
FERNANDO AND OTHERS
vs.
ASSOCIATED NEWSPAPERS OF CEYLON LTD., AND OTHERS

SUPREME COURT
WEERASURIYA, J.
TILAKAWARDANE, J.
AMARATUNGA, J.
SC 274/2004.
FEBRUARY 24, 2005.

*Fundamental rights- Constitution Articles 12(1), 12(2), 14(1)2, 126, 126(4)-
Employed on contract - Absorption into permanent cadre assured?-Legally
enforceable right as approved to Legitimate expectation - Is that
expectation sufficient for constitutional relief? Relationship contractual ?
differently treated - equal protection denied.*

The Petitioners were employed on contract basis in the Respondent Company - for a specific period of 6 months. Their services were duly terminated at the end of the 6 month period. The petitioners' complain that, the termination is in violation of their fundamental right to equal protection of the law, as (1) the practice of the Respondent Company is to absorb into the permanent Cadre and confirm in service all persons recruited on temporary basis and (2) that the Chairman of the Respondent Company had in writing assured them that they would be so absorbed-legitimate expectation.

HELD:

- (1) The Board decisions demonstrate that there was no practice to absorb those in temporary/casual service into the permanent Cadre.

The petitioners have not shown any instance where permanent status has been granted to any employee in accordance with a past practice alleged by them.

- (2) The existence of a legitimate expectation as opposed to a legally enforceable right is a relevant factor in considering the just and equitable relief that could be granted under Article 126(4) when it is shown that the action of the executive which frustrates the legitimate expectation amounts to a denial of the right to equal protection of the law guaranteed by the Constitution.

Legitimate expectation could arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.

The contents of the letters sent by the Chairman to the petitioners can give the reasonable expectation to his recipient that he would be made permanent upon completing six months service.

Per Gamini Amaratunga. J.

“ That expectation also is not sufficient to make the petitioners entitled to the constitutional relief for the infringement of the fundamental rights guaranteed by Article 12(1) ”.

- (3) The disappointment of the petitioners expectation governed by the said letters cannot by itself bring the petitioners' case within Article 12(2) without proof of the additional element that in deciding to terminate their services the management has treated them differently from those who are similarly circumstanced or that they have been denied the equal protection of the law.

APPLICATION under Article 126 of the Constitution.

Case referred to:

Council of Central Service Union (CCSU) vs. Minister of Civil Service, 1984 3 All ER 935 at 944

J. C. Weliamuna with Shantha Jayawardena for petitioners in SC 274/04, 277/04, 369/04, 370/04 and 373/04

Manohara R. de Silva with Shantha Jayawardane for petitioners in SC 275/04. 276/04

A. A. de Silva PC with Lasitha Jayawardane for 1-3 respondents

Cur. adv. vult.

February 24th, 2005.

GAMINI AMARATUNGA, J.

In this application eleven petitioners who are employed on contract basis in the Transport Department of the Associated Newspapers of Ceylon Ltd. (ANCL) seek relief under Articles 17 and 126 of the Constitution against the decision of the management to terminate their services with effect from 30.06.2004. According to their letters of appointment marked P3A to P3E and P3G to P3K, the 1st to 5th and the 7th to 11th petitioners have been appointed to various posts such as driver, mechanic and mate in the Transport Department of the ANCL with effect from various dates in August 2003 on contract basis for a period of six months. The 6th petitioner's appointment as a driver is on the same basis for one year with effect from 02.05.2003. (P3F)

All letters of appointment specify the date of commencement of the six months (one year in the case of the 6th petitioner) contract period and the date on which the contract ends. All letters contain a clause that the contracts would automatically expire on the dates specified therein and an extension of the contract period would be made only in writing at the discretion of the management. However the petitioners have stated that they were verbally informed that they would be absorbed into the permanent cadre in the due course. There is no specific reference to the person or the official who gave such an undertaking. By letters marked P4A to P4J, the petitioners' initial six months period of service was extended by further three months with effect from March, 2004. (In the case of the 6th petitioner by six months).

According to Gazette Notification P1, the ANCL is an institution which comes under the Ministry of Information and Media. At the time the petitioners were recruited the said Ministry was known as the Ministry of Mass Communication and Mr. Imthiaz Bakeer Marker was the Minister of Mass Communication. The ANCL came under his ministry. The petitioners have been recruited during his tenure of office. On 04.11.2003 the Ministry of Mass Communication was taken over by H. E. the President, On 05.11.2003 a new Chairman of the Board of Directors was appointed and subsequently a new Board of Directors was also appointed. On 02.04.2004 the Parliamentary General Election was held and the United Peoples Freedom Alliance was returned to

power. On 23.04.2004 the 2nd respondent was made the Chairman of the ANCL. On 25.05.2004, the letters of termination of services were issued to the petitioners.

The petitioners allege that the termination of their services is in violation of their fundamental rights guaranteed under Articles 12(1), 12(2) and 14(1)(3) of the Constitution. They seek a declaration that the letters of termination of services served on them are null and void and a direction to the 1st to 3rd respondents to absorb them into the permanent cadre and to confirm them in their posts.

After considering the petitioners' application, this Court has granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution. By way of interim relief, this Court has issued an order restraining the 1st to 3rd respondents from giving effect to the notices of termination dated 25.05.2004 marked P10A to P10K. Subsequently the 1st to 3rd respondents have given an undertaking not to discontinue the services of the petitioners until this application is finally disposed of. There are six other applications filed against the same respondents by persons who have received letters of termination of services similar to those served on the petitioners of this application. At the hearing, it was agreed by the parties that the decision of the present application would apply to those applications bearing SC Application Nos. 275/2004, 276/2004, 277/2004, 369/2004, 370/2004 and 373/2004.

The letters of appointment issued to the petitioners contain a clause permitting either party to terminate the contract with one month's notice to the other party or upon the payment of one month's salary in lieu of notice. It appears that the letters of termination have been issued on the basis of this clause. Although the relationship between the petitioner's and the ANCL is contractual, the petitioners seek relief under Article 126 of the Constitution on the basis that the decision to terminate their services is in violation of their fundamental right to the equal protection of the law. Their position is that the practice of the ANCL is to absorb into the permanent cadre and confirm in service those persons recruited on temporary or on contract or on casual basis or as trainees upon completion of six months service subject to a probation period of six months. The petitioners have further alleged that by letters marked P9A to P9K dated 22.03.2004, the then Chairman of the ANCL assured to them that they would be absorbed into the

permanent cadre in due course and accordingly they entertained a legitimate expectation that they would be absorbed into the permanent cadre and confirmed in their posts.

The petitioners allege that the decision to terminate their services is contrary to the practice of the ANCL with regard to those employed on contract basis and is arbitrary and unreasonable. Although there is reference in prayer (b) to the petition to Article 12(2) of the Constitution, there is no specific allegation in the petition that the petitioners have been singled out for discriminatory treatment due to political reasons. Leave to proceed was granted only for the alleged violation of Article 12(1) of the constitution.

Before examining the legal basis upon which the petitioners seek relief, it is pertinent to examine the objections filed on behalf of the 1st to 3rd respondents and especially the position taken up by those respondents with regard to the manner in which the petitioners came to be employed at the ANCL. The third respondent, who is the Head of the Personnel and Human Resources Development Division of the ANCL, has filed an affidavit on behalf of the 1st to the 3rd respondents. It is the 3rd respondent who has signed the letters of appointment issued to the petitioners and the subsequent letters extending the petitioners' period of service and also the letters of termination.

The petitioners in their petition and the affidavit have stated that they made applications for suitable posts in the ANCL and were thereafter called for interviews and after ascertaining their qualifications and experience they were appointed to various posts in the Transport Department of the ANCL. The 3rd respondent in her affidavit has denied the averment that the petitioners were called for interviews on the applications made by them. Her position is that at the time the petitioners were called for interviews, the ANCL was well staffed to carry out its functions but the management had to call the petitioners for interviews due to the pressure brought upon the management by the then Minister of Mass Communication Mr. Imthiaz Bakeer Marker. (Hereinafter referred to as the Minister) In support of this position the 3rd respondent has produced marked R1 and R2A to R2K letters/memos sent by the Minister or on his behalf to the Chairman and the Working Director of the ANCL nominating persons for employment at the ANCL.

Document R1 is a letter dated 18.07.2003, sent to the Chairman of the ANCL by the Co-ordinating Secretary to the Minister seeking employment opportunity for the 2nd petitioner Devapriya as a motor mechanic at the ANCL. Document R2A is a letter dated 04.07.2003 sent by the Minister to Mr. Somasiri, Working Director, recommending the names of eleven persons for employment. The names of the 1st petitioner B. V. N. Fernando, the 5th Petitioner Ratnasiri and the 10th petitioner Niroshan are in this letter. Document R2C is a letter sent by the Minister to Mr. Somasiri, recommending the 3rd petitioner W. B. D. F. Fernando (described as "my youth organizer") for employment. Document R4A by which the 3rd petitioner was called for an interview, specifically refers to the Minister's letter. Document R2D dated 01.07.2003 sent to Mr. Somasiri by the Public Relations' Officer of the Minister, recommended employment opportunity for the 4th petitioner de Saa. Document R2F dated 22.04.2003, sent by the Minister to the Chairman, ANCL, refers to employment opportunity for the 6th petitioner Refthi as a driver in the ANCL. Document R2G dated 02.07.2003 sent by the Public Relations Officer to the Minister to Mr. Somasiri contains three names recommended for employment. The 9th petitioner Cooray's name is in this list. Document R2K dated 22.07.2003, sent by the Minister to the Chairman, ANCL, refers to the 11th petitioner Liyanaarachchi. Some of the documents referred to above (R2C, R2D and R2K) contain references to telephone conversations the Minister or his Public Relations Officer had with the Chairman or the Working Director of the ANCL before sending those letters.

Some of those letters (R1, R2A, R2C, R2D, R2F, R2G, R2I and R2K) contain endorsements made by the working Director to interview the persons named in those letters. Appointment letters of the petitioners have been issued subsequent to the letters of recommendations/nominations referred to above. The 3rd respondent has further pointed out that except the 2nd petitioner, all the other petitioners are from the Kalutara District from which the Minister was elected to the Parliament as a Member of Parliament. As already pointed out in one letter the Minister has described his nominee as "my youth organizer". Although the petitioners have stated that they made applications to the ANCL for employment, they have not produced at least a single copy of such applications to substantiate their version. The 1st petitioner in his counter affidavit has denied the 3rd respondent's averments relating to the manner in which the petitioners came to be employed at the ANCL,

but his bare denial is not sufficient to controvert the 3rd respondent's averments supported by documents.

Thus it is clear that the petitioners have secured employment at the ANCL as the selected nominees of the Minister under whose purview the ANCL came at that time. The petitioners, by stating in their petition and affidavit that they made applications to the ANCL for suitable posts and were called for interviews have deliberately attempted to suppress the manner in which they came to be recruited by the ANCL. By this deliberate suppression of a material fact, the petitioners have attempted to give the impression to this Court that they came to be employed through the regular process set in motion by their applications.

The basis upon which the petitioners claim relief is that in deciding to terminate their services, the management of the ANCL has disregarded the practice of the ANCL to absorb into the permanent cadre those persons recruited on contract basis upon completion of period of six months service. They further contend that the written assurance given by the then Chairman in his letter dated 22.03.2004 that the petitioners would be made permanent in due course, gave them the legitimate expectation that they would get permanent status in their employment.

The existence of a legitimate expectation, as opposed to a legally enforceable right, is a relevant factor in considering the just and equitable relief this Court may grant under Article 126(4) of the Constitution when it is shown that the action of the executive which frustrates the legitimate expectation amounts to a denial of the right to equal protection of the law guaranteed by the Constitution. "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law". *Halsbury's Laws of England, 4th Ed. Vol. 1(1) P. 151, paragraph 81. Lord Fraser in Counsel of Civil Service Union (CCSU0 vs. Minister of Civil Service*⁽¹⁾ at 944, said that a legitimate expectation could arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.

An express promise or an undertaking can take the form of (i) a general representation issued either to the 'world' or to a particular class of beneficiaries, or (ii) a specific representation addressed to a

particular individual or individuals. Such specific representation may take the form of a letter containing an assurance or a promise of a benefit or a course of action which the authority intends to follow. See *de Smith, Woolf and Jowell's Principles of Judicial Review; 1999 Ed. p.p. 472 to 478*. The petitioners rely on the practice of the ANCL with regard to those employed on contract basis as well as the assurance given by the former Chairman by his letter dated 22.03.2004 (P9).

In order to establish the practice followed by the ANCL with regard to those employed on contract, on casual/temporary basis or as trainees, the petitioners have produced, marked P5, P6 and P7, three decisions of the Board of Directors of the ANCL. The relevant part of the Board Decision P5 dated 02.09.2003 is as follows.

“Appointments on contract or as trainees would be for a maximum period of six months at the end of which period such recruits would be absorbed into the permanent cadre on probation for a minimum period of six months.....”

This decision would be applicable to those who have already been recruited as well as future recruitments.”

The 3rd respondent referring to the above Board Decision has stated that at the time the said decision was taken by the Board, there was speculation that the Ministry of Mass Communication was going to be taken over by H. E. the President and that the decision in P5 had been taken in anticipation of a possible take over of the Ministry of Mass Communication and a consequent change in the administration of the ANCL, in order to safeguard the interests of those who have been recruited after the Parliamentary General Election held on 02.12.2001. As already stated, the Ministry of Mass Communication was in fact taken over by the President on 04.11.2003.

The 3rd respondent's assertion that the Board Decision P5 had been taken to safeguard the interests of those recruited after the General Election held in December, 2001 finds support from Board Decisions P6 and P7, produced by the petitioners. By Board Decision P6 dated 07.03.2003 (Prior to P5), the Board had decided to absorb into the permanent cadre those who have been employed on contract, on casual basis or as trainees for a specific period during 16th

December, 2001 and 28th February 2003, if they have completed one year's service (subject to probation for six months) or six months service (subject to probation for one year) by the 28th February, 2003.

On 05.11.2003, the day after the Ministry of Mass Communication was taken over by the President, schedules containing the names of persons who have been recruited on casual/temporary basis, on contract or as trainees after 1st December, 2001 have been tabled at the meeting of the outgoing Board of Directors. The Board had decided to absorb all employees named in those schedules into the permanent cadre and to confirm them in their posts, with effect from 01.11.2003 (document P7). However the new Board of directors on 15.12.2003 had decided to annul all appointments made by Board Decision dated 05.11.2003 (P7) as those appointments had been made without adopting the proper procedure. (R6 and R7)

It is thus clear that Board Decisions P5, P6 and P7 had been taken for the specific purpose of safeguarding the interests of those recruited after the General Election held in December, 2001. If there was a consistent settled practice in the ANCL to confer permanent status to those recruited on contract, on casual/temporary basis or as trainee after they complete six months service, there was no necessity for the Board to adopt the decisions P5, P6 and P7. Thus those Board Decisions, instead of supporting the existence of a past practice, demonstrate that there was no such practice.

It was contended on behalf of the petitioners that since Board Decision P5 remains unannulled and valid, the 2nd and 3rd respondents have no authority to disregard it. The learned President's Counsel for the respondents contended that one Board of Directors cannot take a decision to bind a future Board of Directors and that a later Board is free not to follow a previous Board Decision. Objections to the petitioners' application have been filed not only on behalf of the 2nd and 3rd respondents but also on behalf of the 1st respondent ANCL. The objections therefore indicate that the present administration, headed by the present Board of Directors, is not inclined to implement the Board Decision contained in P5.

The petitioners have stated that over 70 persons recruited after December, 2001 have been absorbed into the permanent cadre. The

3rd respondent in her affidavit has admitted that certain persons recruited after December 2001 have been absorbed into the permanent cadre. The petitioners have produced marked P8A and P8B, two letters of appointment issued to two persons who were first recruited as trainees. One person was a trainee Assistant Store Keeper on 05.05.2003. Even before he completed six months service, he has been absorbed into the permanent cadre on 01.11.2003 as an Assistant Store Keeper on the recommendation of the Chief Store Keeper. The other person recruited in January, 2003 as a Library Clerk has been appointed as Assistant Librarian as she possessed a degree in Library and Information Science. Both those persons have been absorbed into the permanent cadre not on the basis of Board Decision P5 but for special reasons set out in documents R8 and R9. Apart from those two appointments the petitioners have not shown any other appointment made on the basis of Board Decisions P5 and P6.

The petitioners allege that in view of the then Chairman's letter dated 22.03.2004 (P9) they entertained a legitimate expectation that they would be absorbed into the permanent cadre in due course. All copies of P9, individually addressed to the petitioners, are identical. Paragraph one of the letter indicates that it has been issued in response to the requests made frequently by the petitioners to the Chairman at his office to confirm them in service and to an appeal handed over to the Chairman for the same purpose. Paragraph three of the letter states that if the employee has completed a period of six months service on contract or as a trainee, steps would be taken in accordance with the existing Board Decisions to make him permanent subject to a six months probationary period. It is stated in the fourth paragraph that since it is the election time, confirmation of service is not granted during such periods. The letter goes on to state that once the election is over, steps would be taken to confirm him (the employee) in service.

The 3rd respondent in her affidavit has stated that there is no record of the former Chairman's letter P9 in the Personnel Department and that copies of the letters are not filed of record in the personal files of the petitioners in accordance with the normal practice. Those letters are not addressed to the petitioners through the Personnel Division. Even in the Chairman's Office a copy of that letter has not been filed of record. The 3rd respondent has described P9 as a personal communication between the former Chairman and the petitioners.

However, there is no denial of the genuineness of P9. The contents of P9 can give the reasonable expectation to the recipient that he would be made permanent upon completing six months service. However, is that expectation alone sufficient to make the petitioners entitled to the constitutional relief for the infringement of the fundamental right guaranteed by Article 12(1) of the Constitution?

The disappointment of the petitioners' expectations generated by P9 cannot by itself bring the petitioners' case within Article 12(1) without proof of the additional element that in deciding to terminate their services the management has treated them differently from those who are similarly circumstanced or that they have been denied the equal protection of the law.

On the facts, the petitioners have failed to establish a past practice of the ANCL to confirm contract basis employees when they complete six months service. The Board Decisions upon which the petitioners relied demonstrate the absence of any such practice. When Board Decision P5 is viewed in the light of Board Decision P6, it is clear that Board Decision P5 had been taken with a view to safeguard the interests of those who have been recruited after the General Elections held in December, 2001. Confirmations hurriedly granted by the outgoing Board of Directors to those who have been recruited after 01.12.2001 (P7) on the very next day following the take over of the Ministry of Mass Communication by the President clearly demonstrate the motive behind Board Decisions P5 and P6 as well. Subsequently the new Board on 15.12.2003 has annulled the appointments made by Board Decision P7 dated 05.11.2003. The petitioners have not shown any instance where permanent status has been granted to any employee in accordance with the past practice alleged by them or on the basis of Board Decision P5.

The two instances cited by the petitioners (P8A and P8B) relate to two trainees. By its very nature the appointment as a trainee is different from an appointment on contract. Those two trainees have been absorbed into the permanent cadre not on the basis of any past practice or on the basis of Board Decision P5, but for reasons set out in R8 and R9 referred to earlier. The petitioners in their counter affidavit have submitted lists of persons appointed in December, 2004 (after this application was filed) on one year probation period to Security, Rotary

and Dispatch Departments of the ANCL. However, there is nothing to indicate that they are persons first recruited on contract, temporary or casual basis or as trainees or that their appointments have been made on the basis of the Board Decision P5.

Thus the petitioners have failed to establish that the decision of the management to terminate their services in terms of a clause in their letters of appointment is violative of their right to equality and to the equal protection of the law under the Constitution. The statement contained in the former Chairman's letter P9, issued during the election time, cannot by itself be of any avail to the petitioners, when the indispensable element to bring their case within Article 12(1) of the Constitution is lacking. The application of the petitioners is accordingly dismissed without costs.

In view of this decision SC Applications bearing Nos. 275/2004, 276/2004, 277/2004, 369/2004, 370/2004 and 373/2004 also stand dismissed without costs.

WEERASURIYA, J. – I agree.

TILAKAWARDENE, J. – I agree.

Application dismissed.
