

**PREMATILAKE
v.
WITHANACHCHI,
SECRETARY,
JUDICIAL SERVICE COMMISSION AND OTHERS**

SUPREME COURT
WADUGODAPITIYA, J.,
GUNAWARDANA, J. AND
GUNASEKERA, J.
S.C. (FR) APPLICATION NO. 515/97
OCTOBER 16, 1998

Fundamental Rights – Minutes on Pensions – Date of retirement – Last working day for computing the pension – Error in determining the relevant date – Article 12 (1) of the Constitution.

The petitioner who was a District Judge 'Super Grade' attained the compulsory age of retirement, viz, 60 years on 01.01.1997. The Director of Pensions relying on a practice whereby an officer is exempted from reporting for work on his last day, decided to pay the petitioner's pension calculated on the basis of the salary scale which was applicable on 31.12.1996.

Held:

The petitioner completed the age of 60 years on 01.01.1997, at the end of that day; and her pension should be computed on the salary drawn by her as at the date of her retirement, viz, 01.01.1997 according to section 17 of the Minutes on Pensions.

APPLICATION for relief for infringement of fundamental rights.

T. Marapana P.C. with *Nalin Laduwahetty* and *Jayanatha Fernando* for the petitioner.

K. Sripavan D.S.G. for 1st to 5th respondents.

Cur. adv. vult.

October 16, 1998

WADUGODAPITIYA, J.

The petitioner states in her petition that she was born on 1.1.1937 and that, having joined the Judicial Service as a Magistrate in 1979, upon promotion, she functioned as District Judge, Super Grade, upto and including 1.1.97. She specifically states that she completed her 60th year on 1.1.97, and that her last working day was the self-same 1.1.97, since she, in fact, worked on that day.

She complains that the Director-General of Establishments (2nd respondent) in respect of her pension has maintained that her date of retirement is 31.12.96 and not 1.1.97, and that, by letter P2A, the 2nd respondent has informed the 1st respondent, the Secretary to the Judicial Service Commission, that since the last day on which the petitioner **should have worked** was 31.12.96, she is not entitled to any payments in respect of her services on 1.1.97. The 1st respondent has thereupon directed the 4th respondent, the Director of Pensions to pay the petitioner's pension on the basis that her last working day was 31.12.96, thus depriving her of the benefits of the new increased salary scales which came into force on 1.1.97 by Public Administration Circular No. 2/97 dated 15.1.97 (P4). Her complaint is that her pension, as calculated on the old salary scales under the old Public Administration Circular No. 16/95, reduced her commuted pension by Rs. 166,800/- and reduced her pension by Rs. 6,255/- every month.

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Thus, in computing her pension, the question that arises for decision is, whether the effective date of retirement, was 1.1.97 as the petitioner avers, or whether it was 31.12.96 as maintained by the Director-General of Establishments, (2nd respondent). Mr. Marapana for the petitioner submits that the correct date for the purpose of computation of the petitioner's pension would be 1.1.97. He submits (and this is conceded by Mr. Sripavan for the respondents) that there is a practice whereby an officer is exempted from reporting for work on his/her last day, which in this case was 1.1.97. He submits however that this must not be held to interfere with the computation of the pension, on the question as to what should be the actual date of retirement. The Director-General of Establishments has stated that the date of the petitioner's retirement is 31.12.96, and not 1.1.97. This, he says

is on the basis that 31.12.96 was the last day on which the petitioner was required to report for work (vide P2A). This is clearly in error as, what is required is not the *last working day*, but the day on which, (according to section 17 of the Minutes on Pensions), the petitioner attained the compulsory age of retirement, viz 60 years, which in this case 1.1.97.

It is also clear that the petitioner's time of birth is totally irrelevant to the issue, inasmuch as, the time of birth is nowhere mentioned in the rules relating to retirement or the grant of pension. It appears from the submissions of Mr. Sripavan that the 2nd respondent has erroneously calculated the petitioner's date of retirement basing himself on the additional factor of the time of her birth. It seems to us that the rules, pertaining to this matter deliberately avoid mentioning the time of birth for the obvious reason that this could lead to confusion and would end in untenable conclusions.

Mr. Marapana refers us to the document marked P1 whereby the Attorney-General has given his advice on this matter, and stated quite clearly, that the petitioner completed the age of 60 years on 1.1.97, at the end of that day. The Attorney-General further states that for the purpose of computing the petitioner's pension, the relevant date should be 1.1.97.

Mr. Sripavan agrees with, and supports the opinion given by the Attorney-General in P1. He however states that there is an explanation relating to the practice hitherto followed, which in fact moved the Director-General of Establishments to disagree with the Attorney-General and maintain that the relevant date ought to be 31.12.96 and not 1.1.97. The practice appears to be, to consider the last day on which the officer *should have worked* as the date of retirement; the unwritten concession being that an officer is exempted from working on what in fact is, his/her last day. Accordingly the 2nd respondent says (para 7 of his affidavit), that ". . . in accordance with the consistent practice adopted right throughout, I decided that the petitioner's last working day should be 31st December, 1996". The 2nd respondent's argument therefore is that 31.12.96 was the last day on which the petitioner *should have worked* (vide P2A). Continuing this line of argument, the 2nd respondent concludes that therefore, 31.12.96 was *in fact the petitioner's last working day*. He confirms this by stating, at paragraph 6 of his affidavit: "I state that the petitioner's last working day was

the 31st day of December, 1996, and she is not entitled to any allowance given to persons *in service on 1st January, 1997*" (the emphasis is mine). This to us, is not acceptable. No such practice can override the Provisions of the Minutes on Pensions which govern the question in issue, and which indeed must prevail.

For the reasons set out above, it seems clear that the Attorney-General's advice is correct in law, and that, the view taken by the Director-General of Establishments (2nd respondent) is untenable and must therefore be rejected.

We therefore declare:

- i) that the petitioner's fundamental right guaranteed by Article 12 (1) of the Constitution has been violated;
- ii) that the petitioner's pension should be computed on the salary drawn by her as at the date of her retirement, viz. 1.1.97; and
- iii) that the petitioner is therefore entitled to have her pension computed according to the revised salary scale which came into effect on 1.1.97.

We therefore direct the 4th respondent who is the Director of Pensions to pay the petitioner's pension and commuted pension according to the revised salary scale which came into effect on 1.1.97 in terms of Public Administration Circular 2/97 dated 15.1.97 (P4).

The application is allowed but without costs.

GUNAWARDANA, J. – I agree.

GUNASEKERA, J. – I agree.

Relief granted.