IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for a mandate in the nature of a Writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Embody Trading (Pvt) Ltd.
Palugahawela,
Katuwellegama 11526.

CA/WRIT/227/2022

PETITIONER

Vs.

1. Commissioner General of Labour
   Labour Secretariat
   No. 41, Kirula Road,
   Colombo 5.

2. W. Priyani Fernando
   Inquiring Officer/
   Assistant Commissioner of Labour
   Termination of Employment Branch
   Department of Labour
   11th Floor,
   "Mehewara Piyasa",
   Colombo 5.

3. Joseph Sam Kumar
   No. 280/8, Athgala, Kochchikade,
   Negombo.

RESPONDENTS

Before: Sobhitha Rajakaruna J.

Mahen Gopallawa J.

Counsel: Avindra Rodrigo, PC with Akiel Deen, Nishika Fonseka and Kosala Gurusinghe for the Petitioner.

Maithree Amarasinghe, SSC for the 1st and 2nd Respondents.

Argued on: 28.10.2024

Written Submissions: Petitioner - 18.05.2023
1st and 2nd Respondents - 10.01.2024

Decided on: 11.12.2024

Sobhitha Rajakaruna J.

The Petitioner Company has instituted the instant proceedings seeking a writ of Certiorari quashing the decisions of the 1st Respondent- Commissioner General of Labour reflected in 'P2A' by which the Petitioner was directed to reinstate the 3rd Respondent who was an employee serving the period of probation at the Petitioner Company. The Petitioner was compelled to reinstate the 3rd Respondent with effect from 21.04.2022 and pay a sum of Rs. 969,000.00 to him as back wages for the period between 31.10.2021 and 20.04.2022. The 1st Respondent has made the said Order based on an Application made by the said 3rd

Respondent under the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 ('TEWA').

The 3rd Respondent was recruited by the Petitioner subject to a period of probation with effect from 08.03.2021 and the respective letter of appointment is marked as 'P2(ii)(a)'. The probation period stipulated in the said letter of appointment is six months and accordingly, such period was due to conclude on 07.09.2021. However, the period of probation of the 3rd Respondent was extended by two months with effect from 07.09.2021 by a letter bearing the same date, marked 'P2(iv)'. However, at the inquiry before the Commissioner of Labour the Petitioner has admitted that the said letter 'P2(iv)' had not been accepted by the 3rd Respondent placing his signature (Vide- Proceedings before the Commissioner of Labour on 12.01.2022). Subsequently, by letter dated 31.10.2021, marked 'P2(iii)', his services were terminated before the lapse of the said extended period of probation which was due to end on 06.11.2021.

There is no dispute that the services of the 3rd Respondent were terminated while he was serving during his extended period of probation. In terms of Section 2 (1) of TEWA, it is mandatory that 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. The 1st Respondent issued the impugned order on the basis that the Petitioner has failed to obtain the written consent of the 3rd Respondent or the prior approval of the Commissioner of Labour before terminating the services of the 3rd Respondent.

The primary argument of the Petitioner is that the written consent of the 3rd Respondent is not necessary as the 3rd Respondent has accepted the said letter of appointment placing his signature which gives the authority to terminate the services during the period of probation without notice. Such arguments are formulated by the Petitioner based on the following contents under the subheading 'Probation' in the letter of appointment;

> *"You will be on probation for a period of 6 months, which may be extended at the discretion of the management. During this period, your employment may be terminated by the Management without notice."*

The Petitioner contends that by accepting the said letter of appointment, the 3rd Respondent has expressed his consent to the termination of his services by the Petitioner during the period of probation without any notice. However, the Respondents argue that in terms of Section 2(1) of TEWA, it is mandatory that the Petitioner who is the employer obtain either the written consent of the employee or prior approval of the said Commissioner before terminating the services of such an employee. Thus, the primary question that needs to be resolved by this Court is whether the acceptance of the letter of appointment marked 'P2(ii)(a)' by placing the signature can be considered prior written consent of the 3rd Respondent that is required under the Section 2 (1)(a) of the TEWA.

It is noted that the services of the 3rd Respondent have been terminated not during the first period of six months of his services but during the extended period of probation which can be considered as the second term of the period of probation. In ***Lanka Canneries (Pvt) Ltd v. Commissioner of Labour and Others CA/WRIT/385/2021 decided on 31.08.2022*** I have determined that when an employer decides to terminate the services or even extend the probationary period the employer should follow a procedure, according to law, where such decision-making power may not infringe the Rule of Law and the principles of Natural Justice. Accordingly, a consequential issue arises as to whether the Petitioner company has followed due process according to law before extending the period of probation and terminating the services of the 3rd Respondent.

The Court in the said ***Lanka Canneries*** case has held that;

> *"There is no law in our country determining the length of a probationary period. However, it should be governed under the principles of equality of all citizens before the law. In my view, the probationary period is for the employer to objectively assess whether the workman would be suitable to carry out the duties and the responsibilities assigned to the respective post. According to the Collins Dictionary[1], 'probation' is a period of time during which someone is judging your character and ability while you work, in order to see if you are suitable for that type of work.*

[1] https://www.collinsdictionary.com/dictionary/english/probation

Therefore, my view is that when a workman (workman or an employee who comes within the scheduled employment in TEWA) is serving during the probationary period, the employer's duty is not only to assess the employee but also to provide necessary training, guidance and supervisory support to the employee. More than anything, it is the mandatory duty of the employer to complete a formal review of the performance of the employee by the end of the probationary period stipulated in the letter of appointment. It is vital that the outcome of the review be communicated to the employee."

A key principle outlined in the judgment above is that to terminate an employee's services during probation or to extend the probationary period, the employer must follow a fair procedure according to law. Further, the Court has observed that an employee in scheduled employment who is on probation should have the privilege of making an application under TEWA if his employment is terminated on non-disciplinary grounds. As such it is important to draw my attention to the following paragraphs as well from the ***Lanka Canneries*** case***;***

"...I take the view that when an employer takes a decision to extend the probationary period or to terminate the services, he should follow a procedure, according to law, where such decision-making power may not infringe the Rule of Law and the principles of Natural Justice. In light of the above, I hold that any employer should mandatorily follow an effective procedure right throughout the period of probation if an employer needs to enjoy the benefit of not confirming probationers as per the propositions in the aforesaid judgements cited by the Petitioner."

This Court in the said ***Lanka Canneries*** case when examining whether an employer has absolute discretion to terminate a probationer, has taken into consideration several judgements of our superior courts and held as follows;

"It cannot be assumed that the Superior Courts in those judgements have bestowed an absolute discretion to the employer in respect of an employee who is on probation, although the dicta of those judgements enumerate that the probationer has no right to be confirmed in the post. …….. As I have observed above, every employee serving on probation must be treated according to a proper review procedure and such employee should have a right to know his shortcomings in advance. Therefore, the present position of the law should be that the services of an employee who is on probation can be terminated if his services are unsatisfactory and he is

not suitable to carry out the work assigned to him, provided that (a). the employer has treated the employee with a helping hand to overcome his shortcomings, (b). a proper review procedure has been adopted (c). and most importantly such decision to terminate has been taken subject to the provisions of the section 2 (particularly 2(1) & 2(4)) of TEWA.

I have arrived at the above conclusions after carefully perusing all the judgements cited by the Petitioner & Respondents and also by taking into consideration the scheme of TEWA and the Industrial Disputes Act. It will be unfair to the employee and may be in another instance to the employer, if the labour law is going to be established only by reading certain sentences or small passages of a judgement without giving a realistic view in the guise of the relevant statutory law. I take the view that misconceptions in law should be avoided with proper understanding the real characteristics of 'ratio decidendi' and 'obiter dictum' of a judgement and also by reading the entire judgement. Furthermore, it is important to note that no employer has a right to override the statutory provisions stipulated in Section 2 of TEWA. The employer is bound to follow Section 2 of TEWA by which it is mandatory to get prior written approval of the Commissioner (when prior consent of the employee is not there) to terminate the scheduled employment of any workman on non disciplinary grounds."

In this backdrop, I need to advert to the legal requirements specified in Section 2 of the TEWA. Given the said Section 2 (1), it is mandatory to obtain the prior consent of the workman or the prior approval of the Commissioner before terminating the scheduled employment specifically on non-disciplinary grounds. It is paramount that the consent and the approval required therein should be in writing.

The Petitioner has placed reliance on the following paragraph in the judgement of ***Kegalle Plantations Ltd. v. Silva and Others (1996) 2 Sri L. R. 180;***

"It is a condition precedent that the Employer cannot terminate the services of a workman of the scheduled employment firstly without prior consent in writing of the workman and if the workman had given prior consent in writing the Commissioner is functus"

The Petitioner appears to argue that the prior consent required under Section 2(1) of TEWA is fulfilled simply because the 3rd Respondent signed the appointment letter, thus supposedly consenting to termination without notice during the probationary period. In view of the above

judgement of ***Kegalle Plantations Ltd. v. Silva and Others,*** it is a precondition that a workman had given prior consent in writing for the Commissioner of Labour to be functus. This raises an important issue: can a clause in an appointment letter be considered valid written consent from the employee just because they signed the letter? Additionally, it questions whether an employer can include terms in an appointment letter that conflicts with the law of the Country.

The 1st and 2nd Respondents referring to the decision of the Court of Appeal in ***Onally Holding PLC v. Hon. Minister of Labour and Others- CA/WRIT/843/2010 decided on 27.09.2012*** assert that the contents of the Clause under subheading 'Probation' in the letter of appointment marked 'P2(ii)(a)' violates the provisions of the TEWA. S. Sriskandarajah J. has decided as follows in the said case;

> *"The position of the Petitioner is that the 4th Respondent was given 3 months salary together with gratuity, and his services were terminated in terms of the letter of appointment, as stipulated in Clause 7 of the said letter. The Termination of Schedule or Employment of any workman is covered by the Termination of Employment of Workmen (Special Provisions) Act. As such an employer cannot have special clauses in the letter of appointment that would violate the provisions of this Act. Even if there is a clause for termination in the said letter of appointment or the contract of employment, that cannot supersede the provisions of the said Act. Under Section 2 of the Termination of Employment of Workmen (Special Provisions) Act, no employer shall terminate the scheduled employment of workmen without -*
>
> *a. prior consent in writing of the workman; or*
> *b. prior written approval of the Commissioner."*

Anyhow, the Petitioner draws the attention of this Court to the following paragraph of the judgement of Mark Fernando J. in ***Lanka Multi Moulds (PVT) LTD v. Wimalasena, Commissioner of Labour and Others (2003) 1 Sri L. R. 143*** in regard to Section 2 (1) (a) of the TEWA;

> *"I am inclined to agree that 'prior consent' required by section 2 (1) (a) need not necessarily be contained in a single sheet of paper."*

The Petitioner referring to the above paragraph draws an inference that the 3rd Respondent's agreement in respect of the terms of the letter of appointment at the time of his recruitment amounts to a written consent for termination of services without notice during the period of probation. In the said Lanka ***Multi Moulds (PVT) Ltd*** case, Mark Fernando J. has taken extra effort to explain the above sentence as follows by referring to an instance of making a written offer of a golden handshake subject to certain conditions;

> *"If for instance an employer were to make a written offer of a "golden handshake", stating "if you agree to the termination of your services, please accept the enclosed cheque for X rupees as your terminal benefits and sign and return the annexed receipt," the written offer together with the acceptance of the cheque and the signing of the receipt would constitute a "prior consent in writing" to termination within the meaning of section 2(1)(a). However, it is not necessary to decide that question because, as learned State Counsel submitted on behalf of the 1st Respondent, there is a difference between consent to the termination itself (which is what section 2(1)(a) requires), and an agreement - as in this case - as to the quantum of terminal benefits in circumstances in which the termination itself is no longer negotiable or has already been unilaterally determined or effected (which is not enough). The Petitioner's letters and the 2nd Respondent's acceptance of the payments were all subsequent to the Petitioner's unilateral decision to terminate the 2nd Respondent's services, and are not proof of anything more than his agreement to the benefits payable consequent upon that decision. The 2nd Respondent did not give prior consent, in writing or otherwise, to the termination of his services, but subsequently agreed to and accepted the terminal benefits offered."*

Hence, I cannot find that the circumstances in the instant case are comparable to those in the "golden handshake" scenario mentioned by Fernando J., who finally noted there was no prior written consent from the employee in the said ***Lanka Multi Moulds*** case.

The services of a probationer can be terminated on 'disciplinary grounds', provided that the employer gives reasons under Section 2(5) of TEWA and is also subject to an inquiry whilst the services of a probationer can be terminated on 'non-disciplinary' grounds subject to the aforesaid section 2(1) of TEWA. Even if we assume, though I disagree, that an employer has the right to terminate a probationary employee without notice, such a decision must still revolve around a specific reason or incident. There is a distinct difference between the

‘expiration of a service period’ and ‘termination’. If the employer decides that employment will end after six months, this can be viewed as a term within a fixed-term contract.

A fixed-term labour contract is an employment agreement that lasts for a specified period, often established to complete a project or cover temporary staffing needs. It differs from an open-ended or permanent contract in that it has a clear start and end date, typically agreed upon by both employer and employee. These contracts are often renewed if the need persists, but frequent renewals may legally transform a fixed-term position into a permanent one, depending on the interpretation of the Labour Commissioner. When a fixed-term contract ends as scheduled, it is usually not considered a dismissal/ termination of employment and therefore, the employer may not need to provide severance. Anyhow, the ‘termination’ of services even during the fixed-term labour contract should be done according to prevailing law.

Termination of employment refers to the end of an employee’s tenure before the employment contract period expires, which may be initiated by either the employer or the employee. When initiated by the employer, termination can occur for various reasons, including but not limited to performance issues, misconduct, redundancy, or organizational restructuring. According to our law, termination initiated by an employer requires a valid reason, appropriate notice, and adherence to due process. Termination initiated by the employee is known as resignation. Termination of employment is often accompanied by certain rights and obligations such as severance pay, final pay for unused leave, or pension benefits, depending on local labour laws and the terms of the contract. Both parties must fulfil these obligations to conclude the employment relationship properly.

In light of the above, termination is an active decision by either the employer or employee, whereas expiry of the contract is passive, occurring when the agreed period naturally concludes. Employees whose services are terminated before the expiration of the contract may have the right to challenge it as unfair dismissal, whereas the expiry of a contract does not usually trigger the same rights unless multiple renewals suggest an implied permanent role. Similarly, when an employer uses the term "termination" in an appointment letter, it should not imply that they intended to end employment from the very start. The end date of

a fixed-term contract can be set at the beginning of employment, but the actual date of "termination" of employment in an usual contract of employment cannot be determined on the date of recruitment. Completing a service period might be casually referred to as "termination". However, from a legal perspective in labour law, "termination" always results from a specific reason, incident, or conduct, occurring after the time of recruitment, either on disciplinary or non-disciplinary grounds. The employer cannot arbitrarily decide the termination of services or set the termination date according to his whims and fancies.

An employee should have the right to know the grounds for his termination to consider providing consent required in the said Section 2(1) of the TEWA. It is unreasonable to expect an employee to give written consent on the date of recruitment for an unforeseen future incident/event. Thus, I conclude that no employee can give prior consent to the termination of their employment in their initial letter of appointment unless it is a fixed term contract. Bringing an end to employment by an employer, without assigning reasons or a proper inquiry would undermine all basic norms of the law and the rule of Natural Justice. Accordingly, the argument of the Petitioner revolving around the acceptance of the letter of appointment fails.

As I have specifically decided in the said ***Lanka Canneries*** case, the services of an employee who is on probation can be terminated but that has to be effected according to the provisions stipulated in section 2(1) or 2(5) of TEWA. Given the dicta of the said ***Lanka Canneries*** case, it needs to be stressed that an employer should follow an acceptable procedure according to law following the principles of the Rule of Law and Natural Justice before such employer takes a decision either to extend or to terminate the probationary period of an employee. There remains a difference between a.) an employee who serves under a fixed-term contract without an obligation for a period of probation and b.) an employee who serves a period of probation upon a usual contract of employment which has no end date.

As such I take the view that probationers cannot be treated as a different species of the category of an employee. It is the discretion of the employer to impose a period of probation for a new recruit. Anyhow, serving during the probationary period is part and parcel of a process prior to the determination by employer to confirm the respective employee in his or her services. I stress that I do not believe that an employer's discretion to terminate an employee during probation on non-disciplinary grounds should be restricted. What I need to

emphasize here is that the extension or termination of the period of probation should follow the proper procedure as explained above. Moreover, I am not inclined to accept the contention of the Petitioner on the alleged economic distress during the Covid-19 pandemic. It is because of the requirement of having to follow specific legal provisions contained in the TEWA, in the event termination is needed based on such grounds.

Although I have reached the findings above, I did not fail in considering the possible implications that may arise with such an interpretation. It is important that those resolving industrial disputes strive for an objective interpretation of Labour laws that protects employees' rights while respecting the legitimate interests of employers. The balanced approach ensures fairness, promotes industrial harmony and supports sustainable economic growth. Such an approach is essential for creating a competitive job market and fostering economic interests. While Sri Lankan Labour laws are designed primarily to protect the interests of workers, it is essential that the interpretation of law remains balanced and impartial.

In the circumstances, I am unable to disagree with the reasons given by the Commissioner General of Labour for his decision reflected in the impugned letter marked 'P2(a)'. However, the order to reinstate the 3rd Respondent should not be considered as tacit approval to make him permanent in his service without leaving room for the Petitioner to follow a proper procedure to assess the services of the 3rd Respondent during the period from 08.03.2021 to 31.10.2021. However, I do not intend to interfere with the decision of the Commissioner General of Labour awarding the 3rd Respondent the determined quantum of back wages. Subject to the said findings I proceed to dismiss the instant Application.

Judge of the Court of Appeal.

Mahen Gopallawa J.

I agree.

Judge of the Court of Appeal.