
**WANASINGHE
VS.
UNIVERSITY OF PERADENIYA AND OTHERS**

COURT OF APPEAL

SRIPAVAN, J.

BASNAYAKE, J.

CA 1419/2004.

JUNE 2, 28, 2005.

JULY 18, 27, 2005.

Writ of Mandamus – Non-confirmation of appointment to a post – Conduct of the respondents – Mala Fides ?

The petitioner, President of the Citizens Movement for Good Governance filed an application to obtain redress for the 6th respondent and prayed for two reliefs–

- (1) to confirm the 6th respondent with effect from 31.12.2002 and
- (2) promote him to the post of Senior Professor with effect at least from 31.12.2002.

It was contended by the petitioner that the 6th respondent becomes eligible for confirmation and promotion on or after 31.12.2002 but the respondents had not taken any steps to confirm/promote the 6th respondent.

HELD:

- (1) It is evident that the 2nd respondent did not wish the 6th respondent to be confirmed in his post leave alone promote him as a Senior professor.
- (2) The only way to suspend the confirmation/promotion was to have some inquiry pending. Even after the conclusion of a proper inquiry, and explanations were called for and no inquiries began, the allegations hung in the air.
- (3) The allegations made against the 6th respondent, did not appear to have any basis and were never proved.

Per Eric Basnayake, J. :

“The conduct of the 2nd respondent in unnecessarily prolonging the confirmation and that the non-promotion is due to the personal animosity is clearly perceivable and the 2nd respondent is personally responsible in delaying the legitimate dues of the 6th respondent.”

APPLICATION for a Writ of Mandamus.

Elmore Perera with Rasika Dissanayake for petitioners.

Yuresha de Silva, State Counsel for 1st to 4th and 7th respondent.

S. Jayawardane for 5th respondent.

6th respondent in person.

Cur.adv. vult.

December 7, 2005.

ERIC BASNAYAKE, J.

This application was filed by the petitioners to obtain redress for the 6th respondent. The two main reliefs prayed for in the petition are :-

- (1) Prayer (d) to confirm the 6th respondent with effect from 31.12.2002 ; and
- (2) Prayer (c) to promote him to the post of Senior Professor with effect from at the very least, 31.12.2002.

The petitioner's state that the 6th respondent is a highly qualified engineer who has attained the following qualifications namely :-

- * B.Sc. Engineering (University of Ceylon, Katubedde Campus)
- * M.Sc. (University of London)
- * Ph. D. in Electrical Engineering (Carnegie Mellon University of Pittsburgh)
- * D.Sc. Engineering (University of London)
- * Fellow of the Institute of Electrical and Electronics Engineering.

The 6th respondent had been holding the following positions namely :-

- * Asst. Professor of Electrical and Computer Engineering – Drexel University – 1984.
- * Same in Harvey Mudd College in Clare – mount – 1987
- * Professor in Harvey Mudd in 1992.
- * Professor at I. F. S., Open University of Sri Lanka and University of Ruhuna in 1997.
- * University of Peradeniya – 31.12.1999.

By letter dated 17.12.1999 (P6) the 6th respondent was appointed as professor of Electrical and Electronic Engineering of the Peradeniya University (1st Respondent). The 6th respondent assumed his post on 31.12.1999. This appointment was subject to a probation period of 3 years in terms of section 72 of the Universities Act as amended. He was placed at this post with five increments out of a maximum of 8 (Rs. 23,600 - 8 x 550 - Rs. 28,000) and was placed at Rs. 26,350 P. M.

In terms of the Circular No. 723 of the University Grants Commission (P7), a Professor, on completion of 8 years of service, is eligible to become a Senior Professor. The learned counsel for the 5th respondent (University Grants Commission) in his written submissions admits that 8 years need not be in a single Higher Educational Institution.

The 6th respondent had been working as Professor since 1992. If one considers the 8 year period as professor, he would be completing it in the year 2000. In the normal course, one would have to work for five years to get five annual increments. By giving 5 increments to the 6th respondent, the 6th respondent had been placed equally with one who had worked for five years. By giving credit of 5 years, the 6th respondent would have completed 8 years on 31.12.2002 in the 1st respondent University itself. He would be completing his period of probation on 31.12.2002. By applying the above standards the 6th respondent becomes eligible for confirmation and promotion as Senior Professor on or after 31.12.2002.

On 10.12.2002 the 6th respondent had written to the 1st Respondent University (P 10) requesting it to consider him for promotion to the post of Senior Professor. Prior to this, an inquiry was initiated and Mr. Harischandra Dunuwille, Attorney-at-Law was appointed on 21.07.2002

(2R 1) to inquire in to the conduct of the 6th respondent. Mr. Dunuwille, after inquiry, made his order on 16.11.2002 (P 9) exonerating the 6th respondent of the charges. Mr. Dunuwille states that "the charge as formulated cannot be sustained as against Prof. Hoole as he had made no attempt to change his own entry. Mr. Dunuwille's order was conveyed to the 6th respondent 7 months after on 17.06.2003 (P 12).

It was clear that the 1st respondent was obliged to consider the confirmation and the promotion of the 6th respondent any time after 31.12.2002.

The U.S.A.B.

As the 1st respondent delayed the confirmation and the promotion the 6th respondent made an appeal to the University Services Appeals Board. In answering to this petition of appeal the 2nd respondent stated on 20.06.2003 as follows (6R 19) :-

(9) "Regarding his confirmation the Council at its 304th meeting held on 15.06.2002 decided not to consider his confirmation until the findings of the inquiry are reported to the Council.

(10) The findings of the inquiry were placed before the Council as stated in paragraph 5 of my answer, **action has been taken to consider his confirmation and as well as his promotion to the grade of Senior Professor. The selection committee has already been nominated. Hence his confirmation and promotion would be considered in due course** In view of the consideration I would respectfully request that the petitioner's application be dismissed" (emphasis added).

On 24.02.2004 the Attorney-at-Law for the 1st, 2nd and 3rd respondents stated in the answer filed before the U.S.A.B. as follows :-

(b) The question of confirming the Appellant in his present post and whether he is qualified to be promoted to the rank of Senior Professor would depend on a number of factors. These are as follows :-

(1) UGC Circular No. 3/2002 clearly spells out that a Professor who has completed 8 years of service as a Professor may apply for the post of Senior Professor ;

- (2) The Appellant was recruited to the post of Professor by the University of Peradeniya by advertisement and in terms of the said Circular 3/2002 ; he had been placed on 5 steps on the salary scale 23,600-8x550-28,000. Thus according to the said circular, the Appellant has automatically earned 5 years of the required 8 years of service to qualify for the post of Senior Professor.
- (3) The balance period required to be completed by the Appellant is 3 years, which are the 3 years of probation stipulated by clause 2 of the letter of appointment of the Appellant dated 17.12.1999.
- (4) Therefore if the said probationary period had been successfully completed without a blemish on the Appellant, he should have been promoted as Senior Professor by December 2003 (three years from 1999 ends in December, 2002).
- (5) However, the Council of the University at its meeting on 20.07.2002 decided not to confirm the Appellant in his post, on account of several acts of misconduct committed by the Appellant during the relevant period and as inquiries into these acts of misconduct had not been completed ;
- (6)

It is important to note however, that there were no inquiries pending by 24.02.2004 against the 6th respondent. The 2nd respondent admitted so on 20.06.2003 in 6R 19 (quoted above). However, it is interesting to note that on 07.06.2004 an explanation was called to be tendered before 20.06.2004, from the 6th respondent by the 2nd respondent (P 15), failure of which would result in taking disciplinary action. A reply to this was sent on 01.10.2004 (6 R 11). This letter contains the heading "Charge Sheet", No action was taken up to 09.12.2004. Again on 09.12.2004 another letter (6R 28) similar to the one dated 07.06.2004 was sent to the 6th respondent requiring him to furnish an explanation prior to 31.12.2004. A reply to this was sent on 29.12.2004 (6R 29). Up to date no action has been taken against the 6th respondent. It may be that the 2nd respondent was satisfied with the explanation offered.

The U.S.A.B. on 11.01.2005 (6R 24) made their order as follows :- "... **As for his confirmation it is my view that**

once the Appellant had been exonerated from the allegations that were made against him and the probationary period had been completed without blemish, he is entitled to be confirmed in his post ... I am of the view that once he was exonerated from all the allegations against him he is entitled to confirmation in the post as a person with an unblemished record. Accordingly I direct that the Appellant be confirmed in the post with effect from 31.12.1999” (emphasis added).

On 03.11.2005 the State Attorney had filed some documents, declaring that the 6th respondent was confirmed in his post as Professor at a Council meeting held on 06.08.2005. Anyhow this was not conveyed to the 6th respondent until 9th November, 2005.

The conduct of the 2nd respondent

This case was heard with regard to the confirmation and promotion of the 6th respondent in the University of Peradeniya. The petitioners sought a Writ of Mandamus against the respondents. Arguments on this case were heard on 02.06.2005 and the case was fixed for written submissions for 28.06.2005 and thereafter on 18.07.2005. Anyhow by 11.08.2005 written submissions were filed only on behalf of the Petitioners, 5th and the 6th respondents. No written submissions were filed on behalf of 1 to 4 and 7th respondents. On 11.08.2005, this case was finally fixed for 02.09.2005 to enable the 7th respondent to file written submissions. One to four respondents too have not filed written submissions yet. On 02.09.2005 when this case was called in open court, 1 to 4 respondents were represented. No written submissions were filed and hence the case was fixed for judgment for 31.10.2005.

Apparently on 02.09.2005 the learned State Counsel had informed court that the 6th respondent had been confirmed and also that steps were taken to promote him as Senior professor (this appears from a motion filed by the 6th respondent on 24.10.2005). Although the learned State Counsel informed court with regard to the confirmation and promotion, the 6th respondent filed an affidavit to the effect that he was informed of the confirmation only on 09.11.2005 (the confirmation does not mention an effective date). In view of the motion filed and the oral submissions made

by the learned counsel a final opportunity was given to the learned State Counsel to inform court in a definite manner as to the confirmation and the promotion of the 6th respondent. No such document was furnished. The only document furnished was with regard to the confirmation without an effective date.

Mala Fide

That the conduct of the 2nd respondent in unnecessarily prolonging the confirmation and the promotion is due to personal animosity is clearly perceivable. The animosity could be seen when one examines the contents and the tone of some of these documents (for eg., 6R1). It is evident that the 2nd respondent did not wish the 6th respondent to be confirmed in his post leave alone promote him as a Senior Professor. The only way to suspend the confirmation and the promotion was to have some inquiry pending. Even after the conclusion of a proper inquiry, explanations were called for (P 15 and 6R 28) and no inquiries begun. The allegations hung in the air.

The following are few examples that would show the *mala fides* :

- * The intimation of the order exonerating the 6th respondent was delayed by 7 months ;
- * Explanations were called for (in the form of charge sheets) one after another, regarding the same events, without taking any steps to hold an inquiry (P 15 and 6R28) ;
- * The order made by the U.S.A.B. was not implemented from January, 2005 ;
- * Although the Council adopted minute in August, 2005 to confirm the 6th respondent, this fact was not disclosed to the 6th respondent for a period of nearly 3 months.

The warnings given in the form of threats are not befitting people of the caliber of Vice Chancellors and Professors. The 6th respondent appears to be a highly qualified individual. The 2nd respondent himself had acknowledged this, where he states on 20.06.2003 (6R 19) that "I admit that he holds a higher doctorate and he was appointed to the post of Professor of Electrical and Electronics Engineering of the University, placed on a salary point 5 steps higher than the salary scale for a professor". The 6th respondent going before the U.S.A.B., Parliamentary Ombudsman and challenging the reappointment of the 2nd respondent appeared to be the reason for the 2nd respondent to adopt a hostile attitude towards the 6th respondent. Anyhow the allegations made against the 6th respondent did not appear to have any basis and were never proved. Therefore I am of the view that the 2nd respondent was personally responsible in delaying the legitimate dues of the 6th respondent namely his confirmation and the promotion. Both these were held up due to the baseless allegations. These allegations were so hopeless that after the court pronounced a date to deliver its judgment, attempts were made to bring about a settlement. Through out this case I have seen the dilatory tactics adopted by the 2nd respondent in delaying the confirmation of the 6th respondent. There is no way that 6th respondent gets his promotion as Senior professor without first getting his confirmation. At the end the court was informed of the confirmation again without an effective date. Therefore I make order to issue a writ of Mandamus on the 1st to 4th respondents to confirm the 6th respondent with effect from 31.12.1999 on which date the 6th respondent assumed office. I also direct to issue a writ of Mandamus on 1 to 4th respondents to promote the 6th respondent to the post of Senior Professor with effect from 31.12.2002 within one month from today. I also award costs payable to the 6th respondent by the 1st respondent in a sum of Rs. 50,000.

SRIPAVAN J. – I agree.

Application allowed.