

SURATH WICKREMASINGHE
v
NETHISINGHE AND TWO OTHERS

COURT OF APPEAL
SALEEM MARSOOF, J. PC (P/CA)
SRISKANDARAJA, J.
CA 659/2003
AUGUST 5, 2004
SEPTEMBER 14, 2004

Termination of Employment of Workmen (Special Provisions) Act (TEU) 45 of 1971 amended by Act No. 4 of 1976 – sections 2, 5 and 6 – Has the Commissioner power to award compensation in lieu of or without reinstatement except when there is a closure.

The 1st respondent complained to the Commissioner of Labour alleging that the decision of the petitioner to send her on no pay leave for 3 months was tantamount to a violation of her contract of service and was contrary to law. After inquiry the Commissioner determined that the petitioner has terminated the employment of the 1st respondent without obtaining her prior consent or prior written approval of the Commissioner of Labour in contravention of section 2 of the TEU and in view of the fact that the nature of the employment of the 1st respondent as a private secretary was of a personal nature, without ordering reinstatement, instead awarded compensation.

Held:

In terms of Section 6 of the TEU Act in the circumstances, the Commissioner of Labour has only the power to order the employer to continue to employ the workman and he has no power to award compensation in lieu of making an order compelling the employer to continue to employ the workman.

Per Saleem Marsoof, J. (PC)

"It must be desirable to confer such a discretionary power to the Commissioner General of Labour to deal with the eventualities such as those presented in the instant case".

APPLICATION for a *Writ of Certiorari***Case referred to:**

Eksath Kamkaru Samithiya v Commissioner of Labour – 2001 2 Sri LR 137.

Ranjan Gunaratne for petitioners.

Murshid Maharooof for 1st respondent.

Yuresha de Silva for 2nd respondent.

Cur.adv.vult.

October 7, 2004.

SALEEM MARSOOF, J., P/C.A.

The Respondent-Petitioner (hereinafter referred to as 'the Petitioner'), is a well-known architectural firm carrying on business under the name and style of 'Surath Wickremasinghe Associates'. It has filed this application seeking a writ of *certiorari* to quash the order made by the 2nd Respondent, Commissioner General of Labour dated 30th December 2002 (P6) awarding the 1st Applicant-Respondent (hereinafter referred to as the 1st Respondent) compensation computed at the rate of 3 months salary for every year of service in terms of Section 6 of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971, as subsequently amended. The said order was a sequel to an application dated 26th September 2001 (P3) made by the 1st Respondent seeking relief against the decision of the Petitioner to send the 1st Respondent on no pay leave for 3 months with effect from 30th September 2001. The said decision was communicated to the 1st Respondent by the Petitioner's letter dated 3rd September 2001 (P2) in which, after thanking the 1st Respondent for giving her very best towards the

progress of the firm, it is stated that "due to cut backs on capital expenditure" and "the prevailing economic crisis in the country" the Petitioner is compelled to "downsize" the staff.

The letter continues as follows:

The Management has closely considered the options available and have decided to grant you three months no-pay leave with effect from 30th September 2001 and any payments due to you will be paid before this date.

"Meanwhile, if you need a letter of recommendation or a certificate confirming your employment with us, with a view to obtaining alternative employment, the undersigned would be pleased to provide you with same.

"In the event the political and financial situation in the country gets better and we get adequate work you will be recalled and the terms of your employment will be as per the Agreement.

"We trust you will understand our position and bear with us in this regard.

With warm regards,

Yours sincerely,

Sgd/-

Deshabandu Surath Wickremasinghe
Chairman"

The 1st Respondent sought the assistance of the 2nd Respondent, Commissioner of Labour by her letter dated 26th September 2001 (P3) alleging that the decision of the petitioner to send her on no pay leave for 3 months tantamounted to a violation of her contract of service and was contrary to law. The 2nd Respondent caused an inquiry to be held by an Assistant Commissioner of Labour, the proceedings of which have been produced marked P5 and in the course of which the testimony of the 1st Respondent was also recorded. The order of the 2nd Respondent dated 30th December 2002(P6) was made after the

conclusion of the said inquiry. The 2nd Respondent, Commissioner of Labour has determined that the Petitioner had terminated the employment of the 1st Respondent without obtaining her prior consent in writing or the prior written approval of the Commissioner of Labour in contravention of Section 2 of the Termination of Employment of Workman (Special Provisions) Act. However, in view of the fact that the nature of the employment of the 1st Respondent as a Private Secretary was of a personal nature the 2nd Respondent did not make an order directing the Petitioner to continue to employ the 1st Respondent in the same capacity in which she was employed prior to the termination of her employment, and instead made an order as noted above awarding her compensation at the rate of 3 months salary for every completed year of service in the Petitioner firm.

Although in the petition filed before Court several grounds have been urged for challenging the said order, when this application was taken up for hearing on 5th August 2004 learned Counsel for the Petitioner indicated that he would rest his case on the legality of P6 and submitted that in terms of Section 5 and 6 of the Termination of Employment of Workmen (Special Provisions) Act the 2nd Respondent, Commissioner of Labour had no power to award compensation in lieu of or without re-instatement except where there is a closure. Oral submission of Counsel and the written submission filed subsequently were confined to this issue alone.

In order to appreciate the submissions of Counsel in regard to this issue it is necessary to consider Sections 5 and 6 of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 which are quoted below:

"5. Where an employer terminates the scheduled employment of a workman in contravention of the provisions of this Act, such termination shall be illegal, null and void, and accordingly shall be of no effect whatsoever

"6. Where an employer terminates the scheduled employment of a workman in contravention of the provisions of this Act, the Commissioner may order such employer to continue to employ the workman, with effect from a date specified in

such order, in the same capacity in which the workman was employed prior to such termination, and to pay the workman his wages and all other benefits which the workman would have otherwise received if his services had not been so terminated, and it shall be the duty of the employer to comply with such order. The Commissioner shall cause notice of such order to be served on both such employer and the workman."

Section 6 of the Act does not confer any power to the Commissioner to award compensation to an employee whose employment has been illegally terminated. On the face of the said section the Commissioner of Labour can only order the employer to "pay the workmen his wages and all other benefits which the workmen would have otherwise received if his services had not been so terminated" and that too, only where the Commissioner has made order that such employer should continue to employ the workman. In this case the 2nd Respondent, Commissioner of Labour has declined to make an order that the employer should continue to employ the workman as contemplated by Section 6 and it has been submitted on behalf of the Petitioner in these circumstances the award of compensation to the 1st Respondent is not justified in terms of Section 6. He sought to compare with the aforesaid provision Section 6A(1) of the Act which was introduced by Section 4 of Law No. 4 of 1976 to show that the power to award compensation (as opposed to wages and other benefits) under the Act is confined to a situation where the employment was terminated in consequences of the closure of the trade, industry or business of the employer. In fact Section 6 A(1) expressly provides that -

"Where the scheduled employment of any workman is terminated in contravention of the provisions of this Act in consequence of the closure by his employer of any trade, industry or business, the Commissioner may order such employer to pay to such workman on or before a specified date any sum of money as compensation as an alternative to the reinstatement of such workman and any gratuity or any other benefit payable to such workman by such employer."

The identical issues that arise in the present case were dealt with recently by this Court in *Eksath Kamkaru Samithiya v*

Commissioner of Labour⁽¹⁾ (2001) 2 Sri LR 137. In that case, a trade union acting on behalf of 26 workmen complained to the Commissioner of Labour that the termination of their scheduled employment by the employer was illegal. The Commissioner of Labour found that the termination of employment of the 23 workmen was illegal and ordered the employer to pay compensation at the rate of 6 months' salary to workmen whose length of service ranged between 1 to 3 years, 12 month's salary to workmen whose length of service ranged between 3 to 6 years and 18 months' salary to workmen whose length of service exceeded 6 years. The Petitioner sought to quash the said order by *certiorari* and further sought a mandate in the nature of *mandamus* on the Commissioner of Labour to compel him to make an order according to law. The Court of Appeal granted to the union relief as prayed for by it. In the course of his judgment in the case U.D.Z. Gunawardane, J. made the following pertinent observation-

"In section 6 of the Act the term 'wages' is obviously used in the sense of a fixed payment to be made by the employer at regular intervals, very often monthly, to a workman in return for the work or services rendered by the workman. It is to be observed that in section 6 A(1) of the relevant Act the term 'compensation' is used in contradistinction to the term 'wages'..... What I am seeking to explain is this, that is, that 'compensation' is not a thing of the same class or kind as 'wages' and as such in the expression that is employed in section 6 of the Act i.e. 'wages and all other benefits' – the term 'benefits' cannot be interpreted as embracing 'compensation' which is paid as damages to make good the harm or injury caused by the loss of employment, and not paid, like wages, under the contract of employment itself, whilst such contract subsists."

Adverting to the issue whether the Commissioner has any discretion to award compensation in lieu of restoration in service. His Lordship Gunawardane, J. went on to observe at 144 of the judgment -

"It is somewhat irrational to suppose that the legislature, after having so sternly, decidedly and uncompromisingly declared

in section 5 of Act that any termination of employment, in contravention of the provisions of the relevant Act to be utterly void, would have relented in the very next succeeding section of the Act and in the same breach, so to speak, would have given the Commissioner a discretion whether or not to order the re-instatement of the workmen. When Section 5 of the Act declared that all termination of services of workmen in breach of the provisions of the relevant Act is "illegal null void and accordingly shall be of no force or effect whatsoever". there is, at the lowest, an implicit recognition of the legal right of the workman to remain in employment notwithstanding the purported termination And, in fact, such machinery for enforcement of the workman's rights, in the given circumstances, had been provided for by Section 6 of the Act – which requires the Commissioner to reinstate the workman although the draftmen has, perhaps, by force of habit used the word "may" to which draftmen seem to be addicted to."

I am in agreement with the reasoning of this Court in *Eksath Kamkaru Samithiya v Commissioner of Labour (supra)* and hold that the 2nd Respondent only has the power in terms of Section 6 of the Termination of Employment of Workmen (Special Provisions) Act to order the employer to "continue to employ the workman" and he has no power to award compensation in lieu of making an order compelling the employer to continue to employ the workman, although it might be desirable to confer such a discretionary power to the Commissioner General of Labour to deal with eventualities such as those presented in the instant case.

For the foregoing reasons, I make order granting a writ of *certiorari* quashing the impugned order of the 2nd Respondent Commissioner of Labour dated 30th December 2002 marked P6. There shall be no order for costs in all the circumstances of this case.

SRISKANDARAJAH, J. - I agree.

Application allowed.