone to the hospital around October/November 2008 for bleeding (the issue she highlights in her appeal) and that she was recommended only two days leave from her studies. The records also state that bleeding during pregnancy can be a normal occurrence. There is no certificate from any doctor or hospital to show that bleeding was severe or that she had to bed rest or that the flight was harmful to her or the baby.

The Council of the 2<sup>nd</sup> Respondent had considered the fact that the Petitioner had been given a total of 60 months leave, beyond the 4 year period approved by the Council and the fact that the Petitioner had been specifically informed that she was given the last extension of leave up to 31.12.2008 before deciding to treat her as having vacated post w.e.f. 01.01.2009.

The Council also took cognizance of clause 7.2 of chapter V of the University Establishments Code which states that where a person does not return to the country to resume duties at the end of the study leave period, he will be deemed to have vacated post and should be immediately informed by registered post.

I hold that the impugned decisions are not arbitrary, unreasonable or ultra vires as alleged by the Petitioner.

For all the foregoing reasons, the application is dismissed with costs.

Judge of the Court of Appeal

**N. Bandula Karunarathna J.**

I agree.

Judge of the Court of Appeal