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 Writ of *Certiorari* under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.

CA/WRT/0533/2019

Mahaweli Authority of Sri Lanka,
No. 500, T.B. Jayah Mawatha,
Colombo 10.

Petitioner

Vs.

1. **Hon. Ravindra Samaraweera**,
Minister of Labour and Trade Union Relations,
Ministry of Labour and Trade Union Relations,
Labour Secretariat,
Colombo 05.

1A. **Hon Dinesh Gunawardhene**
Minister of Labour and Trade Union Relations,
Ministry of Labour and Trade Union Relations,
Labour Secretariat,
Colombo 05.

1B. **Hon Manusha Nanayakkara**,
Minister of Labour and Foreign Employment,
Ministry of Labour and Trade Union Relations,
Labour Secretariat, Colombo 05.

2. **Mr. M. D. C. Amarathunga**,
Commissioner General of Labour,
Labour Secretariat,
Colombo 05.

2A. **Mr. R. P. A. Wimalaweera**,
Commissioner General of Labour,
Labour Secretariat,
Colombo 05.

2B. **Mr. B. K. Prabath Chandrakeerthi**,
Commissioner General of Labour
Labour Secretariat,
Colombo 05.

3. **Mr. S. Kariyawasam (Deceased)**
No.75,
Melpitiya,
Mathale.

4. **Mr. T. M. Nandasoma**,
Mahaweli Authority of Sri Lanka,
Zone "B",
Walikanda.

5. **Mr. H.P.K.U. Pathirathne**,
Mahaweli Authority of Sri Lanka,
Zone "B" Sinhapura.

Respondents

Before: **M. T. MOHAMMED LAFFAR, J.**

Counsel: Saliya Pieris, P.C. with Geeth Karunaratne, and Ms. Dinithi Jayasinghe for the Petitioner.

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

Ms. Hasini Rupasinghe for the 4th Respondent, instructed by Ms. Piyumi Kumari.

Argued on:	03.07.2024
Written Submissions on:	03.09.2024 by the Petitioner 06.09.2024 by the 04th Respondent
Decided on:	25.10.2024

MOHAMMED LAFFAR, J.

The 1st Respondent, Minister of Labour, in terms of the provisions of the Industrial Disputes Act No. 53 of 1973 (as amended) referred the industrial dispute in suit to the 3rd Respondent, Arbitrator **(P1 and P2).** The said dispute is as follows;

"Whether injustice has been caused to Mr. T.M. Nandasoma and Mr. H.P.K.U. Pathirathne attached to B-Zone of the Mahaweli Authority of Sri Lanka as office Assistants by not being placed in the post of Typist even though they had got through the examination for appointment of minor employees to the post of Typist, held in the year 1991 and if so what reliefs each of them is entitled."

The said T.M. Nandasoma and Mr. H.P.K.U. Pathirathne are the 4th and 5th Respondents in the instant Application respectively. The 4th Respondent joined the Sri Lanka Mahaweli Authority as a casual Messenger in 1986 and subsequently, he was confirmed as an Office Assistant in the said Authority. He covered the duties in the post of Typist for a considerable time period. In 1991, applications were invited from the minor employees for the post of Typist and he applied and passed the speed test and the interview pertaining to the said practical examination held by the Petitioner. However, he was not appointed to the post of Typist. Thereupon, the 4th Respondent made a complaint to the District Labour Office of Polonnaruwa and subsequently the dispute was referred to the said Arbitrator. In 1986, the 5th Respondent joined the Sri Lanka Mahaweli Authority as a casual Labourer and in 1988 he was confirmed as an Office Assistant. He covered the duties in the post of Typist for a considerable time period. Even though the 5th Respondent passed the speed test and the interview pertaining to the said practical examination for the post of Typist, he was not appointed to the said post by the Petitioner. In this Secario, the complaint made by the 5th Respondent was also referred to the Arbitrator.

After inquiry, the Arbitrator delivered the impugned award marked as **Z1** which reads thus;

1. The 4th and 5th Respondents were not guilty of laches and the claim by the 4th and 5th Respondents in the instant arbitration was not prescribed.
2. Grave prejudice has been caused to the 4th and 5th respondents by not promoting them to the post of Typist as they have passed the examination held for the said post in 1991.
3. The discriminatory promotion process conducted by the petitioner in promoting similarly circumstanced employees to the post of Typist while the 4th and 5th respondents were stagnated in the post of Office Assistant, was a violation under article 12(1) of the Constitution.
4. As such, the petitioner was ordered to promote the 4th and 5th respondents to the post of Typist or Clark effective from the 21st of September 1991 along with the back wages, salary increments, and other government benefits.

The petitioner states that the said award is *ex facie* wrongful, *ultra vires*, unlawful, arbitrary, capricious, and contrary to the principles of natural justice on the basis *inter alia,* that;

a. The arbitrator lacks jurisdiction to decide under Article 12(1) of the constitution.
b. The arbitrator has misconstrued Article 126 of the Constitution and accordingly made an award which is bad in law.
c. The arbitrator failed to appreciate the undue delay on the part of the said respondents and erred in law in deciding that the said respondents were not guilty of laches.
d. The arbitrator failed to appreciate the fact that the 4th and 5th Respondents do not possess the minimum educational qualifications required to be promoted to the said post.

The petitioner is seeking to quash the said award on the aforesaid basis and on the grounds set out in Paragraph 18 of the petition.

Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Judicial review is exercised on the limited grounds that stem from the central principle of *ultra-vires* and broadly categorized as Illegality, irrationality and procedural impropriety. In the case of **Council of Civil Service Unions Vs. Minister for the Civil Service (1985) AC 374, Lord Diplock** observed that;

"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." By

"illegality" as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" {Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a „ decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."

In exercising the power of Judicial Review, the Court cannot substitute the original decision with a new decision by going into the merits of the dispute and considering whether it was right or wrong in law, but can only decide whether the decision has been made lawfully within the limits of the powers given to the authority.

Prof. H. W. R. Wade on Administrative Law (12th edition) at pages 34 to 35 states:

"Judicial review is radically different from the system of appeals: When hearing an appeal, the court is concerned with the merits of the decision under appeal. But in judicial review, the court is concerned with its legality. On appeal, the question is right or wrong. On review, the question is lawful or unlawful . . . judicial review is a fundamentally different operation. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, a court, on review, is concerned only with whether the act or order under attack should be allowed to stand or not"

" When a party to the decision is aggrieved by the ***process*** *which led to the decision of a public authority, such party is entitled to invoke the writ jurisdiction of the Court. Review is not directed at correcting a decision on the merits, it is aimed at the maintenance of legality.* ***Pretoria Portland Cement Co Ltd v Competition Commission 2003 (2) SA 385 (SCA) at 402."***

An appeal seeks to attack the correctness of the decision of the inferior court or tribunal while a review seeks to attack the manner in which the decision of the inferior court or tribunal has been arrived at. Grounds of appeal are unlimited and cannot be prescribed as they relate to the errors in law or in fact made by the court whose decision is under attack. On the other hand, grounds of review are limited by law and have to be laid out in the application for review. An error in exercising one's discretion can never be the basis for bringing a review. It is a ground of appeal.

The distinction between judicial review and appeals is described in **Constitutional and Administrative Law by Hilaire Barnett (9th Edition) at page 550** as follows;

"Judicial review must be distinguished from an appeal against a decision. The court and tribunal structure provides a more or less rational appeal structure for those aggrieved by a judicial decision. The appellate court will have the power to reconsider the case and to substitute its own decision for that of the lower court. An appeal may be made on both the law and the facts of the case, so full re-hearing may take place. Judicial review, by contrast, is concerned solely with the manner in which the decision maker has applied relevant rules: it is thus procedural in nature. It is not for the court-in judicial review proceedings- to substitute its judgement for that of the decision-making body to which powers have been delegated but, rather, to ensure that the adjudicator has kept within the rules laid down by statute and the common law. In short, the role of the courts in judicial review is to exercise a supervisory, not an appellate, jurisdiction. Judicial review 'is not an appeal from a decision, but a review of the manner in which the decision was made."

In the instant Application, the Petitioner is challenging the Award marked as **Z1** on the basis, *inter-alia*, that;

1. The 4th and 5th Respondents failed to adduce admissible evidence to establish the fact that such examination was held for the post of Typist.
2. The Arbitrator allowed the said Respondents to adduce hearsay evidence.
3. The Arbitrator failed to appreciate the fact that the said Respondents had subsequently accepted promotions which were below the post of Tytpist.
4. The determination of the Arbitrator was based on the unproved documents.
5. The decision of the Arbitrator is erroneous on the footing that the Arbitrator failed to appreciate the fact that the Respondents are guilty of laches.
6. The Respondents failed to satisfy the Arbitrator that they possess minimum educational qualifications for the said post.
7. The Arbitrator failed to evaluate the evidence adduced and the award is contrary to the facts led before him.

It is the considered view of this Court that the foregoing grounds advanced by the learned President's Counsel for the Petitioner are grounds for appeal and not for judicial review as by those grounds the Petitioner is challenging the correctness of the decision. The Petitioner is not challenging the manner in which the impugned decision was made. Hence, the instant

application is not within the purview of Article 140 of the Constitution. Thus, the application is liable to be dismissed *in-limine* on this basis alone.

Be that as it may, the learned President's Counsel for the Petitioner contended that the Arbitrator has decided that the Petitioner's actions in preventing the 4th and 5th Respondents from being promoted to the post of Typist while granting promotions to several other employees to the said post are discriminatory and in violation of the fundamental rights of the 4th and 5th Respondents guaranteed to them under Article 12 (1) of the Constitution. Under Article 126 (1) of the Constitution the Supreme Court has the sole and exclusive jurisdiction to hear and determine any questions relating to the infringement of any fundamental right of any person. In this premise, the Arbitrator lacks jurisdiction to construe the Articles of the Constitution pertaining to Fundamental Rights, and the above decision of the Arbitrator in deciding the Fundamental Rights violation of the 4th and 5th Respondents is contrary to Article 126 (1) of the Constitution and therefore, the entirety of the said Award is illegal, *ultra-vires* and unlawful.

In terms of the provisions of the Industrial Disputes Act, the Arbitrator is empowered to make a just and equitable Order. It is the statutory duty of the Arbitrator to consider whether the Petitioner has acted reasonably and whether injustice has been caused to the 4th and 5th Respondents. Having scrutinized the said Award, it is abundantly clear that the Arbitrator having considered the evidence adduced before him has come to a conclusion that not promoting the 4th and 5th Respondents to the post of Typist is unreasonable. Thereafter, the Arbitrator has rightly observed the fact that granting promotions to several other employees to the said post is discriminatory treatment to the said Respondents which amounts to a violation of Article 12 (1) of the Constitution. It is pertinent to note that the finding of the Arbitrator is not on the basis of the violation of the Fundamental Rights of the 4th and 5th Respondents.

The industrial Arbitrator is conferred wide powers both as regard to the scope of inquiry and the kind of order that he can make. In the case of **Browns and Co. Vs. Minister of Labour**[1] the Supreme Court observed that;

"Arbitration under the Industrial Disputes Act is intended to be even more liberal, informal and flexible than commercial Arbitration, because Section 17(1) of the Industrial Disputes Act requires the Arbitrator to make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute and thereafter make such award as may

[1] 2001-1SLR-305.

appear to him just and equitable. The function of the arbitral power in relation to industrial disputes is to ascertain and declare what in the opinion of the Arbitrator ought to be the respective rights and liabilities of the parties as they exist at the moment the proceedings are instituted. The Arbitrator's role is more inequisitorial, and he has a duty to go in search of the evidence, and he is not strictly required to follow the provisions of the Evidence Ordinance in doing so. The procedure followed by him need not be the rigidity of the law.

Per Marsoof, J -

"It is important not to lose sight of the fact that this appeal arises from an application for the Writ of Certiorari to quash the award of the arbitrator in an industrial arbitration, and the Court of Appeal which refused the appeal in the circumstances of this case did so in the exercise of its supervisory jurisdiction and not in its capacity as an appellate Court."

The Court of Appeal did not err in affirming the finding of the Arbitrator that although reimbursement of the cost of traveling was not expressly provided for in the letter of appointment issued to the relevant employees of Brown & Co. it was just and equitable to award them an allowance to meet the official traveling expenses, especially considering the fact that they had been provided with a company vehicle for their official and personal travel in the past and withholding of this facility had given rise to an industrial dispute. The impugned award of the Arbitrator is just and equitable and there are no errors on the face of the record to justify intervention by way of certiorari."

Wanasundera J in **Thirunavakarasu Vs. Sriwardena**[2] held that;

"An industrial arbitrator has much wider powers both as regards the scope of the inquiry and the kind of orders he can make than an arbitrator in the civil law. In short, we can fairly say that arbitration under the Industrial Law is intended to be even more liberal, informal and flexible than commercial arbitration. And the effect of section 21 of the Industrial Disputes Act is to indicate that even the rules relating to arbitration in the civil law should not be allowed to trammel the powers of inquiry given to an arbitrator under the Act……."

It is significant to note that the Arbitrator in the instant Application had given adequate opportunity to the parties to adduce their oral and documentary evidence and accordingly, adhered to the principle of natural justice.

[2] 1981-1 SLR-p185.

The learned President's Counsel for the Petitioner contended that the 4th and 5th Respondents failed to produce any documents before the Arbitrator to establish the fact that they have passed the said examination. The attention of this Court is drawn to the fact that the Petitioner, before the Arbitrator and in this Court, has not taken up the position that the said Respondents are unsuccessful in the said examination. However, it is the duty of the Petitioner to produce the documents as to the said examination which they have failed to do so. It appears to this Court that by virtue of the documents marked as A3, A4 and A15 produced before the Arbitrator the fact that the said examination was held and the said Respondents were passed the same was well established.

Moreover, by document marked A23, the Petitioner undertook to consider the 5th Respondent's request to be placed in the position of Typist if he continues good performance, after accumulating two years of experience and three years of service in the permanent carder even though they do not possess the necessary academic qualifications. In this scenario, the 4th and 5th Respondents are entitled to have a legitimate expectation for the said post.

It is pertinent to note that the Arbitrator has properly drawn his attention to the fact that the 4th and 5th Respondents while being office assistants have covered the duties of Typist for a considerable period of time and that their superior officers have made several requests to higher ranking officials of the Petitioner to elevate these Respondents to the post of Typist (A6, A7, A8 and A10), and during the cross-examination, a witness who gave evidence on behalf of the Petitioner admitted the fact that in terms of the Circular marked as A31, the original qualifications required for any such position is not considered for these circumstances relevant to the 4th and 5th Respondents. Furthermore, as per the letter marked as A8, issued by the Secretary, Ministry of Public Administration and Home Affairs addressed to all Secretaries to Ministries and Heads of Department dated 17-07-2007, the employees joined under temporary, casual, substitute and contract basis, even though they have not satisfied the minimum educational qualifications, if there is a satisfactory performance for consecutive three years as at 01-11-2006, must be permanently placed to fill vacancies by participating them in a training program and obtaining them a relevant certificate.

Furthermore, in dealing with the issue of laches. The Court holds that, laches is to be calculated from the date of appointment to the post of typist. However, neither the date of appointment nor the date of conducting the interviews have been established to this Court. The burden is on the Petitioner to establish to Court that there is laches, by tendering documents such as an appointment letter and any document pertaining to the date of conduct of interviews. Thus,

the Petitioner has not dispensed his burden in establishing a central fact in issue.

The Court further holds that, under the Industrial Disputes Act, an Arbitrator possesses broad discretionary powers, enabling them to issue orders that are just and equitable, particularly when there is palpable injustice caused to the parties. This authority remains intact even in cases where there has been a delay on the part of the parties. If clear injustice is evident, the Arbitrator is empowered to disregard any such delay and focus on delivering a just and equitable outcome. Therefore, when determining whether laches have caused material prejudice to the petitioner, the Court will take into account the Arbitrator's wide discretionary powers. In this instance, the Court finds that no material prejudice has been caused to the Petitioner due to the alleged laches.

In those circumstances, I am of the view that the 3rd Respondent having scrutinized the oral and documentary evidence placed before him made a just and equitable award in favour of the 4th and 5th Respondents in terms of the provisions of the Industrial Disputes Act. I do not see any grounds to review the said award under Article 140 of the Constitution.

For the foregoing reasons, the Application is dismissed with costs fixed at Rs. 30,000/- payable by the Petitioner to the 4th and 5th Respondents.

Application dismissed with costs.

JUDGE OF THE COURT OF APPEAL