KUMARA FERNANDO AND OTHERS
v
COMMISSIONER OF LABOUR AND OTHERS

COURT OF APPEAL
IMAM, J.
SRISKANDARAJAH, J.
CA 2282/02
CA 1070/03
CA 1080/03
NOVEMBER 29, 2006
JANUARY 23, 2007

Termination of Employment of Workmen (Special Provisions) Act 45 of 1971 (TEW Act) – S2 (1), S2(1) b, S2 (2), S5, S6 – move to merge two Banks – Termination of services of employees – Industrial Disputes Act – S48 – Absolute discretion vested in the Commissioner of Labour – Bona fides – Natural Justice – Bias – Retrenchment only on a voluntary basis – Method of selection – Arbitrary? Writ of Certiorari futile?

In August 2000 the Standard Chartered Bank (SCB) acquired the Banking operations of ANZ Grindlays Bank Ltd., and subsequent to the acquisition ANZ Grindlays Bank Ltd., changed its name to Standard Chartered Grindlays Bank Ltd. (SCGB)

The two Banks made a application under S2 (1) (b) of the TEW Act seeking the approval of the Commissioner to terminate the services of certain employees. This was approved.

The petitioners in the three applications sought to quash the order of the Commissioner of Labour made under S2 (1) (b) of the TEW Act, approving the termination of their services.

It was contended by the petitioners that TEW Act can be resorted to generally in a situation where the business of the employer is closed down and not in a situation where the employees become excess staff as a result of a prospective merger and the business still continues.

It was also contended that TEW Act should be read together with the express condition imposed by the Central Bank to the effect that employees should be retrenched purely on a voluntary basis and in the circumstances, the orders made by the Commissioner of Labour – are illegal, *ultra vires* – and they should be reinstated.

Held:

(1) S2(2)b read with S2(1)b of the TEW Act constitutes the Commissioner of Labour as the sole authority to declare whether to grant or refuse permission to terminate upon an application made by the employer.

(2) S2 (2)b – provides by express and unequivocal statutory language that approval to terminate may be granted or refused by the Commissioner – in his absolute discretion.

(3) S2(2)(e) when dealing with the power of the Commissioner to grant relief when he has decided to grant approval to terminate also renders his decision on this relief well protected, as it also expressly refers to absolute discretion.

(4) In S2(2)(f) the intention of the Act is manifestly clear which is to effect finality of litigation/ disputes by providing that such an order is final and conclusive.

(5) S 20 establishes primacy of this statute over any other written law.

Per Imam, J.
"The Court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended, decisions which are extravagant or capricious cannot be legitimate, but if the decision is within the confine of reasonableness, it is no part of the Court's function to look further into its merits".

(6) In accordance with the prevailing laws – TEW Act which is *sui generis* and prevails over all other laws with the Commissioner's jurisdiction not being fettered by any other state agency – Central Bank.

(7) The petitioners have failed to point out any part of the order which exhibits bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the Justice or Chairman as the case may be would or did favour one side unfairly at the expense of the other. The Court will not inquire whether he did in fact favour one side, certainly, suffice it that reasonable people might think he did.

Held further

(8) An employer has the right to *bona fide* retrench his employees, on the ground that such employees are redundant to his business. Once the necessity for retrenchment is established the employer is

free to decide on the number of employees who would become surplus to his requirement. Retrenchment is a right of the management and is a necessary incident of the industry, so long as it is exercised bona fide, the employer's decision should be accepted.

'In Sri Lanka there is no requirement for last in first out (LIFO). The employer has a discretion to decide the method of selection for retrenchment.'

Per Imam, J.
"In this case some positions of the employees retrenched are no longer in existence and the status quo cannot be resumed, there will be utter disaster and mayhem, if the workmen claim a return to work".

APPLICATION for Writs in the nature of *Certiorari.*

Cases referred to:

(1) *Barsi Light Railway Co.* v *Joglekar* – 1957 1 (LLJ)243
(2) *Eksath Kamkaru Samithiya* v *Commissioner of Labour* – 2001 2 SLR p 137.
(3) *Nestles Limited* v *The Consumer Affairs Authority* 2005 – 2 SLR 188
(4) *Dr. S. U. S. Perera* v *The University of Colombo.*
(5) *Metropolitan Properties (FGC) Ltd.* v. *Lannon* (1969) 1QB 577.
(6) *Vishwamitra Press* v *Workers of Vishvamitra Press* (1952) LAC 20.

Shibly Azeez PC with *Shirley Fernando* PC, *Farman Cassim* and *Nishantha Sirimanne* for petitioner

Ms. M.N.B. Fernando DSG for 1st and 2nd respondents

Sanjeewa Jayawardane with *Ms. Priyanthi Gunaratne* for 3rd and 4th respondents.

May 9, 2007

IMAM, J.

The petitioner in CA. writ applications No. 1070/03, 1080/03 and 2282/02 respectively, being at all times material, employees belonging, to the "Clerical" "Management" and "Support" staff categories of the 3rd and 4th respondents namely Standard Chartered Bank (henceforth known and referred to as "SCB") and Standard Chartered Grindlays Bank Limited, (henceforth know and referred to as "SCGB") respectively, seek mandates in the nature of 01

writs of certiorari seeking to quash the 3 orders made by the 1st respondent the Commissioner of Labour approving the termination of the petitioner's services in respect of applications bearing Nos. TE/96/2001, TE/97/2001 and TE/82/2001 as prayed for in their respective petitions, in accordance with section 2(1)(b) of the Termination of Employment of Workmen Special Provisions Act No. 45 of 1971 (hence forth referred to as "TEW" Act.)

The facts in the aforesaid cases are as follows. On or about August 2000 the 3rd respondent bank "SCB" acquired the Sri Lanka Banking operations of a Foreign Commercial Bank also operating in Sri Lanka called and know as ANZ Grindlays Bank Limited. Subsequent to the said acquisition ANZ Grindlays Bank Limited changed it's name to Standard Chartered Grindlays Bank Limited ("SCGB"), namely the 4th respondent in this case.

The petitioners in all of the aforesaid Writ Applications have sought to quash by way of *Writs of Certiorari,* the orders made by the Commissioner of Labour made in respect of the inquiries conducted by the 2nd respondent (Inquiring Officer exercising delegated authority) into the said applications for the termination of the petitioners services.

CA.(Writ) Application No. 1070/03 was instituted by 19 Clerical Staff category of employees in respect of the order made by the Commissioner of labour in Application for termination bearing No. TE/96/2001. CA (Writ) Application No. 1080/03 was instituted by 12 Managerial Staff category of employees in respect of the order made by the Commissioner of Labour in Application for termination bearing No. TE/97/2001, whereas CA. (Writ) Application No. 2228/02 was instituted by 54 Support Staff category of employees in respect of the order made by the Commissioner of Labour in Application for termination bearing No. TE/82/2001.

Consequent to the aforesaid writ applications being instituted 01 petitioner out of a total of 19 in CA. 1070/03, 1 petitioner out of a total of 19 in CA. 1070/03, 1 petitioner out of a total of 12 in CA. 1080/03 and 21 petitioners out of a total of 54 in CA. 2282/02 withdrew the respective compensation amounts deposited to their credit with the Commissioner of Labour, resulting in 23 petitioners out of the total number of 85 petitioners in the aforesaid 3 cases having accepted

the respective compensation awarded to them. The petitioners contend that the remaining 62 petitioners have not as stated in the written submissions tendered on behalf of the petitioners accepted the substantial compensation awarded to them by the Commissioner of Labour, and the petitioners contend that despite the severe financial constraints faced by them since being terminated from service over 3 years ago for no fault of theirs seek reinstatement in service.

Learned President's Counsel who appears for the petitioners submitted that the petitioners are dissatisfied and complain against the orders made by the Commissioner of Labour *inter alia*, for the following reasons. The petitioners allege that,

i) The Orders made by the Commissioner of Labour, are illegal, *ultra vires* and perverse.

ii) The Inquiring Officer (2nd respondent) and the Commissioner of Labour have aced in total violation of the principles of Natural Justice, and have failed to offer the petitioners a full and fair hearing at the respective Inquiries.

iii) The Commissioner of Labour could not have proceeded to hear and determine the 3 applications made by the banks to terminate the petitioner's services in the aforementioned 3 cases as the conditions for retrenchment imposed by the Central Bank were not adhered to by the Commissioner.

iv) The Respondents have shown an utter lack of *bona fides* towards the petitioners.

v) The Inquiring officer and the Commissioner of Labour were wrongfully and/or unlawfully influenced by the banks and thus the orders of the Commissioner of Labour demonstrate a clear bias in favour of the banks which has resulted an injustice being caused to the rights and interests of the petitioners.

vi) The actions of the banks and the Commissioner of Labour have cumulatively violated the legitimate expectations of the petitioners *inter alia*, to be retrenched entirely on a voluntary basis and not against their wishes.

vii) The petitioners were not afforded a full and fair opportunity to present their respective cases before the Commissioner of Labour and/or the 2nd respondents.

viii) No accepted rational or logical methods have been adopted by the banks when they purported to identify the petitioners for retrenchment, and hence the said acts of the banks are arbitrary and discriminatory.

ix) The petitioners who were identified were subsequently singled out by being transferred to a common pool, were not allocated any work for over 1 year, but were only paid their monthly salaries and were informed that they could report to work if they so desired. Thus the banks were wrongfully indulging in acts to isolate, degrade and destroy the morale of the petitioners, thereby compelling them to accept the compensation and retire prematurely.

x) The banks outsourced the service of at least 136 personnel when the inquiries into the termination of the petitioner's services were pending before the Commissioner of Labour, in order to carry out the functions previously performed by a fewer number of petitioners. Thus the Banks' contention that the petitioners were excess staff was a stratagem employed by the bank.

xi) The Commissioner of Labour and the Inquiring Officer have failed to properly evaluate the evidence placed before them and hence failed to draw the necessary inferences at the said Inquiries.

xii) The compensation awarded by the Commissioner of Labour was in any event inadequate to compensate the petitioners for their loss of employment.

The petitioner's aver that the banks Applications made to the Commissioner of Labour under section 2(1)(b) of the "TEW" Act for termination of the petitioner's services have clearly been made on the basis that the petitioners were surplus or excess staff, allegedly as a result of the move on the part of the 2 Banks to merge. It was contended by the petitioners that a situation where employees become excess and the business of the employer still continues is

clearly distinguishable from a situation where the entire business of the employer is closed down, which is referred to as "closure". The petitioners referred to section 48 of the Industrial Disputes Act (IDA) where "retrenchment" is defined as "retrenchment" means the termination by an employer of the services of a workman or workmen on the ground that such workman or workmen is or are in excess of the number of workmen required by such employer to carry on his industry".

The petitioners submit that the "TEW" Act refers specific situations in which the scheduled employment of workmen can be terminated, such as the term "closure" found in section 6A of the TEW Act refers to such a given specific situation in which the "TEW" Act can be utilized. Thus, the "TEW" Act can be resorted to generally, in a situation where the business of the employer is closed down (closure), and not in a situation where the employees become excess staff merely as a result of a prospective merger and the business still continues.

The petitioners cited "The Legal Framework of Industrial relations in Ceylon" by S.R. De Silva where the term closure' has been defined as follows.' It has been held by the Supreme Court of India in *Barsi Light Railway Co* v *Joglekar*(1) that retrenchment does not cover a case where the business itself is closed down, since it is the essence of retrenchment that the employer should continue to carry on his industry after the termination of the services of the workmen. In other words, the closure of a business is not a discharge of surplus labour. "The petitioners thus aver that term" closure contemplates a situation where the business of the employer ceases to exist completely; therefore the question of excess/ surplus staff does not arise and the employees can be longer make any claim for re-instatement in service.

The petitioners further allege that by resorting to the provisions of section 2(1)(b) of the "TEW" Act in order to terminate the services of the petitioners for no fault of theirs on non-disciplinary grounds is clearly contrary to the intention of the legislature, and also constitutes a clear abuse of process,. in as much as, *inter alia* the petitioners have been treated as excess staff not because there was a loss of business or lack of it, (on the Contrary the accounts of the Banks

show that their profits were soaring), but solely due to a merger of SCB and SCGB which is not a ground for termination as contemplated by the legislature and in any event the merger cannot be considered a good ground for termination under and in terms of the "TEW" Act. The petitioner in this context referred to "The contract of employment" by S. R. De Silva at page 230, with regard to the rationale for the promulgation of the "TEW Act" of 1971. At page 230 it is stated as follows, " The substantial reason for the Act was the need felt at that time by the State to exercise a greater degree of control over retrenchment and lay off of employees in the private sector on grounds of loss of business, lack of raw materials and so on, and in those instances where such grounds are found to exist, to keep the number of persons so retrenched to the minimum. The Act was not intended to preclude termination on good grounds, but was intended to prevent resort to retrenchment and lay off in circumstances not warranting it and to ensure that employees would receive relief expeditiously, if laid off or terminated. The need felt by the State to exercise a greater degree of control over non disciplinary terminations became urgent at that time in the context of increasing unemployment in the country..." (WS1) The petitioners aver that under these circumstances the banks could not have made Applications to have the services of the petitioners terminated under the "TEW" Act, and the Commissioner of Labour could not have entertained the said Applications, nor thereafter, heard and determined the same. It is submitted by the petitioners that when section 2(1)(a) of the "TEW" Act read together with the express condition imposed by the Central Bank to the effect that employees should be retrenched purely on a voluntary basis, and with section 5 of the "TEW" Act, the applications made by the banks and the orders made by the Commissioner of Labour are illegal, *ultra vires*, unlawful, perverse, null and void, are of no force in law, and liable to be set aside by this Court.

Learned President's Counsel appearing on behalf of the petitioners cited *Eksath Kamkaru Samithiya* v *Commissioner of Labour*[2] where His Lordship U.De Z. Gunawardene, J dealt in detail *inter alia*, with the provisions of sections 5 and 6 of the "TEW" Act, and the discretion vested with the Commissioner of Labour under section 6 in instances where the termination is found to be illegal. His Lordship held that "Manifest purpose of section 5 is to wholly protect

the workman against the termination of his service contrary to the provisions of the relevant Act, and to keep the contract of employment intact notwithstanding such illegal termination." (WS-2) Thus the petitioners contend that if the order of the Commissioner of Labour to grant the Banks approval for the termination of the petitioners service is found to be illegal, an overriding duty would be imposed on him to order the employer to continue the petitioners in service, as if no termination had taken place at all, and therefore the Commissioner would have no discretion to do/act otherwise under section 6 of the "TEW" Act. The petitioners submit that the 1st respondent could not have approved the termination of the petitioner's services, as the same was illegal and therefore, could not have proceeded to award the petitioners compensation in lieu of reinstatement, but a mandatory duty was cast on him to order the banks to continue to employ the petitioners.

Counsel for the 3rd and 4th respondents raised a preliminary objection on 26. 07. 2004 to the effect that the reliefs prayed for by the petitioners were misconceived in law and that the Petitioners applications were futile. This Preliminary Objection together with several other Preliminary Objections raised on behalf of the 3rd and 4th respondents were determined by this Court prior to the hearing into the merits of these writ applications, and the aforesaid objections were overruled by this Court on 09. 12. 2004 including the objection relating to the reliefs prayed for being misconceived in law. Counsel for the 3rd and 4th respondents submitted that although the petitioners sought interim relief to prevent the termination of their services by the employer before this court in December 2002 in CA. 1325/2002, this interim relief which was heard by Their Lordships N.E.Udalagama, J and Edirisuriya, J after a complete interpartes hearing was refused. This order it is submitted was not challenged in the Supreme Court. The Award of The Commissioner of Labour in 2282/02 is the highest ever total award in the history of Labour Law in Sri Lanka being Rs. 82,158,582/- in regard to 55 petitioners, which amounts to an average of Rs.1,493,792/- per person, submits counsel for the 3rd and 4th respondents. Counsel went on to elaborate the total awards made by the Commissioner in CA. 1070/03 and CA. 1080/03 respectively too. Counsel stated that the Awards in each case was as follows.

Case	Award	No of Petitioners	Average per person
a) CA. 2282/02	Rs. 82,158,582/-	55	Rs. 1,493,792/-
b) CA. 1070/03	Rs. 29,437,931/-	19	Rs. 1,549,365/-
c) CA. 1080/03	Rs. 35,658,198/-	11	Rs. 3,241,654/-
		Total	**Rs. 147,254,711/-**

Counsel for the 3rd and 4th respondents contend that the aforesaid Applications of the petitioner's cannot succeed, as there exist several impediments in law, both preliminary and substantive. Counsel avers that in the prayer for relief in CA. 2282/02 the petitioners have prayed for a writ of prohibition against the 3rd and 4th respondents, preventing them as employers, from terminating the services of the petitioners. The petitioners themselves, by praying for such a writ of prohibition have accepted the vital importance of preventing the employer from terminating the services of the petitioners with the intention of pursuing the writ application. The petitioners, according to Defence counsel have also conceded that the act of termination is exclusively vested in the employer. Learned counsel avers that letters of termination were formally issued, the terminations duly effected and compensation deposited. The stay order sought for by the petitioners was refused by Their Lordships N.E.Udalagama, J and Edirisuriya, J in CA. 1325/02 in December 2002, and hence according to learned Counsel for the 3rd and 4th respondents as no appeal was filed the terminations stand which is the status quo.

It is pointed out by learned counsel for the 3rd and 4th respondents that the Writ of prohibition is no longer a live issue at all and cannot be granted as prohibition would lie only to prevent the occurrence of an event which has not yet taken effect, whereas in this instance termination of employment of the services of the petitioners in CA. 2282/02 have occurred more than 4 years before the application.

Counsel for the 3rd and 4th respondents submit that the only remedy that can be granted theoretically is the *Certiorari* to quash the document marked X2 being the approval of the Commissioner of Labour for termination. Counsel submits that however if the Writ of

Certiorari is granted, then the order of the Commissioner of Labour would be annulled. However learned Counsel points out that serious complications would result in respect of issuing such a writ, which would be as follows, *inter alia*.

1) More than 4 years have elapsed since the termination of employment of the petitioners.

2) The termination has been acted upon by all parties including the petitioners who have accepted all terminal benefits thereby accepting the termination, with some of the petitioners having accepted the compensation package.

3) The Bank and its structure has subsequent to the merger undergone a significant change with the status quo which prevailed being no longer in existence.

4) Judicial authorities expound the principle that re-instatement means the resumption of the *status quo ante*, which means re-installing the workman to the same post, same conditions and terms that prevailed prior to termination, and if this is not possible, then the only alternative is compensation. The resumption of the *status quo ante* is not possible even if all parties including the bank are amenable to it due to the restructuring which the bank has undergone, its downsizing, its streamlining, advanced computerization of functions and the introduction of new technologies.

Learned counsel for the 3rd and 4th respondents referred to relevant provisions of the "TEW" (Special Provisions) Act, namely section 2(1) which reads as follows.

"No employer shall terminate the scheduled employment of any workman without

a) The prior consent in writing of the workman; or

b) The prior written approval of the Commissioner."

Section 2 (2) states as follows

"The following provisions shall apply in the case of the exercise of the powers conferred on the Commissioner to grant or refuse his approval to an employer to terminate the scheduled employment of any workman."

Section 2(2) sub paragraph (b) states as follows:

"The Commissioner may, in his absolute discretion decide to grant or refuse such approval."

Section 2(2) sub paragraph (e) states as follows:

"The Commissioner may, in his absolute discretion, decide the terms and conditions subject to which his approval should be granted, including any particular terms and conditions relating to the payment by such employer to the workman of a gratuity or compensation for the termination of such employment."

Section 2(2) subparagraph (f) states as follows.

"any decision made by the Commissioner under the preceding provisions of this subsection shall be final and conclusive, and shall not be called in question whether by way writ or otherwise:

i) In any Court or

ii) In any Court, tribunal or other institution established under the Industrial Disputes Act."

Learned Counsel submits that these statutory provisions which do not find any parallel in any other law, have been advisedly devised by the legislature to provide a greater degree of immunity in respect of orders made by the Commissioner of Labour under this statute to ensure expeditious conclusiveness to proceedings under the Act. Counsel submits that in a series of judgments delivered recently by the Court of Appeal including *Nestles Limited* v *The Consumer Affairs Authority* [3] and *Dr. S.U.S. Perera* v *The University of Colombo* [4] it was held by Their Lordships Justices Sripavan and Basnayake that Courts cannot, through a perceived or subjective process of so called Judicial Activism, refuse to give effect to the statutory word when it is plain, clear and unambiguous. Counsel submits that section 2(2)(b) read with 2(1)(b) of "TEW" (Special Provisions) Act constitutes the Commissioner of Labour as the sole authority to decide whether to grant or to refuse permission to terminate, upon an application to terminate made by an employer. Counsel avers that the Commissioner's order consists of only the permission to terminate excess employees by way of the "Written approval of the Commissioner". However counsel submits that the termination

proper has been effected by the 3rd and 4th respondents by deciding to terminate the contract of employment and consequently issuing formal letters of termination to each of the petitioners. It is averred by counsel that even if the Commissioner's order is quashed by way of a *Writ of Certiorari*, the consequent act of termination by the employer, namely the factum of termination would remain intact and thus cannot be changed. Counsel contends that the petitioners cannot contend that if an order of approval is quashed, then all consequential acts thereafter are also invalid as the termination Act is *sui generis* and extraordinary in its specialty as it provides expressly for terminations to be rendered illegal and for punitive sanctions to be imposed for illegal terminations. Counsel submits that in CA. 2282/02 the petitioners in the Prayer to the petition have not specifically prayed to be re-instated, and as a Court cannot grant more than what has been prayed for, the Writ Application CA. 2282/02 should be dismissed. Counsel states that in the aforesaid case all the petitioners have taken their Gratuity, Leave pay entitlement, EPF and ETF, and as all the petitioners have obtained their terminal benefits, there exists an unequivocal acceptance that their services are terminated.

Counsel submits that several of the petitioners have withdrawn the Compensation awarded by the Commissioner and deposited with the Commissioner of Labour by the 3rd and 4th respondents which clearly indicate their acceptance of their termination as well as the Commissioner's order of compensation upon termination.

The numbers of petitioners who have taken their Compensation payments in each of the cases are as follows.

CA. 1070/03 - 6 Petitioners.
CA. 1080/03 - 3 Petitioners.
CA. 2282/02 - 21 Petitioners.

Counsel avers that this is in addition to all having taken their other terminal dues as well, which enhances the fact fact the even the workmen have accepted their termination of employment. It is pointed out by counsel that in the event of the petitioners being reinstated in service a tremendous practical difficulty would arise, as the sums which have already been given to the petitioners would entail an enormous difficulty in recovering the same. For the

aforesaid reasons counsel for the 3rd and 4th respondents submits that the petitioners cannot be reinstated to their original posts, and urges that these 3 writ applications be dismissed.

Order of the Commissioner

I have examined the 3 writ applications of the petitioners, the objections of the respondents, the written submissions and other material tendered by both sides, and the law applicable to these applications. In December 2002 the 55 petitioners sought interim relief in CA. 1352/02 to prevent the termination of their services by the employer, which application was refused by Their Lordships N.E.Udalagama, J and Edirisuriya, J subsequent to a complete inter parties hearing. It is pertinent to note that this order was not challenged in the Supreme Court. In CA. 2282/02 the petitioners in the prayer to the petition have not specifically prayed to be re-instated in service.

Section 2(2)(b) read with section 2(1)(b) of the "TEW" (Special Provisions) Act constitutes the Commissioner of Labour as the sole authority to decide whether to grant or refuse permission to terminate, upon an application made by the employer. Significantly section 2(2)(b) provides by express and unequivocal statutory language that approval to terminate may be granted or refused by the Commissioner in his absolute discretion. Section 2(2)(e) of the "TEW" Special Provisions Act when dealing with the power of the Commissioner to grant relief when he has decided to grant approval to terminate also renders his decision on this relief well protected, as it also expressly refers to "absolute discretion". The words "absolute discretion" have rarely been used by the Legislature in an Act of Parliament. These 2 provisions pertaining to "absolute discretion" must be considered in view of the fact that the Act is a Special Act promulgated to make special provision in respect of the termination of workmen in non-disciplinary situations. In section 2(2)(f) of the aforesaid Act the intention of the legislature is manifestly clear which is to effect finality of litigation / disputes by providing that such an order is "final and conclusive" and shall not be called in question whether by way of Writ or otherwise. Section 20 of the aforesaid Act establishes primacy of this Statute over any other written law, for in the event of any inconsistency between the provisions of this Act and the provisions of any other written law, the provisions of this Act shall prevail.

When there is a possibility of multiple conclusions being arrived at, the decision must be one made within *vires* i.e. within the power to make decisions and not exceeding it. In this context it is relevant to cite Professor H.W.R. Wade with regard to the proper application of the Wednesbury principle of reasonableness, which is as follows. "the doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the Court must not usurp the discretion of the Public Authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds it acts *ultra vires.* The Court must therefore resist the temptation to draw the bounds too tightly merely according to its own opinion. When a Divisional Court yielded to that temptation by invalidating a Secretary of State's decisions to postpone publication of a report by Company Inspectors, the House of Lords held that the judgments illustrate the danger of Judges wrongly thought unconscientiously substituting their own views for the view of the decision maker who alone is charged and authorized by Parliament to exercise a discretion. The Court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate, but if the decision is within the confines of reasonableness, it is no part of the Court's function to look further into its merits." There is no *ultra vires* as far as the Commissioner is concerned, as the Commissioner has been invested with the exclusive power to decide the question of whether to grant or refuse approval for as application made by an employer to terminate the services of its workman under section 2(1) of the "TEW" (Special Provisions) Act. Thus, in my view the aforesaid orders of the Commissioner of Labour are legal, within vires and non perverse.

Natural Justice

With regard to the complaint of the petitioners that there was a violation of the principles of Natural Justice by the Inquiring Officer namely the 2nd respondent and the Commissioner of Labour by failing to afford the petitioners a full and fair hearing at the respective inquiries, the inquiry before the Commissioner which was under section 02 of the "TEW" Act was very long where Sudheera

Wijetileke and Bharata Ganawickrema who were office bearers of the Union gave evidence. None of the affected workmen gave evidence nor claimed reinstatement. Mr. Anura Silva the witness of the Bank was cross-examined by learned President's Counsel Mr. Shirely Fernando who appeared on behalf of the Union on 9 days, and the inquiry exceeded one year, with 25 dates of inquiry. However the principles of immunity expressly resorted to by the legislature in its wisdom as clearly set out in sections 2 (2)(b), 2(2)(e) and 2(2)(f) of the "TEW" (Special Provisions Act) read in conjunction with the textual authority of professor Wade and the dicta of Lord Denning, show that the order of the Commissioner of Labour cannot be interfered with, unless he has made an order which is so perverse that it shocks conscience of Court. The order of the Commissioner as well as the reasons thereof (X2 and 1R1) are comprehensive containing the detailed reasoning of the Commissioner, wherein the main issues are dealt with in an objective manner. The aforesaid order is not tainted with *mala fides,* and as the order does not shock the conscience of Court, it is my view that there is no violation of the principles of Natural justice. Hence I see no reason to interfere with the aforesaid order of the Commissioner.

Conditions Imposed By The Central Bank

Learned President's counsel for the petitioners averred that one of the principal complaints of the petitioners was that the clear conditions for retrenchment imposed by the Central Bank were not followed, and hence the Commissioner of Labour could not have proceeded to hear and determine these 3 Writ Applications. A condition imposed by the Central Bank as stated in paragraph 2 (iv) of its letter dated 23.01.2001 (X7) refers to "purely on a voluntary basis" in respect of the retrenchment of the Petitioners. The Central Bank reiterated this condition consequent to a discussion which the Central Bank had with the then CEO of "SCGB" Mr. Frank Gamble, in the letter addressed (X7) to Mr. Frank Gamble by the Director of Bank Supervision of the Central Bank dated 23.01.2001 which states that "With regard to item (iv) above, as discussed at the meeting you had with us on 17.01.2001, we wish to reiterate that the releasing of employees should be carried out purely on a voluntary basis and in a fair and equitable manner for employees of both banks and in accordance with the prevailing laws. No employee should be

removed from one bank to the other until the merger of the 2 banks is finalized. In case of retrenchment of staff, you mentioned that each bank would offer compensation packages to its employees and that comprehensive information on those packages would be furnished to the CBSL". In my view "and in accordance with prevailing laws" refers to the "TEW" (Special Provisions) Act, which is *'sui generis'* and prevails over all other laws, with the Commissioners jurisdiction not being fettered by any other state agency. In this context section 12 of the Banking Act was clearly satisfied, the Ministers approval also obtained, and hence the bank has complied with the Law. In the event of a workman having been removed from one Bank to the other before the merger was complete the workman could have given evidence to this effect at the inquiry before the Commissioner, which no workman did. For the aforesaid reasons, I am of the view that the conditions of the Central Bank have been complied with by the 'SCGB' and the approval of the Central Bank is not a matter in issue in this case.

Lack of Bona Fides towards the Petitioners

From an examinations of the inquiry before the Commissioner it is apparent that the petitioners themselves delayed the inquiry. During the pendency of the inquiry, the Bank paid the petitioners their salaries and other benefits in full. For instance in CA. 2282/2002 the inquiring Officer had observed on 31.05.2002 that it was the 12th day of inquiry and that the witness of the Bank was under cross examination for the last 8 days of inquiry (as per proceedings of 31.05.2005 at page 156 of the brief) stated that the inquiry should be concluded on 31.07.2002, and fixed several more dates of inquiry. However notwithstanding this direction learned President's Counsel for the petitioners continued to cross examine the Bank's witness for a further 3 days namely 06.06.2002, 15.06.2002 and 12.07.2002.

The petitioner made an application bearing No. CA. 1325/02 to this court, where their Lordships N.E.Udalagama, J with Edirisuriya, J agreeing held that the petitioners should lead their evidence without delay, state their case when the inquiry commences, and directed the Commissioner to conclude the inquiry as expeditiously as possible. The Commissioner fixed the inquiry for a further 9 days of inquiry giving the petitioners sufficient time to present their case. Even in CA.1070/03 the relevant application was lodged with the

Commissioner-General of Labour on 19.12.2001 consequent to which 13 dates were fixed for inquiry upto 24.09.2002. On 24.09.2002 the inquiring Officer noted that the Bank's witness had been under cross examination for 13 dates spanning a period of 9 months (page 119 of the Brief in Case No. CA 1070/03). Under these circumstances the inquiring Officer consented to grant the petitioners a further four months in which to present and conclude their case. Thus in this case to the proceedings were delayed by the petitioners during which period the petitioners were paid their monthly salaries. The sums paid as salaries during the year long inquiry were as follows:

CA. 2282/02	-	Rs. 13.2 Million
CA. 1070/03	-	Rs. 5.22 Million
CA. 1080/03	-	Rs. 9.1 Million

Amounting to a total of approximately 27.25 million.

For the aforesaid reasons in my view there is no material or evidence to suggest that the respondents demonstrated a total lack of *bona fides* towards the petitioners, and hence I reject the proposition tendered on behalf of the petitioners and hold that there was no lack of *bona fides* towards the petitioners by the respondents.

Allegations of Bias-Meeting with the Commissioner

This allegation of the petitioners was comprehensively dealt with by DSG Ms. Murdu Fernando, who submitted that there was no proof in any manner that the Commissioner was influenced in any way. The petitioner's contention was that the inquiry into the Bank's Applications for termination was expedited by the inquiring Officer (the 2nd respondent) after the then CEO of SCGB (Mr. Wasim Saifi) and the witness for the Bank's Mr. Anura Silva who was at such time under cross-examination had met the Commissioner of Labour on 30.05.2002 without any of the petitioners representatives being present and without even their own legal counsel being present, during the course of the inquiry in May 2002, and had admittedly discussed matters relating to expending the inquiry with the Commissioner (pages 43 and 44 of the proceedings in the CA. 1070/03 Brief. The petitioners are unaware of what other matters were surreptiously discussed between the said parties. It was also admitted during cross-examination by the bank's said witness

Mr. Anura Silva that the said meeting was held just one day before the next day fixed for inquiry into Application No. TE/82/2001 {CA. 2282/02}, (Page 44 of the proceedings in the CA. 1070/03 Brief). The Petitioners submit that this surreptitious meeting directly resulted in the inquiring Officer's sudden and arbitrary decision taken on the very next day namely on 31.05.2002 to drastically curtail the duration of the inquiry and restrict the employees' Counsel's opportunity to present the entire case on behalf of the employees (pages 156 to 164 of the proceedings in the CA., 2282/02 Brief).

His Lordship Lord Denning in *Metropolitan Properties (FGC) Ltd* 570
v *Lannon*[5] as reproduced at pages 456 and 457 of Wade on Administrative Law (8th edition) held that "Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would or did favour one side unfairly at the expense of the other. The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking 580
the Judge was biased. "Wade further states that the aforesaid decision reasserted" justice must be done' as the operative principle. The petitioners allege that a clear and demonstrable likelihood of bias can be inferred from the surreptitious conduct of the respondent Banks' Senior Representatives and the Commissioner of Labour. The petitioners accept that up to date they are unaware of the full and/or actual extent of discussion the Banks' CEO and Mr. Anura Silva the witness had with the Commissioner of Labour on 30.05.2002. However, from the inquiring Officers reaction immediately thereafter which became evident, *inter alia* from the 590
inquiry being expedited, the petitioners allege that the obvious inference of bias needs to be drawn.

The petitioners have failed to point out any part of the order of the Commissioner which exhibits bias on the petitioner. The petitioners themselves accept that they are unaware of the actual extent of the discussion the Banks CEO and Mr. Anura Silva the witness of the Bank had with the Commissioner of Labour on 30.05.2002. Lord Denning in the aforesaid Judgment held that

"Nevertheless there must be a real likelihood of bias. Surmise or conjecture is not enough ....." Due to the aforesaid reasons and the inability of the petitioners to point out in which manner there was bias in the order of the Commissioner, I am compelled to reject the allegation of bias on the part of the petitioners and thus hold that the Commissioner was not biased in the delivery of his order.

Total lack of Bona fides on the part of the respondent Bank Flagrant Violation of the terms and conditions of the Collective Agreements

This complaint of the petitioner is applicable only to the cases of the "Support Staff" and "clerical staff" employees since the "Managerial Staff employees are not parties to any Collective Agreements with the aforesaid 2 Banks. The respondent Banks clearly state in their applications for termination that it is, *inter alia*, the introduction of new Technology that has prompted the bank to treat the petitioners as surplus employees.

SCGB has expressly agreed at clauses 7 and 8 of the schedule 2 of the Collective Agreement dated 26.07.2001 (p 385 of the CA. 1070/03 Brief) read with clause 24 of the main agreement, that it will not retrench staff who become redundant as a result of the introduction of new technology. SCB too has agreed to be bound on very similar terms in the Collective Agreement dated 15.5.2000 (Clause 29 of the Agreement at page 413 read together with clauses 7 and 8 of the 3rd Schedule to the said Agreement at pages 426 and 427 of the CA. 1070/03 Brief). Hence the petitioners entertained a legitimate expectation that they would not be retrenched because new technology was being introduced. Mr. Baratha Gunawickrama, the witness who gave evidence on behalf of the employees in respect of the inquiry into Application No. TE 82/2001 has stated at paragraph 16 of the affidavit submitted by him as evidence in chief (page 183 of CA. 1070/03 Brief), that *inter alia*, Frank Gamble, the then CEO of SCGB (in March 2001), had categorically indicated to the said employees that they would be re-trenched purely on a voluntary basis. The petitioners aver that the employees relied on the aforesaid representation made by the then CEO, and accordingly did not seek alternative employment or pursue other avenues of employment, and have been severely prejudiced as a result of the violation of the said undertaking. The petitioners submit that the Banks are estopped in law from acting contrary to the said holding

out and/or from denying the same. The "TEW" (Special Provisions Act) deals with situations of "Non-disciplinary" termination. As stated by S.R. De Silva in "Legal Framework of Industrial relations in Ceylon" at pages 501 and 502 it was held that "An employer has the right to *bona fide* retrench his employees, on the ground that such employees are redundant to his business. Such redundancy may arise from the fact that the employer wishes to reorganise his business, either due to the losses sustained by him or even for the purpose of enhancing his profits. Once the necessity for retrenchment is established, the employer is normally free to decide on the number of employees who would become surplus to his requirements. These principles have been established in a number of decided cases.

In the case of *Vishwamitra Press* v *Workers of Vishwamitra Press*(6) where retrenchment was effected as a result of reorganization of the Company's business he states "It is the *prima facie* right of the Management to determine it's labour force and the Management would be the best Judge to determine the number of workmen who would become surplus on the ground of rationalization, economy or other reasons on which retrenchment can be sustained." It was also stated that in Ceylon these principles have been enunciated in a number of cases and accepted. "Retrenchment is a right of the management and is a necessary incident of an industry. So long as it is exercised *bona fide*, the employers' decision should be accepted." As stated at pages 316 and 317 of "A commentary on the Industrial Disputes Act" by Nigel Hatch, retrenchment has been justified on the grounds of losses occasioned by strike and reorganization of a business due to losses. Retrenchment is also justified where it is consequent on the closure of a section of the business."

In the present instance reorganization of the business was as a result of the merger and integration of 2 banks which also resulted in a streamlining and introduction of new technologies and processes. The original application for termination (P1 in 228/02, X1 in 1070/03 and 1080/03 categorically states that: ".....The integration of the operations and staff of the two institutions has been coupled with a streamlining of the operational aspect of both institutions and introduction of new technology ...." Obviously, the integration and

streamlining of operations have made an impact on manpower levels. For instance all divisions which independently functioned in the 2 Banks earlier have now integrated which has consequently resulted in 2 divisions becoming a single division for the purposes of operations. In addition, technological developments have also contributed towards a reduced requirement in cadre levels. "As stated by Mr. Ravi Jayasekara in his affidavit of 07.01.2002 at paragraphs 10, 11 and 12 there of appearing at page 42 of the brief in CA. 2282/02.

"10. Subsequent to the acquisition, SCB sought and received approval from the Central Bank of Sri Lanka to integrate the hitherto separate operations of the SCB and Grindlays Bank into a single operation.

11. Accordingly, the 2 Banks have now combined its operations and technology platforms into one. During the integration process new technologies and more efficient processes were introduced.

12. Subsequent to the integration of operations, functions carried out previously by 2 Departments are now handled by one Department ..." The mechanics of the diminution and downsizing was referred to in the application for termination dated 09. 11. 2001 (P1) and the supporting affidavit of Mr. Ravi Jayasekera (page 42 of the brief) where he specifically states with reference to numbers, categories post that there was a downsizing due to the merger. These were not effectively challenged. Hence this clearly reveals that the scope of the application before the Commissioner for termination was on the basis of the merger as well as excess due to streamlining. In accordance with section 2(4) of the "TEW" (Special Provisions) Act, the employer has a right to retrench and the jurisdiction of the Commissioner is in respect of "non disciplinary terminations" i.e. for any reason whatsoever, otherwise than by reason of a punishment imposed by way of disciplinary actions. For the foresaid reasons it is my view that the Banks are not estopped from acting contrary to the said holding out as alleged by the petitioners.

The Employees were denied a full and fair hearing

The petitioners complain that although this Court made an order in CA. Writ Application No. 1325/02 that the inquiry before the Commissioner of Labour should resume not later than 02.09.2002

and be concluded before 30.11.2002, the 2nd respondent however commenced the inquiry on 17.09.2002 and concluded the same on 28.11.2002. Thus the petitioners allege that the 2nd respondent by resuming the Inquiry 15 days after the specified date has unlawfully and unjustly limited the opportunities for the petitioners to fully present their case before the 2nd respondent. The petitioner also contend that the employees were prevented from summoning Mr. Wasim Saifi the then CEO of SCGB as a witness by the 2nd respondent in view of the unreasonable order made by the 2nd respondent, resulting in the rules of fairplay being flagrantly violated by the 1st and/ or 2nd respondents.

Although the 2nd respondent commenced the Inquiry 15 days after 02.09.2002, the 2nd respondent concluded the Inquiry before the 30.11.2002, namely on 28.11.02, thus before the deadline imposed by the Court of Appeal. It is unfair for the petitioners to complain that they were unable to fully present their case before the 2nd respondent. The 2nd respondent had fixed the Inquiry for numerous dates, and the learned President's Counsel Mr. Shirley Fernando who appeared for the petitioners cross-examined the witness of the bank on 13 dates and Inquiry proper constituted numerous dates during which occasions the 2nd respondent endeavoured to complete the Inquiry as expeditiously as possible, which he achieved by concluding the same on 28.11.2002.

It is significant to note that the very same Petitioners alleged bias by the 2nd respondent on the basis that Mr. Wasin Saifi and the witness for the Banks Mr. Anura Silva met the Commissioner of Labour on 30.05.2002 without any of the petitioners' representatives being present and without their own counsel being present.

No established rational or logical methods have been adopted by the banks when they purported to identify the petitioners for Retrenchment.

With regard to the above complaint of the petitioners, in each of the cases namely CA. 228/02, CA. 1070/03 and 1080/03 the numbers which were excess in each category of support staff, clerical staff and managerial Staff respectively, were clearly stated and the reasons for them being excess, also revealed. In all the cases the following issues were addressed in the evidence of the 3rd

and 4th respondents.

a) Whether there was an excess of staff.
b) If so how many persons were excess and in which categories.
c) How many persons had left voluntarily
d) How many persons remained excess thereafter.

For example in CA. 2282/02 which was in respect of Support Staff, paragraphs 10 to 22 of Mr. Ravi Jayasekara appearing at pages 42 and 43 of the Brief are of significance.

He stated the following:

"The Support Staff cadre in 'SCB' consists of Peons, Drivers, Technicians and Labourers.

The support staff cadre in the SCGB consist of peons, Drivers and Technicians. At the time of acquisition of Grindlays Bank by SCGB, SCB had a support staff of 23. SCB carried out its internal administrative operations as an independent commercial Bank with these 23 Support Staff. With the acquisition of Grindlays Bank, the Support Staff Cadre increased from 23 to 68. The integration of the 2 banks operations, introduction of new technology and streamlining of operations reduced the requirement for Staff in the "Support Staff". The reasons why some staff had to be retrenched was adverted to in detail, in respect of each of the categories at paragraphs 27 to 33 of the said Affidavit. Similar evidence appears in CA. 1070/03 in the Affidavit of Mr. Anura Silva, and in CA. 1080/03 too in the affidavit of Mr. Anura Silva. (page 6 of the brief of 1080/03).

Manner of Selection.

The manner in which such staff was selected was set out during the course of evidence.

Q. In Your evidence today you stated that the identification of the redundant staff was a complicated process?

Can you please explain ?

A. In respect of support staff we applied LIFO ("Last in first out"). We could do that because the nature of these jobs was not complex. But in the case of the other jobs what we followed was a professional selection process. The four steps were to

decide the future combined organization structure and then drawing up of personal specifications for each and every job. Then for each of these jobs we identified suitable candidates, mostly current incumbents of those jobs. Then we conducted an interview which was done with a panel with representatives from SCB, SCBG, and an independent Human Resources person. The objective was to find the best candidate for the job, and the ones who were not selected were identified as excess. (pages 157 and 158 of the brief in case No. 1080/03). Thus although the petitioners stated that the manner in which selection was effected had not been stated, evidence had in fact been led to the contrary. For example the following evidence demonstrated the method in which Downsizing was revealed in evidence:

Q. Would you agree with me that in view of the merger operation the management took certain decisions in relation to the operational departments of the Bank?

A. Yes.

Q. There were some changes made?

A. Yes.

Q. One change was a decision made by the management to discontinue the Internal Control Department?

A. Yes.

Q. And that was the department that you were functioning in at that time?

A. Yes. (Pages 194 and 195 of 1080/03)

The need to chose one of 2 persons for a single position was revealed at pages 206, 207 and 208 of the Brief of 1080/03. It was revealed that SCGB had a Compliance officer whilst SCB had a single person (the head of legal) to handle the legal and Compliance functions.

Referring to the function of Compliance.

Q. Do you agree that it requires a person to have a good knowledge of the laws?

A. Definitely.

Q. Consequent to the Merger exercise the Head of Legal also took over as Head of Compliance?

A. Yes.

Q. The Head of Legal . . . was functioning as Head of Legal at SCB?

A. She was Head of legal and Compliance at SCB?

Q. And now she functions Head of Legal and Compliance for both banks?

A. Yes.

The LIFO method of Selection

It was elicited during the course of the inquiry (as stated above) that in respect of Support staff, the "last in first out" (LIFO) method had been adopted in the selection of staff for retrenchment. In respect of the other categories however, a Professional Selection Process was adopted in selecting the redundant staff in view of the fact that they were more senior and had more specialized functions. This evidence was not effectively contradicted by the petitioners.

Although the Petitioners sought to contend that the LIFO system should have been followed in respect of all categories, it is well established that in Sri Lanka there is no compulsion to follow the said method on selecting persons for recruitment. Although this system is indeed adopted, the employer has a discretion to decide the method of selection. This is however, different to the position in Indian Labour law where the LIFO systems has been statutorily recognized and incorporated into the Industrial Disputes Act of India. However In *Industrial Law – P.L. Malik* (16th Edition) at page 1105, it is stated however, that even in the Indian law, there are many situations of departure from this principle. "Departure from the 'last come first go' rule is permissible on valid and justifiable grounds." It was held by the Supreme Court of India " that the employer may take into account consideration of efficiency and trustworthy character of the workmen, and if he is satisfied that a person with a long service is inefficient, unreliable or habitually irregular in the discharge of his duties he may be retrenched." "The Law of Dismissal" by Chakravarthi also speaks of departing from the LIFO rule in an appropriate case.

In Sri Lanka there is no requirement for "LIFO" but the respondent Banks followed it out of prudence in CA. 2282/02 and in order to establish it's *bona fides*. Hence this complaint of the petitioners is baseless as the respondents Banks established logical methods in identifying the petitioners for retrenchment.

The petitioner were not allocated any work for over 1 year in a calculated bid to compel them to accept the VRS packages offered to them.

The petitioners complain that the 3rd and 4th respondents illegally and unlawfully transferred the petitioners to a common pool where they were not allocated any work but were only paid their monthly salaries. The petitioners allege that the "caging" of these employees took place over a year prior to the conclusion of the inquiries pending before the 1st respondent (i. e. on or about January 2002) and therefore, the said illegal transfers were effected during the course of the inquiry into the applications made for the termination of the petitioners' services. It was submitted that whilst not allocating any work to the petitioners, the 3rd and 4th respondent Banks outsourced the services of 136 Personnel to carry out the work previously carried on by some of the petitioners. The said illegal transfers were brought to the notice of the Banks, and the Banks were requested to desist from doing so and to recall all employees who had already been sent on special leave. (Document marked "E11" with the petition in CA. 1070/03 at page 435 of the brief). The petitioners allege that the said transfers were effected by the banks to isolate, frustrate and demoralize the petitioners thereby weakening their resolve to resist the aforesaid wrongful and unlawful actions as well as to compel the petitioners to accept the Voluntary Retirement Scheme (VRS) packages and retire. The petitioners averred that apart from being totally wrongful, unlawful and illegal, the said acts of the banks are similar to a situation of 'non employment' as contemplated by the TEW (Special Provisions) Act, but does not constitute 'Non-employment' because the said employees were paid their salaries.

A similar course of action which was followed by the 3rd and 4th respondents Indian counterparts, has been held by the Indian Industrial Tribunal (Mumbai) to be illegal. The aforesaid decision has been upheld by the High Court of Mumbai, India. (Document

annexed "Z1" and "Z2" with the Petition in C.A. Application No. 1070/03).

It is only after excess staff were identified and after a formal application had been made to the Commissioner by the 3rd and 4th respondents in terms of the law for approval to terminate these persons, whilst all the time paying their salaries, that some of the petitioners were sent to a different department. All these persons who were said to the "caged" were paid their full salary and received all benefits during this period. At the conclusion of the inquiry and consequent to the Commissioner's order for compensation (which was the highest ever award in the annals of Labour Law in the country as stated by the Commissioner in his objections) the 3rd and 4th respondents immediately deposited the same with the Commissioner. There was absolutely no attempt to avoid reparating these persons, and steps had been taken in terms of the applicable law. (Unlike in the Indian case) to terminate them lawfully. The said Indian Judgment may be clearly distinguished on the facts, as in that case the employees were transferred to a different location, arbitrarily, and no further action taken to terminate them legally. Hence the Indian Judgment referred to is irrelevant and distinguished, and has no bearing whatsoever to the present Application. Moreover the provisions of law available under the "TEW" (Special Provisions Act) which had been invoked in case of the 3rd and 4th Respondents, were not available in the Indian case.

Although the petitioners sought to contend that there was 'outsourcing' no valid evidence had been led in respect thereof, except for a list of names tendered by the petitioners which they failed to substantiate. The petitioners were not compelled to accept the Voluntary Retirement Scheme (VRS) packages offered to them. For the aforesaid reasons this complaint of the petitioners is also not tenable.

Necessary Inferences and Material Evidence Disregarded.

The petitioners state that the 2nd respondent has arrived at the conclusion that Support Staff employees will find it more difficult to find jobs than the Clerical or Managerial staff employees and therefore have been offered a better "VRS" package than the other categories of staff on mere conjecture and without any proper

evidence to support the same (para 24 of the report at page 11) The 2nd respondent has given undue and unwarranted weightage to the number of employees in the other categories who have accepted the 'VRS' packages and left, when the same is not in any manner, a material consideration for the determination of issues raised before him, especially as the majority of the Clerical Staff employees (ie 24 out of 40) amounting to 60% of the total sought to be retrenched have not accepted the 'VRS' packages. The petitioners submit that the 2nd respondent has interposed his own personal views whilst determining this matter which is evident from the contents relating to globalization etc. as enumerated by him in the said report which are not matters that are based on any firm evidence.

The aforesaid inferences are decisions, views and observations which he 2nd respondent arrived at, which relate to his 'absolute discretion' being incidental matters – and in my view is an expression of his views although he has considered the material evidence completely and drawn inferences accordingly which are correct.

Compensation awarded to the Petitioners – wholly inadequate.

The petitioners allege that the compensation awarded to the petitioners by the 1st respondent is totally inadequate, and that severe disparities were apparent in the compensation packages awarded to the several categories of petitioners. The petitioners state that although the Banks boast that the highest compensation packages were awarded in respect of these employees, relevant criteria when calculating the compensation payable to each employee had not been taken into account by the Commissioner of labour. The petitioners contend that the inadequacies and disparities of the compensation awarded by the 1st respondent to the petitioners are evident by the following factual examples pertaining to 3 of the employees/ petitioners in the 3 separate staff categories.

Name	Category/Period of service	Compensation awarded	Outstanding Home Loan
Y.G.Rodrigo	Manageria/19 years	Rs. 1.2.Million	Rs. 1.4 Million
B.R.Ranasinghe	Clerical/ 10 years	Rs. 660,000/-	Rs. 560,000/-
K.K.D.Kahaduwa	Support/6 years	Rs. 510,000/-	Rs. 470,000/-

Accordingly at the conclusion of 19 years of service Mr. Y. G. Rodrigo of the Managerial Staff catergory would not receive the benefit of the compensation awarded to him since his outstanding Home Loan clearly exceeds the compensation awarded and therefore he will have to repay the bank a sum of Rs. 2 Million. At the conclusion of 10 years of service Mr. B.R. Ranasinghe would receive only a sum of Rs.100,000/- after he settles the outstanding Home loan with the bank. At the conclusion of 6 years of service Mr. K.K.D. Kahaduwa of the support Staff category would receive a sum of Rs. 40,000/- after he settles the outstanding Home loan with the Bank. Under these circumstances the petitioners submit that they are entitled to the substantive reliefs prayed for in the respective petitions.

Very significantly the entire case of the petitioners and the Union which represented them, and the evidence before the Commissioner of Labour at the inquiry, was entirely presented on the basis that what the Petitioners wanted was enhanced compensation. It transpires that the Commissioner had reasonably acted on the thrust of the Union case which is for the grant of compensation and he has held that due to the merging of 2 entities, and also due to the enhancing of technology that there has been a diminution of the actual need for cadres, that he should not therefore deny permission to terminate, and that he should order compensation as contemplated by the Act. There are several authorities which hold that the Commissioner need not grant reinstatement and that the he can award compensation under the "TEW" (Special Provisions) Act. The affidavit of Mr. Baratha Gnanawickrema President of the Branch Union of the Ceylon Bank Employees Union in his affidavit filed at page 349 in CA. 2282/02 states as follows. "Without prejudice of what I have stated objecting to the grant of approval by the Commissioner of Labour, I state that the only reasonable relief that should be granted in the circumstances of this case is salary and other benefits which the employees would earn up to the age of retirement.

The Only Reasonable Relief

This is substantiated by the fact that Baratha Gnanawickrema states that compensation is the "only reasonable relief that should be granted in the circumstances of the case". Sudheera Wijatilleke and Baratha Gnanawickrema were office bearers of the Union. None of the affected workmen gave evidence nor claimed reinstatement. The

aforesaid 2 Office bearers of the Union obviously coordinated to give evidence in order to make a case out for compensation for all workmen as they in their capacity as Office bearers of the Union would be best equipped to comment upon the financial issues in a post terminal situation.

In this case some positions of the employees retrenched are not longer in existence, and the status quo cannot be resumed. There will be utter disaster and mayhem if the workmen claim a return to work.

Another important issues is what would happen to the large amount of monies that have been taken by the employees on the basis that their services were terminated. The Gratuity Act (section 5) enables the payment of gratuity upon the existence of a terminal situation. The compensation granted is absolutely in excess of that formulated by the State in the published compensation formula and is the highest award made.

I am of the view that the Commissioner has correctly identified the issues, has analysed the relevant facts in relation to the redundant staff, has come to a correct finding with regard to their identification, made orders dated 27.03.2003 having evaluated the evidence based on relevant principles properly, and hence I see no reason to interfere with the orders of the 2nd respondent dated 27.03.2003. For the aforesaid reasons, I refuse the Writ Applications CA. 1070/03, CA. 1080/03 and CA. 2282/02, which are dismissed without costs.

SRISKANDARAJAH, J. – I agree.

Application dismissed.