

PREMAWATHIE
v.
FOWZIE, MINISTER OF HEALTH
AND OTHERS

SUPREME COURT
FERNANDO, J.,
DHEERARATNE, J. AND
WIJETUNGA, J.
S.C. APPLICATION NO. 528/96
SEPTEMBER 25TH, 1996

Fundamental Rights – Article 12 (1) of the Constitution – Settlement proposed by parties – Duty of court to make just and equitable order notwithstanding such arrangement – Article 126 of the Constitution.

The petitioner who was a telephone operator in the Ministry of Health was interdicted on 14.10.94 and charged with several acts of misconduct. The inquiring officer exonerated her of all the serious charges. However, on 31.7.95 the Director General of Health Services held without adducing any reason, that all the charges had been proved and dismissed her from service. The Public Service Commission revoked the said decision and reinstated her in a demoted position as a labourer without back wages. After the judgment was reserved the respondents filed a motion agreeing to reinstate the petitioner as a telephone operator with effect from 9.10.96 with back wages from the date of interdiction.

Held:

1. Once the court grants leave to proceed, Article 126 imposes a duty to make an order which is just and equitable and so the court cannot merely give effect to a settlement proposed by the parties.
2. The petitioner is entitled to reinstatement with back wages as agreed but with increments for 1994, 1995 and 1996 in addition to costs.

APPLICATION for relief for infringement of fundamental rights.

Sanjeewa Jayawardena for petitioner.

K. Sripavan DSG with *S. Fernando*, SC for respondents.

October 23, 1996

FERNANDO, J.

Having joined the public service as a casual labourer in the Ministry of Health on 5.3.80, and having been made permanent on 1.10.85, the petitioner was appointed a telephone operator with effect from 15.6.91, subject to a 3-year probationary period. While serving in that capacity at the General Hospital, Colombo, she received a letter dated 29.6.92 issued by the Director of that Hospital, confirming her in that post with effect from 15.6.91. She was transferred to the Lady Ridgeway Children's Hospital on 17.9.93. She complains of the violation of her fundamental right under Article 12 (1) by reason of her demotion to the post of labourer, and transfer to the Leprosy Hospital, Hendala.

On 8.10.94, she was on duty for the night shift, which was from 4.00 p.m. that day till 8.00 a.m. on 9.10.94 – a period of sixteen hours, during which the practice was to have only one telephone operator. Just before midnight she received a call from someone who said he was calling from the Health Minister's residence: and a little later another call from Dr. Jeganathan, Deputy Director-General of Health Services. This was followed by a surprise visit at 1.15 a.m. by the 3rd respondent, a Deputy Director of the Hospital. It is unnecessary to refer to these events in more detail in view of the settlement which the parties suggested after judgment was reserved.

It is sufficient to say that on 14.10.94 the petitioner was interdicted on half-pay for allegedly sleeping whilst on duty on 8.10.94. She was then served with a charge-sheet dated 2.12.94 which alleged, in substance, that she was rude to the Minister of Health and to Dr. Jeganathan when they telephoned on 8.10.94; that she did not connect them, as requested, to ward 10; that she was sleeping whilst on duty during the shift; and that when Dr. Jeganathan asked to be connected to a ward close to ward 10 (if ward No. 10 could not be connected), the petitioner failed to connect him.

Although the petitioner became aware of it only after this application was filed, it now transpires that the inquiring officer exonerated her of all those charges except the last and of two purely consequential charges of defaulting in her duties and bringing the public service into disrepute. However, the 2nd respondent, the Director-General of Health

Services, by letter dated 31.7.95 told her that he had decided, in terms of section 15.1 of Chapter XLVIII of the Establishments Code, that all the charges had been proved. He neither told her of the inquiring officer's verdict, nor of his reasons, if any, for not agreeing with it. He added that according to her personal file her past service record was extremely unsatisfactory, and that she had not improved despite warnings, and dismissed her with effect from 14.10.94.

She appealed to the Public Service Commission (PSC). By letter dated 23.5.96, the 4th respondent informed her that the PSC had reinstated her in service, subject to a reduction in rank to her original post of labourer, and a transfer to the Leprosy Hospital at Hendala, without any back wages for the period of interdiction, the period when she was not in service being treated as leave without pay. The actual order of the PSC, or even the basis on which it was made, was never disclosed to her. It now transpires that the PSC had revoked the decision of the 2nd respondent and restored the findings of the inquiring officer. Learned counsel for the petitioner submitted that reduction in rank was a major punishment, appropriate only for serious misconduct as defined in the Establishments Code; that in any event it was grossly disproportionate to the petitioner's lapse, particularly considering the enormous loss of back wages; and that it was therefore unreasonable, arbitrary and capricious. He referred to a previous instance in which another telephone operator, had admittedly been dealt with far more leniently.

In his affidavit the 3rd respondent disputed the letter of confirmation issued to the petitioner, querying its signatures and its issue after just one year. He alleged that "multiple complaints" had been received of inefficiency and lack of courtesy on her part. The learned DSG tendered photocopies of several documents from the petitioner's personal file (which are now part of the record). From those we found that the petitioner's confirmation had been recommended and approved in June, 1992, upon her work, conduct, health and efficiency being assessed as satisfactory; that the file contained a copy of the letter of confirmation dated 29.6.92 produced by the petitioner; and that there were no documents recording particulars of any complaints made against her. It is not open to the respondents now to dispute her confirmation, after the lapse of five years. It is possible that the fact that she had already served a probationary period upon her appointment as a labourer was taken into account, but be that as

it may, her confirmation cannot be collaterally attacked in these proceedings.

We also found that by letter dated 21.2.94 the petitioner had been warned for inefficiency and told that if there was no improvement, steps would be taken to demote her. By letter dated 10.10.94 she was asked to show cause within three days why disciplinary action should not be taken against her for that (and the charges arising from the events of 8.10.94). By letter dated 11.10.94 she submitted her explanation on all those matters. Significantly, the charge-sheet did not include any allegation of inefficiency or failure to improve despite warnings. Despite this, the 2nd respondent's letter of 31.7.95 referred to her alleged failure to improve her efficiency in spite of warnings: a finding made without a charge and without an opportunity to defend herself.

After full argument on 25.9.96, judgment was reserved. On 7.10.96 counsel on both sides stated that they were negotiating a settlement. The respondents filed a motion dated 10.10.96 stating that:

"the petitioner has been reinstated to the post of telephone operator with effect from 9th October, 1996, in the General Hospital, Ragama, as mutually agreed upon between the parties . . . the petitioner is entitled to the payment of back wages from the date of her interdiction until the date of reinstatement in the Ragama Hospital".

A copy of a letter dated 9.10.96 sent to the petitioner was also tendered.

There is no doubt that the petitioner's fundamental right to the equal protection of the law has been infringed by the PSC by reason of an arbitrary, unreasonable and grossly disproportionate punishment: an enormous loss of back wages, continuing reduction in earnings for the rest of her working life, and a probable decrease in her pension benefits thereafter – all for a single lapse occurring half-way through a sixteen-hour duty shift. Although the ultimately operative decision was that of the PSC, the 2nd and the 3rd respondents had also been closely involved in an oppressive use, or misuse, of disciplinary powers and proceedings leading up to that infringement. There was no reason for keeping the petitioner under interdiction for more than three months

whilst that inquiry was pending. The terms of settlement do not adequately redress the wrong that has been done to her. Once this court grants leave to proceed, Article 126 imposes a duty to make an order which is just and equitable, and so we cannot merely give effect to a settlement proposed by the parties. In this case the facts were fully probed during the hearing and pointed out the course which justice and equity demanded. Being an equitable jurisdiction, the court cannot acquiesce in a compromise which disturbs its conscience.

Here the victim has been deprived of her means of livelihood for a long period, with resulting anxiety, pain of mind, and suffering to herself and her family. The arrears of salary due to her are likely to amount to about Rs. 50,000 (on which interest would be considerable), and she has had to fight an injustice whilst being deprived of her salary.

I must add that there has been no suggestion that the 1st, 4th and 5th respondents have been concerned in the infringement of the petitioner's fundamental right.

We make order for re-instatement in terms of the motion dated 10.10.96, with back wages (on the basis that the petitioner had been duly confirmed on 29.6.92 with effect from 15.6.91), and with increments for 1994, 1995 and 1996. The State is directed to pay her a sum of Rs. 25,000 as compensation and costs.

DHEERARATNE, J. – I agree.

WIJETUNGA, J. – I agree.

Relief granted.