

**PURE BEVERAGES COMPANY EXECUTIVE  
OFFICERS ASSOCIATION**

v.

**COMMISSIONER OF LABOUR**

COURT OF APPEAL

HECTOR YAPA J (P/CA)

C.A. 823/97

OCTOBER 11<sup>ST</sup>, 12<sup>TH</sup>, 1999

JANUARY 31<sup>ST</sup>, 2000

MARCH 16<sup>TH</sup>, 2000

MAY 23<sup>RD</sup>, 2000

AUGUST 28<sup>TH</sup>, 2000

*Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 as amended by Act No. 4 of 1976 - S.2(1), S.16 - Rules of natural justice - ultra vires - Partial quashing of decision - Finality Clause - Decision a Nullity - cannot stand.*

The Pure Beverages Company sought to terminate its employees attached to the Kaduwela Factory. The Petitioner had come to know that, a Deputy Commissioner of Labour, was inquiring into this matter and, as some members of the Petitioners Association were named as persons whose employment was to be terminated, the Deputy Commissioner had intimated to the Members of the Petitioners Association requesting them to participate, if so desired. The Petitioner informed the Deputy Commissioner, that its members cannot participate without obtaining legal opinion. However, the Commissioner of Labour had approved the termination of all persons including the members of the Petitioners Association, although the Deputy Commissioner did not recommend the termination of the members of the Petitioner Association.

It was contended that the said decision is ultra vires and has been done in violation of the principles of natural justice, and that it was unreasonable, arbitrary capricious.

**Held :**

- (i) S.17 of the Act has laid down that any inquiry conducted by the Commissioner or by any officer to whom such powers functions are delegated should conform to the principles of natural justice.
- (ii) Principles of natural justice not only demands that the affected party should be heard but that they should be given a reasonable opportunity

to present their case. Further the facility of presenting the case of an affected party to be effective and meaningful such an inquiry should be proceeded by sufficient notice.

- (iii) Certiorari could go to quash an unlawful part of an administrative decision having effect in public law while leaving the remainder valid - the decision made regarding the members of the Petitioners Association could be quashed allowing the decision in respect of the other employees belonging to the other two trade unions intact.
- (iv) Even though the decision made by the Commissioner of Labour under S.2(2) (f) is final and conclusive, a decision without any regard to the available material and in violation of natural justice is a decision bad in law. Such a decision in law a nullity and cannot stand.

Application for a Writ of Certiorari and Prohibition.

**Cases referred to :**

1. *University of Ceylon vs. Fernando* - 61 NLR 505.
2. *Regina vs. Secretary of State for Transport Exparte Greater London Council* - 1985 3 WLR 574.
3. *Agricultural, Horticultural and Forestry Industry Training Board vs. Aylesbury Mushrooms Ltd.*, 1972 1 WLR 190.
4. *Amis Minc Ltd., vs. Foreign Compensation Commission* - 1969 2C 147.
5. *Abeywickrema vs. Pathtrane* - 1986 1 SLR 120.

P. Vimalachanthiran with A.P. Niles for Petitioner.

Adrian Perera S.S.C. for 1<sup>st</sup> Respondent.

Chula De Silva, P.C., with M. Maharroof and M. Gunasekera for 2<sup>nd</sup> Respondent.

*Cur. adv. vult.*

January 29, 2000  
**HECTOR YAPA, J.**

This is an application for a writ of Certiorari to quash the decision of the Commissioner of Labour the 1st Respondent (hereinafter referred to as the Commissioner) dated 24.09.1997

made under the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971, (as amended by Law No. 4 of 1976) Section 2 (1) approving the termination of the employment of some of the workmen (executives) who are members of the Pure Beverages Company Executive Officers Association (hereinafter referred to as the Petitioner Association) and for a writ of Mandamus (in the caption wrongly referred to as a writ of prohibition) compelling the Commissioner to do all acts as are necessary to ensure that the workmen i.e. P. Gangodage, B.K.S.L.W. Gunawardana, K. Gunes<sup>u</sup>era and M.S. Sunil are continued in the employment of the Pure Beverages Company Limited who is the 2<sup>nd</sup> Respondent to this application (hereinafter referred to as the Respondent Company).

The facts relating to this application briefly are as follows. The petitioner Association is a Trade Union registered under the Trade Unions Ordinance. The Petitioner Association has as its members persons who are officers of the executive grade employed by the Respondent Company which is incorporated under the Company Law of Sri Lanka and has its registered office and principal place of business at the address referred to in the petition. The Respondent Company produces Coca Cola, Fanta and Sprite drinks on a franchise from the Coca Cola Export Corporation of U.S.A. It also produces Lion Brand drinks. The said company has two factories, one at Biyagama employing about 700 workmen and another at Kaduwela employing about 370 workmen. The Respondent Company in November 1996 announced that the Kaduwela factory is to be closed. Many reasons were given by the Respondent Company for the need to close down the Kaduwela factory on the basis that it was sustaining financial losses. However the Petitioner Association which had members of the executive grade and two other trade unions which had members of the non executive grades in the employment of the Respondent Company protested strongly against the threatened closure of the Kaduwela factory.

The Petitioner Association therefore requested the intervention of the Minister of Labour to effect a settlement.

Further the said association made a request for arbitration under the Industrial Disputes Act in the event of the Respondent Company not agreeing to a settlement. However Petitioner Association did not receive any reply. Thereafter the Petitioner Association came to know from the other two trade unions that an inquiry was taking place before Mr. W.J.L.U. Wijeyaweera, Deputy Commissioner of Labour, in the Termination of Employment Unit of the Labour Department, regarding an application by the Respondent Company to terminate the employment of the employees at the Kaduwela factory. The Petitioner Association also learnt that some members of the said association were named as persons whose employment was to be so terminated. According to the Petitioner Association the information regard to the said inquiry before the Deputy Commissioner of Labour reached the said association unofficially through the other two unions, as there was no intimation by the Commissioner or his subordinates. It was then that the affected members of the Petitioner Association received letters dated 07.01.1997 from the Respondent Company mentioning about the said inquiry fixed for 08.01.1997 and that they could participate if so desired at the inquiry. The copy of the said letter sent to P. Gangodage has been marked P8. Thereafter the then treasurer of the Petitioner Association Mr. W.H.E. Rodrigo and some of the affected members of the said association namely Y.P. Jayaratne, P. Gangodage and M.S. Sunil went before the said Deputy Commissioner of Labour and explained to him that they could not participate at the inquiry at that stage because the lawyers of the Petitioner Association had to be consulted. Hence the Petitioner Association sent the letter dated 23.01.1997 to Mr. W.J.L.U. Wejeyaweera Deputy Commissioner of Labour which has been marked P9. The contents of the said letter reads as follows:-

"We refer to the inquiry now proceeding regarding the application for permission to terminate the employment of about 350 employees.

Five of the employees in respect of whom such permission is being sought are members of our Association, However,

neither our Association nor the said employees were informed of this inquiry. The names of the said five employees are as follows:-

P. Gangodage

Y.P. Jayaratne

B.K.S.L.W. Gunewardena

K. Gunsekera

M.S. Sunil

It was only after the inquiry had been conducted for several days that the said members were informed. Our Association has not been officially informed up to date.

Our representatives then appeared before you and informed you that our lawyers would have to be consulted .

Having obtained the advice of our lawyers, we wish to state as follows:-

1. Our Association has, by its letter of 4<sup>th</sup> November 1996, requested the Honourable Minister of Labour to refer the matter for Arbitration. (A copy of the letter is annexed, for your information). In the circumstances, our Association has to await the decision of Honourable Minister, as to whether the matter would be referred for Arbitration.
2. The Company has acted mala fide, in not informing the said members and our Association of the Company's application and this inquiry. In these circumstances, our Association cannot be expected to participate in the present inquiry.
3. The present inquiry has proceeded for several dates. The company's witness has given evidence in chief, and is under cross-examination by the representative of another Trade Union. All this has happened in the absence of our Association, and our said five members. It is therefore not

possible for our Association and the said five members to join the proceedings at this stage.

The said five members are executives. Executives are in a much worse plight, as compared to other employees, when it comes to seeking new employment. Thus, executives must be treated separately, when it comes to examining questions pertaining to termination of employment.

For these reasons, our Association respectfully submits that the question of the said five members should not be taken up in this inquiry.

*We await your kind reply."*

Since there was no reply to the said letter a reminder was sent on 30.04.1997 (Vide P10) but there was no reply. The Petitioner Association thereafter had assumed that the request made in the letters sent to the Deputy Commissioner of Labour was acceded or that it was receiving attention. Hence the Petitioner Association had not participated in the said inquiry but the said inquiry had continued with the participation of the other two unions.

On 30.09.1997 the Petitioner Association, had come to know from the other two unions that the Commissioner had approved the termination of the employment of all persons named including the said members of the Petitioner Association. Further there had been no intimation to the Petitioner Association or to its affected members from the Commissioner or his subordinates. Hence the Petitioner Association sent the letter dated 30.09.1997 to the Commissioner and this letter has been marked P11. The said letter among other things stated as follows. "We are shocked to learn that you have decided to approve the termination of employment of our members too. We find that the names of five of our members are included in your decision. They are P. Gangodage, B.K.S.L.W. Gunewardena, K. Gunasekera, M.S. Sunil and Mrs. S.R.S.W. Mahanamahewa. We have not received a copy of your decision. Please let us have

a copy of the decision. We respectfully call upon you to take immediate steps to rectify the decision, and to arrange to have our matter referred to arbitration. Also, be good enough to instruct the company to refrain from terminating the employment of our members, pending your action on this."

Meanwhile the Respondent Company terminated the employment of four of the said members of the Petitioner Association. However the employment of Mrs. S.R.S.W. Mahanamahewa was not terminated and it is made to understand that the Respondent Company intends to retain her services. The said ~~VP~~ Jayaratne (referred in P9) has several months ago accepted the voluntary Retirement Scheme of the Respondent Company and resigned from his employment. The other four members of the Petitioner Association whose services were terminated are P. Gangodage, B.K.S.L.W. Gunawardana, K. Gunasekara and M.S. Sunil. Their letters of termination of employment have been marked P12 (a) to P12 (d). The Petitioner Association has marked the decision of the Commissioner dated 24.09.1997 as P13 and the report of the said W.J.L.U. Wijeyaweera Deputy Commissioner of Labour as P14. According to P14 it would appear that said Deputy Commissioner has not recommended the approval of the termination of the employment of the said 5 members of the Petitioner Association. Therefore the Petitioner Association has sent the letter dated 06.10.1997 to the Commissioner which has been marked P15. The said letter quoted the relevant passages from the report of the Deputy Commissioner which recommended against the termination of the services of the affected members of the Petitioner Association and the need for a fresh inquiry. Further the said letter of the Petitioner Association demanded the Commissioner to take immediate steps to issue an amended decision in respect of the five names referred therein deleted. It also demanded the Commissioner to direct the Respondent Company to treat the said four persons as being in continued employment. However there has been no response to the said letter from the Commissioner. Thereafter the office bearers of the Petitioner Association with two of the affected

members met the Commissioner on 08.10.1997 and reiterated the request made in the letter marked P15. However the Commissioner did not acceded to their request. Hence the Petitioner Association has instructed its Attorney at Law to send the letter dated 16.10.1997 to the Commissioner which has been marked P16, demanding that the request made in the letter dated 06.10.1997 (P15) be acceded. There has been no response to the said letter either.

In these circumstances the Petitioners Association stated that the said decision of the Commissioner dated 24.09.1997 approving the termination of the employment of the five members of the said association is ultra vires and has been done in violation of the principles of nature justice. Further the said association complained that the said decision of the Commissioner is unreasonable, arbitrary, capricious and in breach of the legitimate expectations of the said association and the five members that there would be an arbitration or a separate inquiry by the Commissioner. Hence the Petitioner Association as referred to above, has prayed for a Writ of Certiorari to quash that portion of the decision of the Commissioner dated 24.09.1997 (P13) which approved the termination of the employment of P. Ganagodage, B.K.S.L.W. Gunawardana, K. Gunasekera and M.S. Sunil and a Writ of Mandamus to compel the Commissioner to do all acts as are necessary to ensure that the said four members of the Petitioner Association (referred to above) to be continued in the employment of the Respondent Company.

At the hearing of this application it was submitted by learned Counsel for the Petitioner that the Commissioner had directed the Deputy Commissioner W.J.L.U. Wijeyaweera to conduct an inquiry into the application of the Respondent Company seeking permission in terms of the Section 2(1) of the Termination of Employment of Workmen (special provisions) Act. The said Deputy Commissioner conducted an inquiry and made his report marked P14 recommending that permission be granted to terminate the employment of number of employees.

However the said report specifically recommended that permission should not be granted to the Respondent Company to terminate the employment of the five (now four) members of the Petitioner Association namely P. Gandodage, B.K.S.L.W. Gunewardana, K. Gunesekara and M.S. Sunil. The Deputy Commissioner has given his reasons for making this recommendation to exclude the said members of the Petitioner Association. It was the contention of the Counsel for the Petitioner that the Deputy Commissioner was conscious of and has acted in accordance with the requirement of the principles of natural justice as set out in Section 17 of the Termination of Employment of Workmen Act. Hence it is important to keep in mind the vital provisions contained in Section 17 of the said act. This section provides as follows:-

“The proceedings at any inquiry held by the Commissioner for the purposes of this act may be conducted by the Commissioner in any manner, not inconsistent with the principles of natural justice, which to the Commissioner may seem best adapted to elicit proof or information concerning matters that arise at such inquiry.”

In my view Section 17 of the said Act has laid down in very clear terms that any inquiry conducted by the Commissioner or by any officer to whom such powers of functions are delegated (vide Sections 11(2) & 12(1) (e) of the said Act) should confirm to the principles of natural justice. In this case there is no doubt that there has been a violation of the principles of natural justice. It would appear from the available material that the said inquiry had been conducted without giving due and sufficient notice to the Petitioner Association and its affected members. As seen from the report of the Deputy Commissioner the inquiry had commenced on 19.12.1996 and continued on 26.12.1996, 07.01.1997, 08.01.1997 and thereafter continued for several dates until the inquiry was concluded on 16.07.1997 (vide P14). It was on 07.01.1997 that the affected members were officially informed by the Respondent Company requesting them to participate on 08.01.1997 if they so desired (vide PB). Therefore

it would appear that the Respondent Company had attempted to keep the Petitioner Association and the affected members out of the said inquiry, perhaps for reasons best known to the Respondent Company. However the Petitioner Association and the affected members complained that they were kept out since they were more knowledgeable than the employees of the other two Unions on the question of justification or otherwise of the closure of the Kaduwela factory. It is well to remember that principles of natural justice not only demands that the affected party or parties should be heard but that they should be given a reasonable opportunity to present their case. Further the facility of presenting the case of an affected party to be effective and meaningful such an inquiry should be preceded by sufficient notice. (Vide *The University of Ceylon vs. Fernando*<sup>(1)</sup>) The Respondent Company and the Commissioner have grievously failed to give sufficient notice to the Petitioner Association and to the affected members. No one has the right or justification to treat these inquiries lightly for the reason that ultimately a decision at such an inquiry would involve the termination of the employment of several workmen. In other words at the end of such an inquiry there is the prospect of denying a man of his bread and butter. Therefore the Deputy Commissioner of Labour was correct when he came to the following conclusion.

“On receipt of the application the company was requested to inform all the workers and relevant unions, about the inquiry and the commencing date. The company has failed to inform the Pure Beverages Company Executive Officers Association. They have come to know of this inquiry only after the Examination in chief of the company witness was over. And they demanded that they should be heard separately. Therefore I do not recommend the approval of the termination of the services of the 5 workers, who are members of the Pure Beverages Company Executive Association namely:

- (1) P. Ganegoda
- (2) Y.P.R. Jayaratne

- (3) B.K.S.L.W. Gunawardena
- (4) K. Gunasekara
- (5) M.S. Sunil

If the company so desire they can make a fresh application to the Commissioner of Labour.”

In view of the above finding of the Deputy Commissioner, I am unable to accept the submission made by learned President's Counsel on behalf of the Respondent Company that the Petitioner Association and the affected members were provided with ample opportunity to participate at the inquiry conducted by the Deputy Commissioner. The best person who could speak on the matter, the Deputy Commissioner has stated in very clear terms that he thinks otherwise as seen from the above paragraph of his report P14. Hence he has very specifically not recommended the termination of the service of the five (four in this application) executives who are members of the Petitioner Association and has suggested a fresh inquiry by stating as follows. “If the Company so desire they can make a fresh application to the Commissioner of Labour.”

It is appropriate to consider here the justification of the request made by the Petitioner Association on behalf of the affected members that they be given a separate inquiry. The Petitioner Association has gone so far as to demand arbitration proceedings. However having regard to the fact that the affected persons are executives and the number involved being so small, i.e. four or five, it is fair and reasonable that they should be given at least a separate inquiry for the reason that the executives should not be treated on the same footing as the labours or the clerks. In my view there should have been a separate inquiry for many reasons. Firstly as complained by the Petitioner Association in their letter dated 23.01.1997 to the Deputy Commissioner (vide P9) “executives are in a much worse plight, as compared to other employees, when it comes to seeking new employment.” Secondly one should never forget the fact that compensation can never be a proper substitute for employment.

In the present day context it is only a necessary evil. Therefore every effort must be made to keep the workmen firmly in their jobs unless the termination of their employment is a grave necessity. Therefore if there was a separate inquiry for the executives, it may be that since four or five executives were involved, a reasonable effort could have been made at the instance of the Commissioner to retain their employment at least in the Biyagama Factory, as was done in the case of Mrs. S.R.S.W. Mahanamahewa. If this fact of keeping Mrs. S.R.S.W. Mahanamahewa in employment of the Respondent Company is Correct, then it would amount to an act of discrimination by the Respondent Company with regard to the other affected executives. Further a separate inquiry would have also enhanced the prospect of calculating a higher scale of compensation payable to the affected members of the Petitioner Association who are executives. Surely it is not reasonable to treat a labourer and an executive on the same scale when calculating compensation payable in order to terminate the services of an executive. Therefore I am unable to accept the submission of learned President's Counsel of the Respondent Company that the Commissioner has correctly determined that no distinction should be drawn between the executives and the workers and further that the Commissioner has decided that compensation should be calculated for everybody on the same basis after taking into consideration the period of service and the salary drawn.

It was also submitted by the learned Counsel for the Petitioner that there was a serious contradiction between the recommendations of the Deputy Commissioner (P14) and the decision of the Commissioner dated 24.09.1997 (P3). It would appear that after the recommendations of the Deputy Commissioner, the Commissioner has set out his findings in an internal document dated 18.09.1997 which has been produced marked X8, annexed to the further affidavit filed by P. Gangodage one of the affected members of the Petitioner Association. The findings of the Commissioner referred to in X8, deal only with the reasons for the closure of the Kaduwela bottling plant

(factory) of the Respondent Company. The penultimate paragraph mentions that the Respondent Company has acted mala fide with regard to one aspect of the closure and then in the last paragraph the Commissioner states as follows.

“Having regard to the aforesaid reasoning and the closure of the Kaduwela Bottling plant, I approve the recommendations made by the Deputy Commissioner of Labour (Industrial Relations). The parties be informed accordingly.”

Therefore as submitted by Counsel for the Petitioner there is not even an indication that the Commissioner intended to go contrary to the recommendations of the Deputy Commissioner regarding the five (now four) members of the Petitioner Association. However the Commissioner thereafter made his decision dated 24.09.1997 (P13) granting permission to the Respondent Company not only to terminate the services of the employees specified by the Deputy Commissioner but also the five (now four) members of the Petitioner Association e.i. P. Gangodage, B.K.S.L.W.L. Gunawardana, K. Gunasekera and M.S. Sunil. The said decision of the Commissioner is arbitrary and quite contrary to the recommendations of the Deputy Commissioner. Further the Commissioner has not given any reason for so acting contrary to the recommendations of the Deputy Commissioner which he has approved on 18.09.1997. Therefore this part of the decision of the Commissioner cannot be allowed to stand, since it is a per incuriam order or decision. Besides there is nothing in the said decision of the Commissioner (P13) to show that the Commissioner was even aware that he was acting contrary to the recommendations of the Deputy Commissioner. Even if one were to argue that the Commissioner has the power to do so, since Section 2 (1) of the Termination of Employment of Workmen Act empowers only the Commissioner to grant approval to terminate the scheduled employment of any workmen, his decision dated 24.09.1997 relating to the affected members of the Petitioner Association has to be necessarily struck down for there has been a failure of natural

justice in contravention of Section 17 of the Termination of Employment of Workmen Act. Further the argument of the President's Counsel for the Respondent Company that some executives have accepted the compensation given by the Respondent Company does not change the character of the inquiry, where such an inquiry has been conducted in violation of natural justice. Besides, in today's context workmen are forced to accept compensation packages out of necessity and not because the compensation package was reasonable.

If that be the case, the next matter to be considered here is whether such partial quashing of the Commissioner's decision by Certiorari is possible in law. In other words whether it is legal and proper to quash part of the decision of the Commissioner dated 24.09.1997 which is bad in law. On this matter learned Counsel for the Petitioner cited the case of *Regina Vs. Secretary of State for Transport Ex parte Greater London Council*<sup>(2)</sup> which held that, in an appropriate case, Certiorari could go to quash an unlawful part of an administrative decision having effect in public law while leaving the remainder valid. Further Wade and Forsyth Administrative Law Seventh Edition Page 329 states as follows. "An administrative Act may be partially good and partially bad. It often happens that a tribunal or authority makes a proper order but adds some direction or condition which is beyond its powers. If the bad can be cleanly severed from the good, the Court will quash the bad part only and leave the good standing." Vide also *Agricultural, Horticultural and Forestry Industry Training Board Vs. Aylesbury Mushrooms Ltd.*<sup>(3)</sup> Therefore in relation to the decision of the Commissioner dated 24.09.1997 it is clearly possible to sever the good from the bad. Hence the decision of the Commissioner which had been wrongly made, so as to apply to the four affected members of the Petitioner Association could be quashed allowing the decision made by the Commissioner in respect of the other employees belonging to the other two trade unions intact.

There is one other matter to be considered in this judgment. This arises from the submission of learned President's Counsel

for the Respondent Company that the decision of the Commissioner is final and conclusive having regard to Section 2(2) (f) of the Termination of Employment of Workmen Act. Learned Counsel contended that the legislature has left the discretion of the Commissioner outside the jurisdiction of the Courts. Section 2(2) (f) of the said act provides as follows.

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

Above submission of Counsel is based on the ouster or the preclusive clause provided in Section 2(2) (f) referred to above. However it must be stated here that a decision made by the Commissioner without any regard to the available material and in violation of natural justice is a decision bad in law. Hence such a decision is in law a nullity and cannot stand. Therefore it is open to a court to declare such a wrong decision as void. In the case of *Anismintc Ltd. Vs. Foreign Compensation Commission*<sup>(4)</sup> majority of judges held that the wrong decision of the commission on what they regarded as a "jurisdictional fact" vitiated the decision since the tribunal had exceeded its jurisdiction by this wrong decision. The ouster clause, therefore, was not applicable as there was no true determination by the tribunal as required by the statute." In the same case at page 170 Lord Rid stated as follows. "If you seek to show that a determination is a nullity, you are not questioning the purported determination - you are maintaining that it does not exist as a determination. It is one thing to question a determination which does exist: it is quite another thing to say that there is nothing to be questioned." Also vide the case of *Abeywickrama vs. Pathirana and others*<sup>(5)</sup> Therefore this argument of learned President's Counsel has to fail.

For the aforesaid reasons, I hold that, that portion of the decision of the Commissioner dated 24.09.1997 approving the termination of the employment of P. Gangodage, B.K.S.L.W.

Gunawardana, K. Gunasekera and M.S. Sunil is bad in law. Accordingly, I make order granting the Writ of Certiorari as prayed for by the Petitioner quashing the said part or portion of the decision as contained in P13. Further I grant a Writ of Mandamus against the Commissioner and direct him to do all acts as are necessary to ensure that the said four members of the Petitioner Association are continued in the employment of the Respondent Company. Application is allowed with costs.

*Applicatton allowed.*