

TRUSTEES OF THE CEYLON SCHOOL FOR THE DEAF AND BLIND VS. COMMISSIONER OF LABOUR AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 971/2007
FEBRUARY 18, 2009
MARCH 20, 2009
APRIL 29, 2009
MAY 15, 2009

Writ of Certiorari - Payment of Gratuity Act 12 of 1983 - Section 6 (2), Section 7 - Retirement - Pensionable service? Entitlement to gratuity payments - salary paid by State - Changes made to the salary after service period of employee - liability to pay arrears? Trust Ordinance - Section 114.

The petitioner an approved charity employed the 4th respondent – a government teacher in January 1969 as a teacher – after 33 years the 4th respondent retired in April 2002. The respondent received a pension from the State. The respondent was promoted in April 1997 and his salary revised with arrears to be paid with effect from September 1999. This was communicated in December 2005. The Commissioner of Labour informed the petitioner to pay gratuity and the arrears of the salary. The petitioner contended that, they are not entitled in law to make any payment for gratuity to a teacher whose salary was paid by the State, and that, they are not responsible for changes made to the employees position/salary after the service period of the employee had ended.

Held

- (1) In view of Section 7 as the 4th respondent was in the contributing pension scheme, he is not exempted by Section 7 of the Gratuity Act.
- (2) Even though the notification to pay the enhanced salary was in 2005 – three years after retirement, the 4th respondent was promoted with effect from April 1997 – and the notification to pay

the arrears from September 1999 is in order. Even though the notification came after retirement the 4th respondent's monthly salary was revised and his salary was deemed to have been in effect from September 1999. The last salary has to be considered on the basis of the revised salary.

APPLICATION for a Writ of Certiorari.

Case referred to:-

Hindu Women's Society Ltd and others vs. Commissioner General of Labour and others – SC 188/2007 – SCM 1.10.2007

M. A. Sumanthiran with Buddhinee Herath for petitioner

Yuresha de Silva SC for 1- 3 respondents

Hemantha Situge with M. K. P. Chandralal for 4th respondent.

September 03 2009

SRISKANDARAJAH, J.

The Petitioner is an approved charity incorporated under Section 114 of the Trust Ordinance with the aim of providing both academic and vocational education for deaf and blind children. The 4th Respondent a government teacher was recruited on the 15th of January 1969 to the Petitioner's School. He worked in the capacity of a teacher for 33 years with the Petitioner and retired from service on the 21st of April 2002. It is admitted by all parties to this application that the 4th Respondent's salary was paid by the government and he is receiving a pension from the government. The Position of the Petitioner is that as the 4th Respondent was in a pensionable service and after retirement he is receiving a pension, he is not entitled to any gratuity payments as per the payment of Gratuity Act No. 12 of 1983 but the gratuity payment made by the Petitioner to the 4th Respondent is a voluntary payment. The Learned State Counsel who appeared for

the 1st and 2nd Respondents (the Commissioner and the Assistant Commissioner of Labour) brought to the notice of this court the Supreme Court case; *The Hindu Women's Society Limited and Another v. The Commissioner General of Labour and Nine others*⁽¹⁾ In this case the Commissioner General of Labour has given an undertaking that as the respondent is drawing a pension from the Government on the basis of an award made by the Director of Pension he would withdraw the notification marked P30, which is a notice issued under the Gratuity Act.

The Petitioner submitted that without prejudice to the above submissions the Petitioner made a payment of gratuity to the 4th Respondent amounting to Rs. 174,689.50 on 07.05.2003 on the basis of his last drawn salary Rs.11,077/-. The Ministry of Human Resources Development, Education and Cultural Affairs notified the Petitioner that the 4th Respondent had been promoted to Grade 1 in the teacher service with effect from 21st April 1997 and that his salary was revised accordingly and that the arrears were to be paid with effect from 1st September 1999. Accordingly the 4th Respondent's monthly salary was revised to Rs. 15,204/- and he is entitled to this salary from 1st September 1999. The 4th Respondent claimed that the gratuity payment to be made on the revised salary that he was entitled to at the time of retirement. As the Petitioner has not acceded to the request the 4th Respondent made a complaint to the Commissioner of Labour and the Commissioner of Labour after an inquiry by his letter dated 17th August 2007 informed the Petitioner that the Petitioner was unable to establish the fact that it duly paid the Gratuity payment payable to the 4th Respondent as per the Payment of Gratuity Act and requested the Petitioner to pay a sum of Rs. 134,216.78 as remaining amount payable to the 4th Respondent and surcharges.

The Petitioner's challenge to the aforesaid order in this application is two fold. One is on the basis that the Petitioner is not obliged in law to make any payments for gratuity to any teacher whose salary is paid by the Department of Education. The second is that the said order of the 1st and 2nd Respondents is vitiated by error of law on the face of the record in that the Petitioner cannot be lawfully held responsible for changes made to the employee's position and salary after the service period of the employee had ended since the Petitioner's responsibility towards the employee ends with the retirement of the employee.

The settlement arrived in the Supreme Court case referred to above; *The Hindu Women's Society Limited and Another v. The Commissioner General of Labour and Nine others (supra)* does not indicate whether the employee under consideration was under a contributory pension scheme or a non contributory pension scheme. In the present case the 4th Respondent was in the contributory pension scheme and it is evident by the salary particulars of the 4th Respondent. Section 7 of the Gratuity Act provides:

7. *The provisions of section 5 shall not apply to or in relation to a workman –*
 - (a) *employed as a domestic servant or as a domestic servant or as a personal chauffeur in a private household; or*
 - (b) *entitled to a pension under any non-contributory pension scheme.*

In view of the above provisions the 4th Respondent is not exempted by section 7 of the Gratuity Act. The Petitioner in his counter affidavit admitted that according to Payment of Gratuity Act No 12 of 1983 as amended, an employee who had

been contributing to a pension scheme is entitled to gratuity and it was on that basis of this statutory obligation the 4th Respondent was paid his gratuity at the time of his retirement. But the Petitioner's position was when the 4th Respondent's salary anomaly was corrected and he was put on the correct salary scale by the Ministry of Education, the Petitioner cannot be held responsible to award him enhanced gratuity on the basis of increased salary. The rate of payment of gratuity is provided in Section 6. Section 6(2) provides:

- (2) *A workmen referred to in subsection (1) of section 5 shall be entitled to receive as gratuity, a sum equivalent to –*
- (a) *Half a month's, wage or salary for each year of completed service computed at the rate of wage or salary last drawn by the workman, in the case of a monthly rated workman, and*
 - (b) *In the case of any other workman, fourteen days' wage or salary for, each year of completed service computed at the rate of wage or salary last drawn by that workman.*

The question that has to be determined is the last drawn salary in relation to the 4th Respondent. The 4th Respondent's salary at the time of retirement was paid without considering his promotion for Grade 1 for which he was entitled to from 21st April 1997. The Ministry of Human Resources Development, Education and Cultural Affairs notified the Petitioner by its letter dated 13th December 2005, three years after retirement of the 4th Respondent that the 4th Respondent had been promoted to Grade 1 in the teacher service with effect from 21st April 1997 and that his salary was revised accordingly and that the arrears were to be paid with effect from 1st September 1999. Even though this notification came after his

retirement the 4th Respondent's monthly salary was revised to Rs. 15,204/- and this salary was deemed to have been in effect from 1st September 1999. Therefore the 4th Respondent is entitled to this salary at the time of retirement. In fact the arrears of salary to the 4th Respondent were to be paid with effect from 1st September 1999. This fact indicates that he is not only entitled to Rs. 15,204/- as his last salary at the time of retirement but in fact his salary was rectified and paid. Therefore the Commissioner is not in error in coming to the conclusion that the last drawn salary has to be considered on the basis of the revised salary.

In view of the above the Petitioner has not established any ground to issue a writ of certiorari to quash the decision contained in document dated 17th August 2007 marked 17. The application of the Petitioner is dismissed without costs.

application dismissed.