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

In the matter of an application for mandates in the nature of Writs of *Certiorari* and *Prohibition* in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/533/2023

1. Mr. Nikhil Trilokekar
   23 Palangathure West
   Kochchikade 11540
   Sri Lanka
2. Mr. Oscar Arango
   Carrera 7C # 130A-69
   Barrio Bella Suiza
   Bogota
   Colombia
3. Mr. Krunoslav Ivancic
   E-58, Anand Niketan,
   New Delhi, 110021
   India
4. Mr. Ian Macindoe
   Carradale, Clumps Road
   Lower Bourne, Farnham
   Surrey GU 10 3HF
   United Kingdom
5. Mr. Lee Salway
   Tradbury, Ballagawne Rd,
   Colby, Isle of Man,
   IM9 4AX
   United Kingdom
6. Mr. Paul Sutton
   3 Magnolia Close
   Moulsham, Chelmsford
   Essex CM 29HU
   United Kingdom

7. Mr. Satyadeep Dwivedi
   N 451 Tarapore Towers
   New Link Road, Andheri West
   Mumbai 400053
   India
8. Mr. Nick Kyriacou
   8 The Lindens
   Houghton Regis, Dunstable
   Bedfordshire LU55DQ
   United Kingdom
9. Mr. Ramchand Vadlamani
   E2154 Sobha Althea
   Harohalli, Yelahanka
   Bangalore 560064
   India
10. Mr. Chandran Vedamurthy
    D404, Calgary
    House of Hiranandani
    Chiksane, Devanahalli
    Bangalore 562110
    India

    By their Attorney-
    Anoukshi Yashodha Vidanagamage
    Attorney-at-Law
    No. 112/83, Queens Park,
    D. M. Colombage Mawatha,
    Nugegoda.

PETITIONERS

Vs.

1. Commissioner General of Labour
2. P. K. D. Tharangani
   Deputy Commissioner of Labour
   Industrial Relations Division
3. K. D. Manoj Priyantha
   Commissioner of Labour
   Industrial Relations Division

All at:
Department of Labour
'*Mehewara Piyasa'* Building
Colombo 5

4. Sri Lankan Airlines Limited
Airline Centre
Bandaranayake International Airport
Katunayake

RESPONDENTS

Before: Hon. Justice R. Gurusinghe
Hon. Justice Mahen Gopallawa

Counsel: Mr. Mohamed Adamaly, PC with Ms. Nishadi Wickramasinghe instructed by Ms. Shanya Wickramarathna for the Petitioners

Mr. Dilantha Sampath, State Counsel for the 1st - 3rd Respondents

Mr. Palitha Kumarasinghe, PC with Ms. Gimeshika de Silva instructed by Ms. Rasika Wellappili for the 4th Respondent

Argued on: 06.03.2025

Written Submissions: Petitioner on 04.04.2025
4th Respondent on 04.04.2025

Decided on: 15.05.2025

Mahen Gopallawa J.

Introduction

The Petitioners are all expatriate pilots who were employed by SriLankan Airlines, which has been cited as the 4th Respondent. The Petitioners have sought a writ of *Certiorari* to quash the decisions made by the 1st Respondent Commissioner General of Labour, ("the Commissioner"), contained in the letters dated 17.05.2023 and 27.06.2023 marked 'P35' and

'P37' respectively. The substantive decision of the Commissioner is contained in 'P35' and is to the effect that there were no directly applicable statutory provisions to recover the salaries not paid to the Petitioners during the period of compulsory no-pay as "earned wages." It further informs that, if the Petitioners agree, the dispute could be referred for settlement by arbitration, the file would be closed. The document 'P37' contains the reasons communicated by the Commissioner for the decision in 'P35' and was issued pursuant to a request by the Petitioners. The Petitioners have also sought a writ of *Mandamus* compelling the 1st and/or 2nd Respondents to prosecute the 4th Respondent under the Wages Boards Ordinance, No. 27 of 1941 (as amended) and/or other applicable law for its failure to pay the salaries owed to the Petitioners and statutory dues in the form of Employees' Provident Fund (EPF) and Employees' Trust Fund (ETF) payments and to recover the same. The Petitioners have further sought a writ of *Mandamus* directing the 1st and/or 2nd Respondents to "make an appropriate order in terms of the mandatory provisions of law to direct the 4th Respondent to make payment of salaries and statutory dues owed to the Petitioners from April 2020" (vide paragraph (f) of the prayer to the petition).

The 1st - 3rd Respondents as well as the 4th Respondent have objected to the grant of the aforementioned reliefs sought by the Petitioners and moved for the dismissal of the application.

Factual Background

It is necessary to examine the factual background to the dispute between the parties in order to consider the reliefs sought by the Petitioners and the applicable legal provisions in the instant application in their proper context. The following synopsis of the dispute between the parties, as presented in the pleadings filed and the submissions made on their behalf, could be presented.

The Petitioners were employed by the 4th Respondent as Captains to pilot its fleet of Airbus A320 and/or A330 aircraft under fixed-term contracts. Their periods of service ranged from 11 months to 15 years. A copy of the terms and conditions of the contract common to the pilots have been annexed to the petition marked 'P3'.

It is common ground between the parties that the dispute referred to in the instant application arose as a consequence of the COVID-19 pandemic, which had a profound impact upon the airline industry worldwide. The Petitioner drew the attention of the Court to the decision made by the 4th Respondent in the letter dated 30.03.2020 marked 'P4' addressed to the President of the Airline Pilots' Guild of Sri Lanka as initiating such dispute. In the said letter, the 4th Respondent had intimated to its staff that due to 90% of its fleet being grounded consequent to a 98% reduction in flights per month, it had made several decisions. This included imposing mandatory salary deductions on employees with a monthly fixed gross income exceeding Rs. 100,000/= and sending expatriate pilots on "compulsory no-pay" for a

period of three (03) months. The decision to place expatriate pilots on "compulsory no-pay" for a period of three (03) months from 01.04.2020 to 30.06.2020 had been communicated to them by the letter dated 03.04.2020 marked 'P5', which also states that such no-pay period was subject to extensions at the discretion of the Company. It was additionally clarified in the pleadings by the Counsel for the parties that the term "compulsory no-pay" in documents 'P4' and 'P5' refers to "compulsory no-pay leave."

According to the Petitioners, the decision to place them on compulsory no-pay leave had been unilaterally made by the 4th Respondent and left them stranded without any income in a foreign country amidst the pandemic. They also state that the initial period of compulsory no-pay leave had been unilaterally extended by the 4th Respondent from time to time by the documents 'P5', 'P7', 'P8' and 'P9', until their fixed-term contracts ended or until their services were terminated. The 1st to 3rd Petitioners were informed that their contracts of employment would not be renewed and that their services would be treated as having ceased from the date of completion of the respective contract period by the documents marked 'P9'. The services of the 4th to 10th Petitioners were terminated by the 4th Respondent by giving notice of termination in terms of the contract of employment, with such termination to take effect from 01.01.2021 (vide letters dated 14.10.2020 marked 'P11').

The position of the 4th Respondent is that, like the other airlines, it was compelled to resort to austerity measures to avoid bankruptcy and ensure the survival of the company as a National Carrier. It refers to the fact that during the period from 19.03.2020 to 26.12.2020 and thereafter from 20.01.2021 to 28.02.2021 and 21.05.2021 to 31.05.2021, all international airports in Sri Lanka were closed for all inward international commercial passenger flights, as per restrictions imposed by the local regulatory authority (Civil Aviation Authority of Sri Lanka). There had also been a drastic decrease in outbound international flights due to restrictions imposed by regulatory authorities of foreign countries, and that it was compelled to extend the compulsory no-pay leave of the Petitioners in view of the extensions of the periods of closure of airports (vide paragraphs 7-9 of the 4th Respondent's Statement of Objections). It further states that the services of the 4th to 10th Petitioners were terminated in compliance with the termination clause in their contracts of employment (vide paragraph 14).

The learned President's Counsel for the Petitioners submitted that the instant application is confined to the recovery of the unpaid arrears of salary due to them during the period of compulsory no-pay leave and that the termination of their services is not challenged. The Petitioners state that the last salary they were paid was for the month of March in 2020 and no payment of any salary or allowance or other form of remuneration whatsoever was made since April 2020 onwards.

The pleadings indicate that the Petitioners had initially complained to the Commissioner with regard to the decision to place them on compulsory no-pay leave through the Airline Pilots' Guild of Sri Lanka (in which the 2nd and 3rd Petitioners were members), which had lodged a

complaint at the Industrial Relations Division of the Department of Labour. According to the petition, the 3rd Respondent had conducted an *inter partes* hearing and communicated his opinion and/or decision in the letter dated 21.09.2020 marked 'P10'. In 'P10', the 3rd Respondent observed that placing pilots serving on fixed-term contracts on compulsory no-pay leave since March 2020 was a violation of their contract and, as such, action should be taken with their consent (vide item 03). It further notes that, if there was an excess of staff, action should be taken in accordance with the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971. The position of the 1st to 3rd Respondent's on 'P10' is that it was merely a recommendation and not an order/directive (vide paragraph 9 of their Statement of Objections).

It is observed that the inquiry of which the findings have been impugned in the instant application commenced with the complaint dated 05.01.2021 marked 'P16', lodged on behalf of the Petitioners by their Power of Attorney with the Commissioner. In the said complaint, the Petitioners have sought the intervention of the Commissioner "to settle this matter and/or take all steps necessary to recover the said statutory payments, inclusive of salary, EPF, ETF and Gratuity, together with all associated surcharges and/or interest and other attendant relief lawfully due to the said expatriate Pilots" (vide page 2). The complaint had been referred for an inquiry to the Negombo District Labour Office and an inquiry had been initiated by a Labour Officer in terms of section 3(1)(b) read with section 2(1) of the Industrial Disputes Act, No. 43 of 1950 (as amended). Learned Counsel for all parties concurred that, where notice of an "industrial dispute" had been brought to the notice of the Commissioner, recourse to the procedure set out in section 3(1)(b) of the said Act, where an endeavour to settle the industrial dispute by conciliation is envisaged, is permissible and, in fact, common place since it is the Industrial Disputes Act that has specifically the authority for the Commissioner to initiate an inquiry upon any complaint relating to an "industrial dispute" received by him/her. However, there was a divergence of opinion between the Counsel for the Petitioners and the Respondents as to the consequences of initiating such an inquiry under the Industrial Disputes Act and such matter will be addressed herein later.

A copy of the proceedings of the inquiry held into the complaint 'P16' has been annexed to the petition marked 'P38(b)'. As per the proceedings, the inquiry appears to have been conducted before officers of the Negombo and Gampaha Labour Officers and the Industrial Relations Division of the Labour Secretariat in Colombo at various times spanning a period of almost two (02) years, with sittings commencing from 05.04.2021 and continuing until 04.04.2023.[1] During the inquiry, written submissions marked 'P19' dated 06.01.2021, 'P22' dated 27.01.2022, 'P25' in April 2022, 'P29' dated 29.11.2022 and 'P34' dated 10.04.2023 were filed by the Petitioners, whilst the 4th Respondent filed the written submissions dated 10.08.2022 marked 'P27'/ 'P33'.

[1] As per the proceedings, the inquiry appears to have been conducted on the following dates: 05.04.2021, 11.05.2021, 28.02.2022, 16.03.2022, 12.10.2022, 13.02.2023 and 04.04.2023.

At the conclusion of the inquiry, the decision of the Commissioner was communicated to the Petitioners by letter dated 17.05.2023 marked 'P35' in the following manner;

> *02) "... ඒ අනුව මෙම ප්‍රශ්නගත සේවකයන් වැටුප් රහිත අනිවාර්ය නිවාඩු යවා තිබීම මත, අනිවාර්ය නිවාඩු යවනු ලැබූ කාලයට නොගෙවන ලද වැටුප, උපයා ගත් වැටුපක් ලෙස ව්‍යවස්ථාපිත ප්‍රතිපාදන ප්‍රකාරව අය කර ගැනීමට සෘජු ප්‍රතිපාදන නොමැති බව මෙයින් කාරුණිකව දන්වමි."*
>
> *03) ''මෙම ආරවුල බේරුම්කරණය මඟින් විසඳා ගැනීමට එකඟ නම් බේරුම්කරණය වෙත යොමු කිරීමට හැකි බවත්, එසේ නොමැති නම් ගොනුවේ කටයුතු අවසන් කරන බවත් වැඩි දුරටත් දන්වමි.''*

Upon a request for reasons being made, the following reasons for the decision in 'P35' were communicated to the Petitioners by letter dated 27.06.2023 marked 'P37';

> *"... උක්ත කරුණ සම්බන්ධයෙන් ඔබ විසින් මා වෙත යොමු කරන ලද 2023.06.20 දිනැති ලිපිය හා බැඳේ.*
>
> *එමඟින් ඔබ විසින් ඉල්ලා ඇති කරුණ සම්බන්ධයෙන් මාගේ 2023.05.17 දිනැති ලිපියේ සඳහන් පරිදිම මෙම ආරවුලට සම්බන්ධ සේවකයින් වැටුප් රහිත නිවාඩු යවා තිබීම හා එම කාලයට අදාළව ඔවුන් සේවයට වාර් තා නොකිරීම මත, අනිවාර්ය නිවාඩු යවනු ලැබූ කාලයට නොගෙවන ලද වැටුප, උපයාගත් වැටුපක් ලෙස ව්‍යවස්ථාපිත ප්‍රතිපාදන ප්‍රකාරව අය කර ගැනීමට සෘජු ප්‍රතිපාදන නොමැති බව වැඩි දුරටත් දන්වා සිටිමි."*

As evidenced by their statement of objections and the submissions made by learned Counsel, both the 1st to 3rd Respondents as well as the 4th Respondent have taken up the position that the Commissioner's decision in 'P35' and 'P37' are valid in law and justified in the facts and circumstances of the instant case since there is a matter for an arbitrator to inquire into as the Petitioners have not reported to work during the period of compulsory no-pay leave and as such they have not "earned" the wages that they have claimed. They have further stated that the decision has been made pursuant to an *inter-partes* inquiry following due process and that the reasons for the decision have also been adduced.

The 4th Respondent accordingly submitted that, since judicial review is concerned with the decision-making process and not with the decision itself, in the absence of procedural impropriety, this Court cannot interfere with the findings of the Commissioner made in the instant case. In support of such contention, the 4th Respondent has cited the decisions of this Court in ***Marasinghege Premasiri v. C. I. Alagiyawanna,***[2] ***R.A. Piyaratna v. Buddhist and Pali University of Sri Lanka,***[3] and ***Nagananda Kodituwakku v. Dinesh Gunawardane, Minister of***

[2] CA (Writ) Application No. 233/2022, decided on 29.09.2022.
[3] CA (Writ) Application No. 133/2022, decided on 10.06.2022.

Education and others.[4] However, the *dicta* cited by the 4th Respondent from these cases itself unequivocally indicate that decisions made by a public authority in excess of its powers are amenable to review. In the instant application, the basis upon which the Petitioners have challenged the decision of the Commission marked 'P35' and 'P37' is that the decision has been *ultra vires.* Hence, I am satisfied that this Court possesses jurisdiction to inquire into the instant application.

Grounds of Review and Analysis

In their petition, the Petitioners allege that the order/decision contained in 'P35' and 'P37' is *ultra vires,* illegal, unlawful, perverse *vis-à-vis* the law, fundamentally erroneous and flawed, unreasonable, erroneous on the face of the record, *mala fide* and not an order/decision as contemplated by law. They further allege that the 1st and 2nd Respondents have failed to apply the mandatory provisions of law which require prosecution of an employer who fails to make payment of salaries and statutory dues owed to its employees (vide paragraphs 73-75 of the petition).

It is observed that the aforementioned grounds of review relate to two fundamental issues: firstly, the entitlement of the Petitioners to the unpaid salaries and statutory dues; and, secondly, if such entitlement is established, legal remedies available for the recovery of such salaries and statutory dues from the defaulting employer. I intend to examine and analyze the grounds of review in relation to such issues.

1. *Entitlement of the Petitioners to the Unpaid Salaries and Statutory Payments.*

At the hearing of this application and in the written submissions, the central argument presented on behalf of the Petitioners was that that the decision contained in 'P35' and 'P37' is *ultra vires* the provisions of the Wages Boards Ordinance and that the 1st and 2nd Respondents should be compelled to apply the mandatory provisions in the said Ordinance to secure the recovery of the salaries and statutory dues owed to the Petitioners from the 4th Respondent. In this context, the learned President's Counsel for the Petitioners submitted that the employment of the Petitioners constituted a "trade" within the meaning ascribed to such term in the Wages Boards Ordinance, although a Wages Board has not been established for same. This position was not challenged by the Respondents.

As submitted by learned President's Counsel at the hearing and detailed in their written submissions, the Petitioners' argument is based on the proposition that there is a fundamental and inherent obligation to pay salary to a workman even if there is no obligation cast on the employer to provide work. The Petitioners have sought to rely on section 2 of the Wages Boards Ordinance as statutory authority for such proposition.

[4] CA (Writ) Application No. 45/2022, decided on 03.02.2022.

Section 2 of the Wages Boards Ordinance provides as follows;

2. The employer of workers in any trade shall comply with the following provisions of this section regarding the payment of wages to every such worker:-

(a) He shall, subject as hereinafter provided, pay such wages in legal tender directly to the worker, without any deduction other than an authorized deduction, as hereinafter defined, made with the consent of the worker:

Provided that the aggregate of the deductions so made at any onetime shall not exceed-

(i) seventy-five per centum of the wages due, in the case of a worker in any trade specified by the Minister for the purposes of this paragraph by Notification published in the Gazette; and

(ii) fifty per centum of the wages due, in the case of a worker employed in any other trade;

Provided, further, that nothing in the preceding provisions of this paragraph shall affect or be deemed to affect-

(i) any deduction authorized to be made from such wages by the Income Tax Ordinance or any other written law; or

(ii) any retention or payment of the whole or any part of such wages made in pursuance of or compliance with any order, process or decree made or issued by any court of law.

For the purposes of this paragraph a payment which, immediately after the wages are paid to the worker, is made out of the wages by the worker to the employer or to an agent of the employer, shall be deemed to be a deduction from the wages.

In this paragraph "authorized deduction" means a deduction made in such manner and subject to such conditions, if any, as may be prescribed in respect of-

(i) any advance of money made by the employer to the worker,

(ii) any payment which, at the instance of the worker, is made out of the wages of the worker by the employer to any person other than the employer or an agent of the employer in order to discharge any obligation of the worker or for any other purpose, or

(iii) any other prescribed matter.

(b) Subject to the provisions of subsection (1) of section 5, he shall fix the wage period (not exceeding one month) in respect of each worker employed by him and shall pay the wages for that period to that worker -

(i) where that period does not exceed one week, within three days after the expiry of that period, or

(ii) where that period exceeds one week but does not exceed two weeks, within five days after the expiry of that period, or

(iii) where that period exceeds two weeks, within ten days after the expiry of that period:

Provided, however, that where owing to the absence of any worker or to any other unavoidable cause, it is not possible to pay the wages of any worker within the time limited by this paragraph, he may retain such wages and shall thereafter pay such wages to that worker at the earliest possible opportunity.

Nothing in this paragraph shall in any way affect the period of notice or warning necessary under any provision of written law other than this Ordinance for the termination of any contract.

(c) If on any date he terminates the employment of a worker or any worker lawfully terminates employment under him, he shall, before the expiry of the second working day after that date, pay the wages due to that worker.

It is observed that section 2 of the Wages Board Ordinance sets out the parameters relating to the payment of wages by employers to workmen in "trades" covered by the Ordinance. It clearly articulates and recognizes an obligation upon an employer to pay such wages in legal tender directly to the workman, without any deduction other than an authorized deduction, made with the consent of the workman. The term "authorized deduction" has been statutorily defined in the said section and the Wages Boards Regulations 1971,[5] which specify the other matters where "authorized deductions" may be made. In this regard, I observe that neither section 2 nor the Regulations contemplate or permit withholding or stopping the payment of salary, as done in the instant case.

It is also conspicuous that no reference has been made in section 2 to any duty to work on the part of a workman or any obligation on the part of the employer to offer work. In their written submissions, the Petitioners too have, *inter alia,* stated that the Wages Boards Ordinance does not distinguish between workers who are given work to do and those who are not given work. In such circumstances, it could be reasonably inferred that the obligation of an employer to

[5] Published in the Government Gazette No. 14,961 dated 04.06.1971.

pay wages in section 2 of the Wages Boards Ordinance is not linked to or conditional upon any obligation on the part of the employer to offer work. However, I wish to qualify that an inference should not be drawn to situations where a workman, who has been offered work, refuses or absents himself from attending to such work due to his own reasons or fault.

The learned President's Counsel for the Petitioners also drew the attention of this Court to jurisprudence of local and English courts in support of the proposition that there is a fundamental and inherent obligation to pay salary to a workman independent of any obligation cast on the employer to provide work. He laid particular emphasis on the decision of the Supreme Court in ***Coats Thread Lanka (Pvt) Limited v. Samarasundara***,[6] relating to a suspension without pay of a workman against whom allegations of corruption had been made and the conduct of a disciplinary inquiry and subsequent termination of employment. On the issue of the workman's entitlement to wages during the period of suspension, the Court observed as follows (per J. A. N. de Silva CJ);

> *"At this juncture I venture to consider the legality of the decision by the employer to suspend the employee without pay.*
>
> *SR de Silva in his "Law of Dismissal" states, "It is settled law that the employer has no right of suspension. Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work, he will have to pay wages during the so called period of suspension.*
>
> *Abeysekere in his "Industrial Law and Adjudication" concurs.*
>
> *"The right to suspend, in the sense of a right to forbid a servant to work, is not an implied term in an ordinary contract between master and servant. Such a power can only be created by statute governing the contract, or by express provision in the contract. If a master nevertheless, suspends in the sense of forbidding an employee to work,* ***he will be liable to pay wages for the period of suspension.****"*
>
> *This Sri Lankan authorities suggest that a suspended worker is entitled to full wages during suspension." (at p. 11)*

His Lordship further observed as follows (at p 15);

> *"The Appellant finally submits that the Respondent had unjustly enriched himself by accepting wages from the Appellant Company whilst taking employment elsewhere.*

[6] [2010] 2 Sri L.R. 1.

> *As mentioned previously wages are a natural right of the worker that flows from the contract of employment. The employer may in certain circumstances (as adverted to previously) decide not to provide work to the worker and prohibit him from attending to work. Yet the employer's duty to pay wages remains. In this instance the employee was merely receiving his contractual dues. The fact that he had received other wages during his suspension from a 3rd party is beside the point* (emphasis added)."

The learned President's Counsel for the Petitioners also referred to the English case of ***Collier v. Sunday Referee Publishing Co Ltd***,[7] wherein it was held as follows (per Asquith J.);

> *"It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out* (emphasis added)."

In addition to the aforementioned statutory and judicial authorities, the learned President's Counsel for the Petitioners also referred to the prior conduct of the Commissioner, in particular to the fact a Tripartite Agreement had been entered into by the Commissioner and several Trade Unions (on behalf of the workmen) and the Employer's Federation (on behalf of the employers) during the COVID-19 pandemic in March 2020 permitting the employer to pay only half-wages, if the employer had no work to offer to workmen. The learned President's Counsel contended that, such agreement was an affirmation of the fact that the law requires full wages to be paid, even if there is no work to be offered, and that it is only through agreement that such obligation to pay wages could be reduced, and, that, the Commissioner had accepted such position by being a party to the said agreement. However, it is noted that the aforementioned Tripartite Agreement is not binding upon the parties to the instant case.

In view of the specific provisions of section 2 of the Wages Boards Ordinance and the aforementioned judicial authorities cited, I am inclined to accept the proposition that the said Ordinance articulates and recognizes the obligation of an employer to pay wages to a workman employed in any "trade" to which it applies and that such obligation is not linked or dependent upon the employer's ability to offer work to the workman.

Since the decision of the Commissioner contained in 'P35' and 'P37' was made on the basis that the salaries not paid to the Petitioners during the period of compulsory no-pay leave could not be considered as "earned wages," it would be convenient at this juncture to examine the maintainability of such a proposition.

In this context, the Petitioners contend that, since the Wages Boards Ordinance does not distinguish between workers who are given work and those who are not given work, the mere

[7] [1940] 2 KB 647.

fact of being employed, despite not physically engaged in work during the period of compulsory no-pay leave, entitles them to the payment of their salary. They further contend that compulsory no-pay leave was imposed upon them by a unilateral directive of the 4th Respondent, and, as such, they were prevented from working. In fact, the Petitioners had requested to be scheduled for flights and had, at no time, refused to work. Another material consideration alluded to by the Petitioners is that they were retained in employment and, although they were not rostered for flights, were required to keep their pilots' licences updated and undergo on-ground training during the period of compulsory no-pay leave.

It is recalled that the position of the 4th Respondent was that it was compelled to adopt austerity measures, including placing the Petitioners on compulsory no-pay leave due to the effects of the COVID-19 pandemic on the airline industry and restrictions imposed by local and foreign regulatory authorities. In fact, in its written submissions filed in the instant application and at the inquiry marked 'P27'/'P33', the position has been taken that such restrictions constituted an event of *Force Majeure* that had the effect of frustrating the contracts of employment between the Petitioners and the 4th Respondent. However, the Petitioners contend that the 4th Respondent did operate certain types of flights, and, such contention appears to be well-founded in the light of the notice dated 19.05.2021 issued by the Civil Aviation Authority of Sri Lanka (CAASL) marked '4R3' (attached to the statement of objections of the 4th Respondent) which *inter alia,* permits aircraft departures with passengers and inbound freighter operations, notwithstanding other restrictions. There is also a reference to the fact that the utilization of pilots at 20% of normal levels in the 4th Respondent's statement of objections (vide paragraph 13). Thus, the Petitioners alleged that they were discriminated against by the 4th Respondent in rostering for flights and imposing salary reductions vis-à-vis local pilots. Although I do not consider it necessary to address the allegation of discrimination in these proceedings, I am nevertheless of the view that the justification advanced by the 4th Respondent for the necessity to place the Petitioners on compulsory no-pay leave is untenable in the light of the aforementioned circumstances.

It is also my view that the necessity for a workman to "earn wages" would only arise in circumstances where the workman is offered work. Hence, if the workman is not offered work by the employer, such as by placing him/her on compulsory leave as in the instant case, the necessity to "earn wages" cannot arise. The maxim *lex non cogit ad impossibilia* to the effect that "the law does not require or compel a person to do something impossible", would militate against such a requirement being imposed upon the workman. Hence, I am inclined to hold that the finding made by the Commissioner that the Petitioners were required to "earn wages" during their period of compulsory leave is contrary to the provisions of section 2 of the Wages Boards Ordinance and the law. Viewed from this perspective, the Commissioner appeared to have relied on irrelevant considerations in determining the Petitioners' entitlement to salary.

It is also apparent that at the inquiry held by the Department of Labour, neither the inquiring officer nor the Commissioner appear to have considered the same at all in arriving at the decisions in 'P35' and 'P37'. Contrary to the allegation made by the 4th Respondent in its written submissions, the Petitioners had specifically drawn the attention of the inquiring officer to the applicability of the provisions of the Wages Boards Ordinance, most significantly in their written submissions marked 'P25', 'P29' and 'P34'. It is also observed that no explanation has been provided for such omission in the statement of objections of the 1st to 3rd Respondents. Furthermore, no explanation has been provided by the Commissioner for the departure from the "recommendations" made in 'P10' on the same issue. Since the Long Title of the Wages Boards Ordinance describes it *inter alia,* as "an Ordinance for the regulation of wages and other emoluments of persons employed in trades" and its application to the disputing parties in the instant case was not in doubt, I am inclined to treat such failure on the part of the 1st to 3rd Respondents as a substantial error of law.

Viewed in this light, the position taken up by the counsel for both 1st to 3rd Respondents and the 4th Respondent, that the Industrial Disputes Act does not provide for the recovery of "unearned wages" is misconceived in law, as it ignores the provisions of the Wages Boards Ordinance that specifically regulate the payment of wages in trades and the Commissioner has been paying attention upon a statute that does not contain any specific or substantive provisions relating to wages. As submitted by the learned President's Counsel for the Petitioners, substantive and regulatory provisions relating to the payment of wages in the private sector are regulated by three statutes: the Wages Boards Ordinance in relation to workmen employed in "trades;" by the Shop and Office Employees (Regulation of Employment and Remuneration) Act, No. 19 of 1954 (as amended) in relation to workmen employed in "shops or offices" and the Factories Ordinance, No. 45 of 1942 (as amended) in relation to workmen employed in "factories", as defined in such statutes.

The importance of timely payment of salary to a workman has been emphasized by this Court in ***Siddadurage Kalyani Silva v. Sri Jayawardenepura General Hospital Board and others***,[8] which considered similar provisions relating to payment of salary in the Shop and Office Employees (Regulation of Employment and Remuneration) Act. The Court held as follows (per Rajakaruna J.);

> *Salary is a periodical payment which may be specified in an employment contract, made by an employer to the employee. Monthly salary to an employee who looks forward for a specific sum by the end of the month for the services rendered by him, has a major impact on social structure theories which deals with several problems in how society is structured. In my view this includes family, religion, law, economy & class etc. Therefore, I am of the view that when an employer, without the consent of such*

[8] CA (Writ) Application No. 35/2021, decided on 10.08.2022.

employee, takes a decision to reduce, deduct or suspend an existing salary of an employee including the change of salary scale, such employer should follow a procedure, according to law, where the decision making power may;

a. not trespass unduly on personal rights and liberties of the employee,
b. not infringe the rule of law and the rule of natural justice,
c. not violate any law, regulation & duly issued government circulars/directions.[9]

In light of the foregoing and particularly considering the fact that they were unilaterally placed on compulsory leave by the 4th Respondent and while retained in employment, I hold that the Petitioners are entitled to the payment of their full salary during the period of compulsory leave commencing from the month of April 2020 until the cessation or termination of their employment, as the case may be. As a consequence of such entitlement to salary, the Petitioners are entitled to EPF and ETF payable thereon, which are statutory entitlements provided under the Employees' Provident Fund Act and the Employees' Trust Fund Act. Hence, I hold that all EPF and ETF payments due to the Petitioners in respect of such period should also be paid to them, as provided by their terms and conditions of employment and the law.

The Petitioners have further alleged that the Commissioner has failed to provide reasons for the decision in 'P35' and 'P37' in violation of the principles of natural justice, relying upon the authority of ***Karunadasa v. Unique Gemstones Ltd and others***.[10] In this context, the Petitioners characterized the said orders as being "perfunctory, terse and totally bereft of reasons." I am unable to agree with this position. Although the reasons given in 'P35' and 'P37' may be flawed, as discussed earlier, they nevertheless communicate to the Petitioners the reasoning or basis for the finding made therein. In interpreting the duty to give reasons, it is my view that a distinction should be maintained between the existence of reasons given by the decision-maker to arrive at his/her decision and the merits or otherwise of such reasons.

2. <u>Legal Remedies for the Recovery of Salaries and Statutory Dues from Defaulting Employer.</u>

The Court will now consider the legal remedies available in instances where an employer defaults in the payment of salaries. The position of the Petitioners, as articulated at the hearing and in their written submissions, is that the Commissioner has a responsibility and statutory duty to prosecute the employer for payment in terms of the Wages Boards Ordinance, and the failure to do so constitutes an abdication of this statutory power. In this regard, the Petitioners argue that the intention of the framers of the Wages Boards Ordinance was to ensure the timely wages to employees by employers and to sanction defaulting employers, and in particular, adverted to sections 3D and 4(2) of the Ordinance.

[9] Ibid, at p 8.
[10] [1997] 1 Sri L. R. 256. The Petitioners have also referred to the judgment of the Court of Appeal in the said case reported as ***Unique Gemstones Ltd v. W Karunadasa and others*** [1995] 2 Sri L. R. 357.

Section 3D of the Wages Boards Ordinance,[11] provides as follows;

> *3D. (1) Where an employer of any worker in any trade has failed to maintain and keep in the premises where that trade is carried on the wage record required to be kept under*
> *subsection (1) of section 3, or fails, when required to do so under subsection (2) of that section, to produce such record for inspection, the Commissioner is hereby empowered to assess the wages or the short payment of wages, as the case may be, payable to such worker under this Ordinance on the basis of all the evidence both oral and documentary, available to him, and the provisions of subsection (2) shall apply where default is made in the payment of any such wages.*
>
> *(2) Where an employer makes default in the payment of any sum which he is liable to pay under subsection (1), and the Commissioner is of opinion that it is impracticable or inexpedient to recover that sum under any other provisions of this Ordinance then, he may issue a certificate containing particulars of the sum so due and the name and place of residence of the defaulting employer to the Magistrate having jurisdiction in the division in which such place is situated. The Magistrate shall thereupon summon such employer before him to show cause why further proceedings for the recovery of the sum due should not be taken against him, and in default of sufficient cause being shown, such sum shall be deemed to be a fine imposed on such employer by such Magistrate, and shall be recovered accordingly. Every sum so recovered shall be paid to the Commissioner.*
>
> *(3) The correctness of any statement in a certificate issued by the Commissioner for the purpose of this section shall not be called in question or examined by the court in any proceedings under this section, and accordingly nothing in this section shall authorise the court to consider or decide the correctness of any statement in such certificate, and the Commissioner's certificate shall be sufficient evidence that the amount due under subsection (1) from the defaulting employer has been duly calculated and that such amount is in default.*

Section 4 of the Ordinance[12] which relates to the penalty for failure to comply with provisions of Part I, and, *inter alia,* provides in section 4(1) that "every employer who fails to comply with any provisions of this section of this Part shall be guilty of an offence and shall be liable to a

[11] Section 3D was introduced by Wages Boards (Amendment) Act, No. 10 of 1978.
[12] The current text of Section 4(1) of the Ordinance was introduced by Wages Boards (Amendment) Act No. 14 of 2019 and the text of Section 4(2) was amended by Wages Boards (Amendment) Act No. 36 of 1982. Section 2A was introduced by the aforementioned Act No. 36 of 1982 and amended by Wages Boards (Amendment) Act No. 14 of 2019.

fine not less than five thousand rupees and not exceeding ten thousand rupees or to imprisonment of either description for a term not exceeding one year or to both such fine and imprisonment." Section 4(2A) provides for the imposition of surcharges payable on the sum in default and the calculation of such surcharge on a sliding scale depending on the period in default. Section 4(3) sets out that "the power of the court to make an order under subsection (2), for the payment of any sum of money shall not be in derogation of any right of the worker to recover that sum by any other proceedings."

There is precedence for the institution of proceedings by the Commissioner in the Magistrates' Court against defaulting employers for recovery of payments due under section 3D(2) of the Wages Boards Ordinance, as evidenced by several decisions of the superior courts on issues arising out of the exercise of such powers.[13]

However, in addition to the aforementioned sections, section 56 of the Ordinance[14] empowers the Commissioner or a registered Trade Union to recover money due to a workman by a suit instituted in a court of competent jurisdiction in the following manner;

> *56. Notwithstanding anything to the contrary in any other written law –*
>
> *(a) a suit for the recovery of any sum due under this Ordinance from any employer to any worker may be instituted in a court of competent jurisdiction in the name of the Commissioner of Labour or in the name of a trade union which is registered under the Trade Unions Ordinance and of which that worker is a member;*
>
> *(b) any sums due under this Ordinance from an employer to two or more workers may be sued for in a single suit instituted in the name of the Commissioner of Labour or in the name of a trade union which is registered under the Trade Unions Ordinance and of which those workers are members;*
>
> *(c) a suit for the recovery of any sum due under this Ordinance from any employer to any worker shall be maintainable if it is instituted within six years after that sum has become due;*

[13] Such case law include ***D.M.Karunarathne, Acting Deputy Commissioner of Labour v. Bhuwelka Steel Industries (Sri Lanka) Ltd*** (SC Appeal 114/2021), decided on: 01.03.2023; There are several other cases involving the same parties decided by the Court of Appeal including CA (PHC) Application No. 143/2014, decided on 20.07. 2021, CA/Rev/PHC/Application No. 117/2019, decided on 31.10.2022, and CA/Rev/PHC/Application No. 166/2019, decided on 31.10.2022.

[14] The current text of Section 56(c) has been introduced by Wages Boards (Amendment) Act No. 14 of 2019.

(d) in any such suit instituted in the name of the Commissioner of Labour, he may be represented by any Deputy or Assistant Commissioner of Labour or any Inspector of Labour; and

(e) in any such suit instituted in the name of a trade union, such union may be represented by any of its officers.

Thus, it is observed that, excluding Part II, the Wages Boards Ordinance provides for the recovery of payments due to workmen by the Commissioner by two principal means; either by instituting proceedings in the appropriate Magistrates' Court by recovering the sum due as a fine (section 3D) or by instituting a civil suit for the recovery of the sum due in a court of competent jurisdiction (section 56). It is further observed that the Ordinance vests the Commissioner with the discretion regarding the choice of procedure to be adopted, and, if the Commissioner to institute proceedings in the Magistrates' Court, section 3D(2) requires the Commissioner to form an opinion that that recovery under any other provisions under the Ordinance is "impractical or inexpedient." I am of the view that the aforementioned statutory provisions cast a statutory duty upon the Commissioner to recover payments due to workmen under the Ordinance from defaulting employers. However, it is also evident that the 1st Respondent does not appear to have considered such provisions in recovering the payments due to the Petitioners in the instant case.

In contrast, the 1st Respondent appeared to have considered the dispute between the Petitioners and the 4th Respondent as an "industrial dispute" and invoked the provisions of the Industrial Disputes Act to inquire into and endeavour to settle such dispute by conciliation. By 'P35' at the conclusion of the inquiry, the 1st Respondent had sought the consent of the Petitioners to refer the dispute to arbitration as provided for in section 3(1)(d) of the said Act. At the hearing of this application, learned State Counsel for the 1st to 3rd Respondents submitted that the Industrial Disputes Act contained adequate provisions to determine the entitlement of the Petitioners and obtain the payment of same, and in particular made reference to sections 3(3), 17, 40A and 43 thereof. Whilst the Commissioner undoubtedly has the discretion to invoke the provisions of the Industrial Disputes Act to inquire into and resolve industrial dispute, the issue that presents itself to Court is whether the decision to seek the consent of the Petitioners to refer the dispute between the Petitioners and the 4th Respondent to arbitration is rational and reasonable, in light of the facts and circumstances of the instant case.

Based on the pleadings and submissions made by the learned Counsel, I wish to refer to certain matters that are relevant in deciding whether the Commissioner's decision is rational and reasonable. Firstly, the Commissioner's decision to refer to arbitration presupposes the existence of a "dispute" between the parties and based on the reasons adduced in 'P35' and 'P37', such dispute appears to relate to whether the salaries withheld from the Petitioners during the compulsory leave period can be considered as "earned wages" and whether there

are statutory provisions for the recovery of same. As already discussed, I have expressed the view that the Commissioner's finding that the Petitioners were required to "earn wages" during their period of compulsory leave is contrary to law and based on irrelevant considerations.

In light of this position, the next issue to consider is whether there is a live dispute that warrants a reference to arbitration. It is the Petitioners' contention that the contract of employment, salary particulars, imposition of compulsory no-pay leave by the 4th Respondent, the period of compulsory no-pay leave, cessation or termination of employment and the non-payment of salaries and statutory duties since April 2020, which are the material facts to determine the Petitioners' entitlement and liability of the 4th Respondent under the Wages Boards Ordinance, have all been admitted by the 4th Respondent and are not in dispute. Hence, they argue that such material was available at the inquiry held by the Labour Department, and, as such, there is no necessity for an arbitrator to inquire afresh into such matters. According to the Petitioners, such an inquiry is also likely to cause further delay and prejudice. In the absence of a plausible response on the part of the Respondents on such issue, I am inclined to agree with the position taken up by the Petitioners.

Furthermore, I am of the view that in the availability of procedures addressing defaults by employers in the Wages Boards Ordinance, which can be considered as the *lex specialis* relating to the regulation of wages and other emoluments of persons employed in trades, it would neither be rational or reasonable to have recourse to the provisions of the Industrial Disputes Act, which is relatively a more *lex generalis* dealing with "industrial disputes." It is re-iterated that the Commissioner has also not adduced any compelling reasons for such a choice. Since the Petitioners have specifically objected to reference to arbitration in the instant application, it would have been incumbent upon the 1st Respondent to offer a specific explanation on the issue, and I was unable to find the same either in the statement of objections or in the submissions made at the hearing. Hence, the decision of the 1st Respondent also appears to be at variance with the well-established legal maxim relating to statutory interpretation *generalia specialibus non derogant* to the effect that "things general do not restrict or detract from things special."[15] Such reasoning seems to be fortified by the provisions of section 65 of the Wages Boards Ordinance itself which provide as follows;

> *65. Save as otherwise expressly provided in this Ordinance, the provisions of this Ordinance shall have effect notwithstanding anything contained in any written law other than this Ordinance; and in case of conflict or inconsistency between the*

[15] The legal maxim has also been expressed as "*generalibus specialia derogant"* to the effect that "things special restrict things general." See Bryan A. Garner (ed) *Black's Law Dictionary* (7th ed, West Group, 1999) 1639. The maxim has been applied in *Abeyratne and Another v. Manchanayake* [1992] 1 Sri L.R. 361 and more recently in *Wiitha Group of Companies (Private) Limited v. Capital Printpack (Private) Limited*, SC Appeal No. 21/2017 decided on 09.06.2023.

provisions of this Ordinance and such other law, the provisions of this Ordinance shall prevail.

At this point, it would be convenient to address the legal objection raised by the State Counsel on behalf of the 1st to 3rd Respondents and the learned President's Counsel for the 4th Respondent that recourse to arbitration provided an equally efficacious alternative remedy which would militate against the grant of prerogative relief to the Petitioners in the instant application. In support of such objection, the learned State Counsel referred to several decisions of this Court including ***Obeysekera v. Albert and others***,[16] wherein this Court (per Soza J.) held that section 20 (1) of the Industrial Disputes Act conferred the right on the aggrieved party to repudiate the award and accordingly such party cannot seek a discretionary remedy like certiorari. The Court also observed as follows;

"Certiorari is a discretionary remedy and therefore it will not normally be granted unless and until the plaintiff has exhausted other remedies reasonably available and equally appropriate."

The learned State Counsel also referred to ***Ishak v. Laxman Perera, Director General of Customs and others***,[17] wherein the Court upheld the objection that section 154 of the Customs Ordinance provided an adequate alternative remedy to prerogative relief and observed as follows (per Tilakawardane, J. P/CA);

Another matter that has been urged by the respondents in this case is that as a specific remedy has been set out in Section 154 of the Customs Ordinance that this would exclude the invocation of the writ jurisdiction as an alternative remedy was available in law.

"Where there is an alternative procedure which will provide the applicant with a satisfactory remedy the Courts will usually insist on an applicant exhausting that remedy before seeking judicial review. In doing so the Court is coming to a discretionary decision." "Where there is a choice of another separate process outside the Courts, a true question for the exercise of discretion exists. For the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being properly regarded as being a remedy of last resort. It is important that the process should not be clogged with unnecessary cases, which are perfectly capable of being dealt with in another tribunal. It can also be the situation that Parliament, by establishing an alternative procedure, indicated either expressly or by implication that it intends that procedure to be used, in exercising its discretion the Court will attach importance to the indication of Parliament's intention."

[16] [1978-79] 2 Sri L.R. 220.
[17] [2003] 3 Sri L.R. 18.

However, it is observed that the aforementioned decision in ***Obeysekera v. Albert and others*** has been considered and departed from in several subsequent decisions by the Supreme Court including in **E*. S. Fernando v. United Workers Union and another***,[18] where the Court held as follows (per G. P. S. de Silva J. (as he then was));

> *"It would therefore appear that, assuming that the repudiation of an award in terms of section 20 is a "remedy", yet it is not an adequate and an effectual remedy. To disentitle the petitioner-appellant to the remedy by way of certiorari, the "alternative remedy" must be an adequate and an effectual remedy. In Obeysekera vs. Albert and others (supra) the Court of Appeal does not seem to have sufficiently addressed its mind to the question of the adequacy and efficacy of the "remedy" provided in section 20 of the Industrial Disputes Act. In this view of the matter, as at present advised, I am of the view that the case of Obeysekera vs. Albert and others (supra) has been wrongly decided."*

In response to the objection raised by the Respondents, the Petitioners sought to rely on ***Somasunderam Vanniasingham v. Forbes and another***,[19] where the Supreme Court (per Bandaranayake J.) observed as follows;

> *"As I have said there is no rule requiring alternative administrative remedies to be first exhausted without which access to review is denied. A Court is expected to satisfy itself that any administrative relief provided for by statute is a satisfactory substitute to review before withholding relief by way of review. Those decisions adverted to in the judgement which followed the decision in Obeysekera vs. Albert et al. in this area of law have also been wrongly decided and should not be regarded (as was done in the instant case) as having a binding effect on the Court of Appeal. They should no longer be followed.*
>
> *In this area of the law, where there is no illegality, the Court should first look into the question whether a statute providing for alternative remedies expressly or by necessary implication excludes judicial review. If not, where remedies overlap, the Court should consider whether the statutory alternative remedy is satisfactory in all the circumstances..... If not, the Court is entitled to review the matter in the exercise of its jurisdiction. Of course if there is an illegality there is no question but that the Court can exercise its powers of review. Vide Colombo Commercial Co. vs. Shanmugalingam[20], Virakesari Ltd vs. P. O. Fernando."[21]*

[18] [1989] 2 Sri L.R. 199.
[19] [1993] 2 Sri L.R. 362.
[20] 66 NLR 26.
[21] 66 NLR 145.

The Petitioners have also referred to ***Jayamaha v. Provincial Public Service Commission and others***,[22] wherein the necessity to exhaust alternative remedies was considered by this Court (per Janak de Silva J.) in the following terms;

> *"The question then is whether a Court can refuse to exercise powers of judicial review in these circumstances. The general principle is that an individual should normally use alternative remedies where available rather than judicial review [R. (Davies) v. Financial Services Authority (2004) 1 W.L.R. 185; R. (G) Immigration Appeal Tribunal (2005) 1 W.L.R. 1445]. Our Courts have held that where a party fails to invoke alternative remedies judicial review can be refused. [Rodrigo v. Municipal Council Galle (49 N.L.R. 89); Gunasekera v. Weerakoon (73 N.L.R. 262); Obeysekera v. Albert & others (1978-79) 2 Sri L.R. 220); Rev. Maussagolle Dharmarakkitha Thera and another v. Registrar of Lands and others (2005) 3 Sri L.R. 113]. The general principle is applicable even where the alternative remedy is an administrative procedure, such as in this case and Courts will require the party seeking judicial review first to exhaust such administrative procedure before invoking the discretionary power of judicial review [R (Cowl) v. Plymouth City Council (2002) 1 W.L.R. 803; R. v. Barking and Dagenham LBC Ex. P. Lloyd (2001) L.G.R. 421; R. (Carnell) v. Regents Park College and Conference of Colleges Appeal Tribunal (2008) E.L.R. 739].*
>
> *However, as it is a general principle, Courts have recognized several qualifications in its application. There may be situations where the alternative remedy is not adequate and efficacious in which event judicial review is available [E.S. Fernando v. United Workers Union and another (1989) 2 Sri L.R. 199]. It maybe that judicial review is capable of providing immediate means of resolving the dispute in which case it may be the more appropriate procedure. There may also be a need to obtain interim relief which may not be possible under the alternative procedure. This is not an exhaustive list and there are certainly other instances where judicial review may be granted even though an alternative administrative procedure exists."*

In its written submissions, the 4th Respondent has also referred to invoking the jurisdiction of the Labour Tribunal and lodging a complaint at the Termination Unit of the Labour Department in terms of the Termination of Employment of Workmen (Special Provisions) Act as alternative remedies that ought to have been pursued by the Petitioners. However, I am unable to agree with that position for several reasons. Firstly, it is observed that reliefs sought by the Petitioners relates to wages and statutory dues whilst in service, whilst a Labour Tribunal and the Termination Unit would primarily consider circumstances and consequences relating to the termination of services. Secondly, since the Petitioners were retained in employment by the 4th Respondent during the period salaries and statutory dues are claimed, it is doubtful whether the Petitioners had *locus standi* to invoke such remedies. Thirdly, it is

[22] CA (PHC) Application No. 188/2014, decided on 05.07.2018.

noted that the learned President's Counsel for the Petitioners specifically indicated that the Petitioners did not wish to challenge the termination of their services or intended to seek re-instatement or re-employment in the 4th Respondent. Fourthly, there is no evidence adduced by the 4th Respondent indicating that such alternative remedies would be equally effective and efficacious, for instance, relating to time and costs involved.

In fact, in ***Karunaratne v. Jackolis Appuhamy***,[23] wherein the workman filed an application before the Labour Tribunal for the recovery of balance wages, the Supreme Court (per Pandita - Gunawardene J.) held that the recovery of balance wages was not within the scope of section 31B of the Industrial Disputes Act. With regard to the remedy available to the workman, the Court observed as follows;

> *"In the course of his argument, learned Counsel for the appellant invited my attention to the Wages Boards Ordinance-hereinafter referred to as the Ordinance-(Cap. 136, L. E. C). I was referred to Gazette Notification 11,095 of 22.3.1957, by virtue of which the provisions of this Ordinance were declared to be applicable to the Baking Trade.*
>
> *Under section 2 (a) of this Ordinance the Employer was required to pay "the worker" his wages without any deduction other than an authorised deduction. A deduction from the wages such as in this case does not come within the term "an authorised deduction".*
>
> *Such a deduction not being an authorised deduction was forbidden under section 2 (a) to which reference has already been made.*
>
> *The Ordinance also declares such a deduction to be a penal offence triable in the Magistrate's Court (vide Sections 4 and 61 of the Ordinance). On conviction of the Employer, repayment of this deduction to the worker was also provided (vide Section 4(2) of the Ordinance, as amended by Ordinance No. 27 of 1957).*
>
> *The remedy open to the applicant was therefore to submit his complaint to the Commissioner of Labour for a charge to be laid against the appellant under the relevant Section of the Ordinance. The applicant has mistakenly or otherwise sought the wrong Forum* (emphasis added)*."*

I am of the view that the facts and circumstances of the above case bear significant similarities to the instant case, and, as such, the decision of the Supreme Court is directly relevant.

Upon consideration of the aforementioned jurisprudence, what is manifest is that the necessity to exhaust alternative remedies arises only if such alternative remedy is adequate

[23] 74 NLR 46.

and equally efficacious. However, as I have discussed above, the offer of the Commissioner to refer the dispute between the Petitioners and the 4th Respondent for arbitration and the other alternative remedies cited by the 4th Respondent do not offer an adequate or equally efficacious remedy to the Petitioners, in comparison to the reliefs sought in the instant application, considering the facts and circumstances of the instant case. Hence, I overrule the legal objection raised by the Respondents relating to the exhaustion of alternative remedies.

In their written submissions, the Petitioners have further alleged that the reference to arbitration is an attempt by the Commissioner to further prejudice the Petitioner and drag and delay justice by several more years, especially in view of the fact that the 4th Respondent is also a State Enterprise (vide paragraph 116). Whilst further delay and potential prejudice by submission to arbitration is foreseeable, such a fact would not necessarily imply that the action of the Commissioner was intended to benefit the 4th Respondent which was a State Enterprise. As the party making such an assertion, the onus of establishing the same would lie with the Petitioners. Apart from mere conjecture, the Petitioners have not been able to provide any affirmative evidence that the 1st and 3rd Respondents were acting in collusion with the 4th Respondent or under dictation by any State agency or any other evidence.

The necessity to expressly plead and properly enumerate in detail allegations of *mala fides* in judicial review applications is well established and has been articulated in by this Court in ***Bandaranayake v. Judicial Service Commission***,[24] as follows (per Sripavan J. (as he then was));

> *"Learned Counsel also urged bad faith on the part of the first respondent Commission. "The plea of mala fides is raised often but it is only rarely it can be substantiated to the satisfaction of Court. Merely raising doubt is not enough. There should be something specific, direct and precise to sustain the plea of mala fides. The burden of proving mala fides is on the individual making allegation as the order is regular on its face and there is a presumption in favour of the administration that it exercises its power in good faith and for the public benefit." Principles of Administrative Law (Jain & Jain, 4th Edition 1988 Page 564) Accordingly, the court will not in general entertain allegations of bad faith made against the repository of a power, unless bad faith has been expressly pleaded and properly enumerated in detail. [Vide* ***Gunasinghe v Hon Gamini Dissanayake]***.[25] *The petition however did not set out in detail the allegations of mala fide against the first respondent Commission."*

Therefore, I am inclined the reject the allegations of *mala fides* made by the Petitioners above, although such fact may not have a bearing on the final outcome.

[24] [2003] 3 Sri L.R 101.
[25] [1994] 2 Sri L.R 132.

Legal Objections and Analysis

It is observed that in their statements of objections, the Respondents have raised several legal objections to the maintainability of the instant application. Although the availability of alternative remedies was the focus of submissions made by learned State Counsel for the 1st to 3rd Respondents and by the learned President's Counsel for the 4th Respondent, the 4th Respondent has raised other legal objections as well in its written submissions. Hence, for the sake of completeness, I will endeavour to address those legal objections based on the available particulars.

1. *Availability of Alternative Remedies*

I have addressed the legal objection relating to the necessity to exhaust alternative remedies in detail in pages 20-24 hereof and concluded that the proposal by the Commissioner to refer the matter for arbitration is not an equally efficacious remedy to recover the salaries the Petitioners are entitled to, in light of the provisions in the Wages Board Ordinance. Invoking the jurisdiction of the Labour Tribunal or lodging a complaint at the Termination Unit of the Labour Department too do not constitute equally efficacious alternative remedies. Further, it is noted that the availability of an alternative remedy itself does not preclude this court from going into the issues raised by the Petitioners. Hence, I overrule the legal objection raised by the Respondents relating to the exhaustion of alternative remedies.

1. *Facts in Dispute*

The Respondents sought to argue that reference to arbitration was warranted since facts were in dispute regarding the issue of whether the Petitioners had "earned" their wages during the period of compulsory leave. However, as I have discussed in page 18-19 hereof, the material facts necessary to determine the Petitioners' entitlement and liability of the 4th Respondent under the Wages Boards Ordinance, including the contract of employment, salary particulars, imposition of compulsory no-pay leave by the 4th Respondent, the period of compulsory no-pay leave, cessation or termination of employment and the non-payment of salaries and statutory duties since April 2020, have all been admitted by the 4th Respondent and were not in dispute. Such material was available at the inquiry held by the Labour Department, and, as such, there is no necessity for an arbitrator to inquire afresh into such matters. Hence, in my view, the objection raised by the Respondents relating to facts in dispute is devoid of merit.

2. *Material Parties*

In its statement of objections, the 4th Respondent has stated that the Petitioners have failed to add all necessary parties, namely, the Labour Officer who conducted the inquiry and the Assistant Labour Commissioner who made the decision to refer the dispute to arbitration. However, the decision marked 'P35' and reasons given in 'P37' had been issued in the name

of the Commissioner General of Labour, who is the 1st Respondent. The officers referred to above are subordinate officers of the 1st Respondent in the Labour Department and the proceedings of the inquiry marked P38(b), which document the actions taken by the said officers, have been annexed to the petition. Hence, I no prejudice has been caused to the Respondents by the failure to cite the said officers as parties, and I overrule the objection raised by the 4th Respondent.

3. <u>Contractual Dispute</u>

In its statement of objections, the 4th Respondent states that the instant dispute deals purely with rights and obligations arising from a private employment contract. Whilst the Petitioners were employed by the 4th Respondent under a contract of employment, the orders and action impugned in the instant application are those of the Commissioner in the exercise of statutory functions. Furthermore, the reliefs sought by the Petitioners arise out of statutory entitlements under the Wages Boards Ordinance, the Employees' Provident Fund (EPF) and the Employees' Trust Fund (ETF). In fact, the terms and conditions of employment in the employment contract marked 'P3' itself make specific reference to EPF, ETF and the Payment of Gratuity Acts.

I have also carefully considered the authorities cited by the 4th Respondent in its written submissions, namely, ***Ratnayake v. C. D. Perera***,[26] ***Galle Flour Milling (Pvt) Limited v. Board of Investment of Sri Lanka***,[27] ***Jayawardena v. People's Bank***,[28] ***Meragala v. People's Bank and others***,[29] ***M. S. S. Salahudeen v. Sri Lankan Airlines Limited***,[30] ***Perera v. Municipal Council of Colombo and others***[31] ***and Mendis v. Seema Sahitha Panadura Janatha Santhaka Pravahana Sevaya.***[32] It is observed that all such cases related to a contractual relationship between the Petitioner and the public authority (except in *Ratnayake*'s case where the contractual relationship was between a member and elected committee of a trade union) and the decision impugned was a decision made by the public authority or state enterprise as a contractual partner. I am compelled to observe that the factual matrix in the instant case is substantially different to such cases in several aspects: firstly, the impugned decision is not of the contractual partner (the 4th Respondent) but of the Commissioner, who is a third party; secondly, the impugned decision relates to the exercise of a statutory function by the Commissioner; thirdly, the reliefs sought in the instant application are secured and enforceable by statute. Hence, in my view such decisions do not constitute binding or persuasive authority to the facts and circumstances arising in the instant case. Accordingly, I overrule the preliminary objection raised by the 4th Respondent on this matter.

[26] [1982] 2 Sri L.R. 451.
[27] (2002) BLR 10.
[28] [2002] 3 Sri L.R. 17.
[29] [2006] 2 Sri L.R. 101.
[30] CA (Writ) Application No. 99/2012, decided on 23.09.2019.
[31] 48 NLR 66.
[32] [1995] 2 Sri L.R. 284.

4. No Writ of Mandamus to Compel Prosecution

In its written submissions, the 4th Respondent has raised the above legal objection that, where the Legislature has vested a public authority with discretion, a writ of *Mandamus* will not lie to direct such public authority as to how that discretion should be exercised. The said legal objection is raised specifically in relation to paragraph (d) of the prayer to the Petitioners' petition. Whilst I am in full agreement with the submissions made and authorities cited by the 4th Respondent that the Court should exercise extreme caution in intervening with the exercise of prosecutorial discretion vested in a public authority, I am also mindful that the fullest effect that this objection would be to preclude the Court from granting relief under prayer (d), as it is formulated. In this context, I wish to emphasize that the findings made by me herein regarding the entitlement of the Petitioners to the unpaid salaries and statutory dues and the statutory duty on the Commissioner to recover same on behalf of the Petitioners from the defaulting employer under the Wages Boards Ordinance is not in any manner affected or invalidated by such objection. Hence, the objection will be considered by the Court when formulating the reliefs to be granted.

Conclusion and Orders of Court

In view of the foregoing, I proceed to issue a writ of *Certiorari* quashing the order/ decision dated 17.05.2023 and 27.06.2023 marked 'P35' and 'P37'. I further issue a writ of *Mandamus* directing the 1st Respondent to take action under the Wages Boards Ordinance, No. 27 of 1941 (as amended) to recover the salaries owed to the Petitioners by the 4th Respondent from April 2020 until the cessation or termination of their employment, as the case may be, and, also to recover the statutory payments of Employees' Provident Fund (EPF) and Employees' Trust Fund (ETF) due to them in respect of such period, forthwith. In view of the considerable delay that has already occurred and the statutory prescriptive limits that may apply, the 1st Respondent is further directed to consider adopting the most expedient and expeditious course of action available under the applicable statutes to secure the payments due to the Petitioners.

Application is allowed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal