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The Gazette of the Democratic Socialist Republic of Sri Lanka

EXTRAORDINARY

අංක 1709/5 - 2011 ජුනි 06 වැනි සඳුදා - 2011.06.06

No. 1709/5 - MONDAY, JUNE 06, 2011

(Published by Authority)

PART I : SECTION (I) — GENERAL

Government Notifications

My No. : IR/10/13/2009.

THE INDUSTRIAL DISPUTES ACT CHAPTER 131

The award transmitted to me by the Arbitrator to whom the Industrial Dispute which has arisen between Mrs. M. I. M. J. Samarawickrama, No. 1499/1, Katukurunda Road, Kottawa, Pannipitiya of the one part and Tea Small Holdings Development Authority, No. 70, Parliament Road, Pelawatta, Battaramulla of the other part was referred by order dated 13.01.2010 made under Section 4(1) of the Industrial Disputes Act, Chapter 131 (as amended) and published in the *Gazette* of Democratic Socialist Republic of Sri Lanka extraordinary No. 1637/17 dated 21.01.2010 for settlement by arbitration is hereby published in terms of section 18(1) of the said Act.

V. B. P. K. WEERASINGHE,
Commissioner General of Labour.

12th May, 2011,
Department of Labour,
Labour Secretariat,
Colombo 05.

Between

Mrs. M. I. M. J. Samarawickrama,
No. 1499/1, Katukurunda Road,
Kottawa,
Pannipitiya.
of the One Part

Contd.,

Case No. A/3318

and

Tea Small Holdings Development Authority,
No. 70, Parliament Road,
Pelawatta,
Battaramulla.

Of the other Part

The Award

The Honourable Minister of Labour Relations and Foreign Employment by virtue of the powers vested in him by Section 4(1) of the Industrial Disputes Act, Chapter 131 of the Legislative Enactments of Ceylon (1956 revised edition) as amended by Act, Nos. 14 of 1957, 4 of 1962 and 39 of 1968 read with Industrial Disputes (Special Provision) Act, No. 37 of 1968 appointed me as Arbitrator by his order dated 13th January, 2010 and referred the following disputes to me for settlement by arbitration.

The matter is dispute between the aforesaid parties are :

Whether Mrs. M. I. M. J. Samarawickrama is entitled to be backdated the post of Manager Grade III (Planning and Guiding) to 08.05.2007 that was granted to her by the Tea Small Holdings Development Authority with effect from 01.09.2008 and receive arrears of salary accordingly and to what other relief she is entitled.

Appearance

Mrs. M. I. M. J. Samarawickrama,
Appeared herself for the party of the First Part

Miss Kumuduni Nanditha - State Council
Mr. Chamath Fernando - Attorney-At-Law
Miss Kavisha Jayasinghe - Attorney-At-Law
Appeared for the party of the Second Part

Mrs. M. I. M. J. Samarawickrama, in her evidence stated as follows :

- (a) The applicant joined Tea Small Holdings Development Authority as an Agricultural Economist on 1st June, 1987
- (b) The applicant served on the above post for more than 21 years without any promotion, salary increments or seniority.
- (c) The applicant was appointed as Manager (Planning and Assessment) Grade III on the 01st September, 2008.
- (d) the applicant states that number of officers who were in the Grade IV and V were promoted to Grade III several years before she was promoted to Grade III.
- (e) In the circumstances she further states that the present salaries of the said officers who were promoted to the Grade III is higher by about Rs. 7000 when compared to the applicant's present salary.

	<i>Officer's Name</i>	<i>Previous Post and Grade</i>	<i>Promoted Post and Grade</i>
1.	Mr. C. J. T. Fernando	Assistant Regional Manager - IV	Regional Manager - III
2.	G. G. Bandula	Assistant Regional Manager - IV	Regional Manager - III
3.	Mrs. G. D. P. Jayanthi	Accountant - IV	Finance Manager - III
4.	Mr. D. A. P. Pemaratne	Assistant Planning Officer - V Assistant Planning Officer - V	Regional Manager III

	<i>Officer's Name</i>	<i>Previous Post and Grade</i>	<i>Promoted Post and Grade</i>
5.	Mr. D. T. I. Wijemanna	Senior Administrative Officer - IV	Assistant General Manager (Personnel and Administration) III
6.	Mr. S. D. Nandasena	Planning Officer	Assistant General Manager (Development), III, Deputy General Manager, (Development) III, General Manager
7.	Mr. K. G. Narada	Assistant Internal Auditor - V	Internal Auditor - III
8.	T. H. T. De Silva	Assistant Project Officer - IV	Assistant General Manager III (Services)

- (f) The applicant further states during her tenure of employment spanning over 23 years she had never been accused of not carrying out her duties or not suspended for work for fraud or any other fraudulent acts.

The applicants further submitted letters of commendation she received from the respondent is marked as a P3a to P3e.

- (g) The applicant further states as a Grade IV officer she did duties and responsibilities of Grade III officer, She further submitted letters assignment of duties marked P5 (a) to P5(i).

- (h) The applicant states that she complained to the higher management of the injustice meted out to her being Grade (IV) officer and had to carry out and duties of Grade III officer without getting salary increments or seniority (documents marked P6a to P6d).

- (a) The applicant further states in the years 1999/2000 Harshan Silva was appointed as Assistant General Manager (Services) under relief granted on political victimization.

- (b) The applicant further states that Harshan Silva lacked even basic qualification and hence appoint was irregular.

- (c) The applicant further states that the subject matter pertaining to the post of Assistant General Manager (Services) was pertaining to subject of Fertilizer. The appointee Harshan Silva had no experience whatsoever with regard to the subject Fertilizer. The applicant who handled the subject was overlooked.

The applicant filed the document marked P11 addressed by then Chairman Rohana Ilangaratne to the General Manager of the Respondent Authority instructing that the applicant who was then holding the post of Agriculture Economist to be appointed to the Post of Assistant General Manager (Services).

The applicant further submitted that Chairman's instructions were not implemented by the General Manager. The applicant stated that when she complained to the Human Right Commission about the injustice she was advised to go before the Supreme Court in order to find solution for her grievances.

The Supreme Court ordered to setting aside the appointment of Harshan de Silva and ordered that vacancy be filled according to accepted procedure (P 14).

The applicant further said the Respondent Authority failed to carry out the Supreme Court order hence she went before the Parliamentary Committee on Public Petitions. The committee directed that Petitioner be appointed to Grade III Manager (Planning and Assessment) Re Annexure P 13 (a) and 13(b).

The applicant further said the documents pertaining to false allegation was removed by her personal file by the management as the management failed to prove charges (P14).

The Respondent Authority informed to the applicant since they have abolished the post of the Assistant General Manager (Services), the need for calling applications for the said post will not be arisen (P15).

The applicant was appointed to the present position only on 01.09.2008 without assigning seniority or salary increments.

The applicant request to backdate her post Grade III Manager (Planning and Assessment) was rejected by the management saying that the said post was a new creation (P16, P17).

The applicant said that she applied for her present position Grade III Manager (Planning and Assessment), as the Respondent Authority abolished the post of Assistant General Manager (Services) after Supreme Court made the order setting aside the appointment of Harshan de Silva and directed the said post be filled according to accepted procedure.

The applicant submitted Auditor General report dated 31.01.2005, The report states that the person who was appointed to the post of Assistant General Manager (Services) as per the decision of the Board of Directors of Respondent Authority dated 09.09.2003 even lacked the minimum basic qualifications of GCE (O/L) (CP 18a, P18b, P18c).

The applicant further said that the officer who was appointed to the post of Assistant General Manager (Service) was placed in a higher grade with increments and also placed in 10th higher point of the salary scale.

The applicant further states that her present position should be backdated to 1st January, 2003 (the day in which irregular appointment was given to the aforesaid officer as Assistant General Manager (Services) or the applicant's previous position as Agricultural Economist (Grade IV) backdated as a Grade III position with effect from 01.01.2003 to 09.08.2008 and back wages be paid accordingly.

During cross examination the applicant stated as follows :

- (1) Applicant went before Supreme Court as the Respondent Authority made an irregular appointment for the post of Assistant General Manager (Services) overlooking the applicant who were the most suitable and qualified for the above post.
- (2) She further said that the said post was included in the staff manual 19/2000 of the Respondent Authority.
- (3) The applicant further said if proper procedure was followed in filling the said position she was definite of getting selected to the post as she was successfully carrying out duties pertaining to the subject.
- (4) The applicant said that the Supreme Court ordered to regularize the recruitment procedure.
- (5) The applicant answering the question why should her appointment be backdated stated that.
- (6) The applicant stated that the post of Assistant General Manager (services) was included in the 1999/2000 staff manual.
 - (a) When she was working as a Grade IV Officer she was doing duties and responsibilities of Grade III Officer.
 - (b) As mentioned in the Supreme Court Petition if the Respondent Authority followed the proper recruitment procedure in selecting to the above post most probably she could have got the above post and also the increment and seniority pertaining to the said post.

On overall analysis of evidence I have come to following conclusions.

- (i) The Respondent Authority had acted malice towards the applicant by giving salary increments to 8 other officers. By doing so the Respondent Authority has acted unjustly and unfairly.

- (ii) The Respondent Authority had appointed Harshan Silva to the post of Assistant General Manager (Services) who lacked even basic qualification by overlooking applicant. By doing so the Respondent Authority had acted unjustly and unfairly.
- (iii) The said irregular appointment was highlighted in the Auditor General report (P18a, P18b, P20a).
- (iv) When Supreme Court ordered to regularize the recruitment procedure the Respondent Authority abolished the post of Assistant General Manager (Services) depriving the applicant's opportunity to apply for the same post. By doing so the Respondent Authority had acted unjustly and unfairly.

In the circumstances, I wish to quote majority decision of the Supreme Court in *State Bank of India Vs. Edirisinghe* (1991) that the arbitrator has to make an award which is just and equitable, he is not tied down and fettered by the terms of the contract of employment. He can create new right and introduce new obligation between the parties. The effect of the award is to introduce terms which become implied terms of the contract. It was pointed out that as industrial arbitrator creates a new contract for the future in contrast to a judge who enforces rights and liabilities arising out an existing contract. An industrial arbitrator settles disputes by dictating new conditions of employment to come into force in the future when he cannot get the parties to agree to them in contract to a judge who determines the existing right and liabilities of the parties.

For the reasons aforesaid it is my finding that the Respondent Authority (party of the Second Part) has caused injustice to the applicant. (party of the First Part).

In the circumstances taking into consideration the totality of evidence led before me I make award that the Party of the First Part.

be paid arrears of salary inclusive of salary increments due for the period 01.01.2003 to 01.09.2008 in respect of the Agricultural Economist post held by Mrs. M. I. M. J. Samarawickrama.

I further made order that this award should be implemented within 21 days of the publication in the Government *Gazette* of the Democratic Socialist Republic of Sri Lanka.

I consider this award just and equitable.

KAPILA M. SARATHCHANDRA,
Arbitrator.

11th March, 2011.

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