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

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

CA (Writ) Application No: 152/2018

1. A.W.M. Shihar,
   No. 41/3/1/1,
   Sri Wagiragnana Mawatha,
   Colombo 9.

2. M.T.M. Najeeb,
   No. 41/3, Sri Wagiragnana Mawatha,
   Colombo 9.

3. S. Francis,
   No. 421/92, T.B. Jayah Mawatha,
   Colombo 10.

PETITIONERS

Vs.

1. Commissioner General of Labour.

2. E.C.P. Dabare,
   Deputy Commissioner,
   Special Investigations Division.

3. P.B. Chandi Pemabandu,
   Assistant Commissioner of Labour,
   Colombo West.

   1st – 3rd Respondents at
   Labour Secretariat,
   Department of Labour, Colombo 5.

4. M.A.M. Abdul Cader (Pvt.) Limited,
   No. 97, Poorwarama Road, Colombo 5.

5. Leather Fashions Company (Pvt) Limited.
   No. 97, Poorwarama Road, Colombo 5.

6. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

RESPONDENTS

Before: **Mahinda Samayawardhena, J**
Arjuna Obeyesekere, J

Counsel: Pubudu De Silva for the Petitioners

Ms. Nayomi Kahawita, Senior State Counsel for the 1st – 3rd and 6th Respondents

S.N.Vijith Singh for the 4th and 5th Respondents

Written Submissions: Tendered on behalf of the Petitioners on 17th July 2020, 20th August 2020 and 28th August 2020

Tendered on behalf of the 4th and 5th Respondents on 30th July 2020 and 20th August 2020

Decided on: 16th November 2020

Arjuna Obeyesekere, J

The issues that arise for determination in this application is two fold. The first is whether the decision taken by the 3rd Respondent, an Assistant Commissioner of Labour that the 4th and 5th Respondents are liable to pay the Petitioners gratuity for their period of employment with them, is final. The second is, whether such decision can be subsequently reviewed or amended by the 3rd Respondent herself or another Deputy or Assistant Commissioner, and if so, the circumstances in which such decision can be amended.

The facts of this matter very briefly are as follows.

The 1st and 2nd Petitioners had commenced their employment with the 5th Respondent, a limited liability company on 3rd January 1990. The 3rd Petitioner had joined the 4th Respondent, also a limited liability company on 22nd September 1987 and was holding the post of General Manager at the relevant time. The Petitioners state that a Director of the 4th and 5th Respondents had summoned the Petitioners to his office on 5th May 2009, and informed them that the 4th and 5th Respondents were facing financial difficulties, and unable to keep the Petitioners in employment any longer. Although the Petitioners admit that they were paid a sum of Rs. 123,500, 237,500 and Rs. 315,000, respectively at that point, the Petitioners claim that they were forced to accept the said sums of money and forced to sign letters acknowledging the receipt of the said sums.

The Petitioners had filed three separate applications before the Labour Tribunal of Colombo complaining of unlawful dismissal from their employment on 5th May 2009. As a copy of the application filed before the Labour Tribunal has not been filed with the petition, I am unable to ascertain if the Petitioners had sought any relief from the Labour Tribunal with regard to gratuity. The position taken up by the 4th and 5th Respondents before the Labour Tribunal was that the Petitioners had resigned from service voluntarily and that the aforementioned sums of money had been paid to the Petitioners as gratuity, calculated on the basis of their last drawn salary and their period of service. I must state that the above position had been suggested to the Petitioners during cross examination before the Labour Tribunal, and that each of the Petitioners had admitted that the above sums of money were received by them on account of gratuity.

After a full inquiry where the evidence of each Petitioner was led, the Labour Tribunal had rejected the position of the 4th and 5th Respondents that the Petitioners resigned voluntarily, and had held that the services of the Petitioners have been unjustly terminated. The Labour Tribunal had not ordered reinstatement, but acting on the basis that the aforementioned sums of money were paid as compensation, had enhanced the quantum of compensation that each of the Petitioners should be paid. The Labour Tribunal had however directed that the said sums of money that had already been paid to the Petitioners be deducted from the final sum that had been ordered as compensation. Thus, even though the Petitioners had admitted the position of the 4th and 5th Respondents that the above sums of money reflect the payment of gratuity, the Labour Tribunal had proceeded on the basis that the said sums of money were in fact paid as compensation.

Dissatisfied by the Orders of the Labour Tribunal, the 4th and 5th Respondents had filed an appeal with the Provincial High Court of the Western Province holden at Colombo. I am not in a position to ascertain whether the 4th and 5th Respondents had raised the issue of gratuity before the High Court, or if the payment of gratuity formed a question of law in the said appeals, for the reason that the petition of appeal has not been tendered to this Court. The High Court, having heard the parties had dismissed the appeals filed by the 4th and 5th Respondents. The judgments of the High Court do not contain any reference to the payment of gratuity. It is not disputed that an appeal has not been made to the Supreme Court against the said judgments of the High Court.

The Petitioners claim that they lodged a complaint with the Labour Department relating to the non-payment of gratuity prior to the institution of proceedings before the Labour Tribunal, but that the Labour Department did not proceed with the inquiry in view of the fact that the above applications were pending before the Labour Tribunal. The Petitioners have not made available to this Court, a copy of the said complaint made to the Labour Department.

After the dismissal of the appeals of the 4th and 5th Respondents by the High Court, the Petitioners had re-agitated the issue of non-payment of gratuity with the Labour Department. The 3rd Respondent, an Assistant Commissioner of Labour, having conducted an inquiry with the participation of the Petitioners and the 4th and 5th Respondents, had made three Orders dated 29th January 2015 marked **'P7a'**, **'P7b'** and **'P7c'** directing the 4th and 5th Respondents to pay the Petitioners the following sums of money as gratuity:

Petitioner	Order	Years of service	Last drawn Salary	Amount	Surcharge
1st	**'P7a'**	19	13000	123,500	37050
2nd	**'P7c'**	19	25000	237,500	71250
3rd	**'P7b'**	21	30000	409,500	94500

Instead of complying with the said directives or seeking judicial review thereof, the 4th and 5th Respondents had moved the 3rd Respondent to reconsider the said directives. However, none of the parties have tendered to this Court any material that was tendered by the 4th and 5th Respondents at the time they sought a reconsideration of '**P7a**', '**P7b**' and '**P7c**'.

By a letter dated 28th December 2017 marked '**P10**', the 2nd Respondent, Deputy Commissioner of Labour, having re-considered the issue, had informed the Petitioners as follows:

> "ඒ අනුව සේවා යෝජක විසින් අදාල පාරිතෝෂිත මුදල ගෙවීම් කළ බවට සනාථ කල හැකි ලේඛන ඉදිරිපත් කර අදාල ගෙවීම් තහවුරු කළ හෙයින් තවදුරටත් මෙම පැමිණිල්ල සම්බන්ධයෙන් කටයුතු කළ නොහැකි බව කාරුණිකව දන්වා දෙමි."

I must note that '**P10**' does not specifically set aside '**P7a**', '**P7b**' and '**P7c**', nor does '**P10**' refer to the material that was considered in taking the decision embodied therein.

Aggrieved by the above decision in '**P10**', the Petitioners filed this application, seeking the following relief:

a) A Writ of Certiorari to quash the decision contained in '**P10**';

b) A Writ of Mandamus directing that '**P7a**' - '**P7c**' be implemented and/or enforced.

The grievance of the learned Counsel for the Petitioners is that the Commissioner General of Labour does not have the power to conduct an inquiry on the same issue for a second time and for that reason, the issuing of '**P10**' is illegal and *ultra vires* the powers of the 2nd Respondent. He submitted further that the decision of the 3rd Respondent is the decision of the Commissioner General of Labour, and that once the Commissioner General of Labour makes a decision, all other Officers of the Department of Labour including the 2nd Respondent are *functus* with regard to that issue. The essence of this argument is that the 2nd Respondent acted *ultra vires* his powers when he issued '**P10**'.

The above argument of the Petitioners is supported by the following definition of '*Commissioner General of Labour*' found in Section 48 of the Industrial Disputes Act:

> *"Commissioner means the person for the time being holding the office of Commissioner of Labour and includes –*
>
> *(a) any person for the time being holding the office of Deputy or Assistant Commissioner of Labour;*
>
> *(b) in respect of any power, duty or function of the Commissioner under this Act, any person authorized in writing by the Commissioner to exercise such power, perform such duty or discharge such function;*
>
> *(c) in respect of the power conferred on the Commissioner by section 3(1) (b), any Labour Officer;"*

In terms of Section 48A "*Where a labour officer exercises any power of the Commissioner under this Act, such officer shall be subject to the general or special directions of the Commissioner.*" Thus, a distinction has been drawn between decisions of a Deputy or Assistant Commissioner, and a Labour Officer, wifh specific provision for the Commissioner General of Labour to examine decisions of a Labour Officer.

The issue that I must therefore answer is whether the 2nd Respondent, exercising the powers vested in the Commissioner General of Labour can amend, vary or cancel a decision taken by the 3rd Respondent, who was also exercising the powers vested in the Commissioner General of Labour.

I would like to commence by re-producing the following passage from **Administrative Law** by Wade & Forsyth[1]:

> *"It may be necessary to determine whether there is power to revoke or modify the decisions or orders of an administrative authority or tribunal. The question here is whether the authority itself has power to do this. This is different from*

[1] H.W.R. Wade and C.F. Forsyth, Administrative Law (11th Edition, 2014, Oxford University Press), page 191.

the question whether some other authority has power to do so, which may be affected by a statutory provision that the decision 'shall be final'."

Having said so, the authors proceed to state as follows:

"In the interpretation of statutory powers and duties there is a rule that, unless the contrary intention appears, 'the power may be exercised and the duty shall be performed from time to time as occasion requires.' But this gives a highly misleading view of the law where the power is a power to decide questions affecting legal rights. In those cases the ***courts are strongly inclined to hold that the decision, once validly made, is an irrevocable legal act and cannot be recalled or revised****. The same arguments which require finality for the decision of courts of law apply to the decisions of statutory tribunals, ministers and other authorities.*

For this purpose a distinction has to be drawn between powers of a continuing character and powers which, once exercised, are finally expended so far as concerns the particular case. An authority which has a duty to maintain highways or a power to take land by compulsory purchase may clearly act 'from time to time as occasion requires.' But if in a particular case it has to determine the amount of compensation or to fix the pension of an employee, there are equally clear reasons for imposing finality. Citizens whose legal rights are determined administratively are entitled to know where they stand." [2]

What is in issue here is whether the same public authority who made the decision can revoke it or vary it, or whether a decision once made is final and conclusive and not capable of being revoked by the same authority. Where such decisions affect legal rights of people, Courts are strongly inclined to hold that the decision, once validly made, is an irrevocable legal act and cannot be recalled or revised. The general rule therefore is that once a decision is made by a public authority, such decision is final and cannot be varied, revoked or rescinded. **Wade & Forsyth** goes onto state that, *"If a public authority has statutory power to determine some question, for example the compensation payable to an employee for loss of office*[3]*, its*

[2] Supra, p 191,

[3] Livingstone v. Westminster Corporation [1904] 2 KB 109.

decision once made is normally final and irrevocable. This is not because the authority and the employee are estopped from disputing it, but because, the authority has power to decide only once and thereafter is without jurisdiction in the case." [4]

There are however several well recognized exceptions to the above rule. The first exception is where the power of review is provided for in the statute itself. It must be stated that even in such a situation, the party prejudiced must be heard prior to any change of decision.

English Courts have identified certain instances where decision-makers are empowered to review, rescind or vary their decisions, even though such a power has not been expressly provided. The following passage from **Administrative Law**[5] sets out in a nutshell what those instances are:

> *"Even where such powers are not expressly conferred, it seems that **statutory tribunals have power to correct slips**[6] and to set aside decisions obtained by **fraud** or based upon a **'fundamental mistake of fact'**.[7] There has been little discussion of the source of these powers; **presumably they are implied from the tribunal's statute**.[8]*

In **Akewushola v. Secretary of State for the Home Department**,[9] Sedley LJ held that once the decision is made, *"the maximum power must be to correct accidental errors which do not substantively affect the rights of the parties or the decision arrived at."* He proceeded to state that, *"I do not think that, slips apart, a statutory tribunal – in contrast to a superior court – ordinarily possesses inherent power to rescind or review its own decisions."*

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[4] Supra; page 202

[5] Supra; page 191-192.

[6] *Akewushola v. Secretary of State for the Home Department [2000] 1 WLR 2295.*

[7] *Fajemisin v The General Dental Council [2013] EWHC 3501 para 37-8 (Keith J) in reliance upon Porteous v West Dorset District Council [2004] EWCA Civ 244 (local authority had power to retake a decision where a fundamental error of fact was found); similarly Crawley Borough Council v. B [2000] EWCA Civ 50 disapproving of R v. Southwark LBC ex p Dagou (1995) 28 HLR 72 to the opposite effect).*

[8] *The High Court has an exceptional power to reopen proceedings it has already determined where it was shown there would otherwise be 'significant injustice' and there was no other remedy (such as an appeal): Taylor v. Lawrence [2002] EWCA Civ 90.*

[9] Supra.

In the case of **Fajemisin v The General Dental Council**[10] the above passage by Sedley LJ was interpreted as follows:

> *"The use of the word "ordinarily" suggests that Sedley LJ thought that there may be situations other than the need to correct accidental errors where a tribunal could re-visit its previous decision, but he did not say what they might be...In short, Sedley LJ was saying, I think, that a tribunal's power to re-visit a previous decision was limited to cases analogous to the slip rule 40.12[11] of the Civil Procedure Rules. The fact that the tribunal proceeded to determine the appeal in ignorance of the true facts as a result of an administrative error was not something which was capable of being corrected by something akin to the slip rule.. Sedley LJ was saying that ordinarily the only circumstance in which a tribunal can re-visit a previous decision it made was in the case of an accidental error."*

The second exception to the rule would therefore be the power to correct an accidental mistake.

The third exception is where a decision has been obtained by fraud or fundamental mistake of fact. Lord Denning held in **Lazarus Estate Ltd. v. Beasley**[12]*that*:

> *"No Court in this land will allow a person to keep an advantage he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud.* ***Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever;"***

Whether a decision could be reviewed where there is a fundamental mistake of fact arose in **Porteous v West Dorset District Council**[13]. In this case, Miss Porteous had applied to the local housing authority to be housed as a homeless person. She had received a letter informing her that she was eligible for assistance, as she considered to be homeless with a priority need on account of her children and not intentionally

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[10] [2013] EWHC 3501.

[11] Civil Procedure Rule 40.12 of the Civil Procedure Rules which provides that 'the Court may correct an accidental slip or omission in a judgment or order.'

[12] *[1956] 1 QB 702.*

[13] [2004] EWCA Civ 244.

homeless. She had previously lived in the district, with a sufficient local connection to warrant the local authority accepting a duty under section 193 of the Housing Act 1996 to secure permanent accommodation for her as a matter of urgency. This decision however had been made in ignorance of the fact that she was the tenant of a property in another part of the country which was available to her, as she had mistakenly thought that her tenancy of the property had been transferred to her sister. When the correct position was discovered, the authority withdrew their decision. The Court held that this decision was correct.

Mantell LJ held that:

> *"Is the local housing authority entitled to revisit and change an earlier decision if the earlier decision resulted from a fundamental mistake of fact? It would seem surprising if it could not. If an exception may be made for fraud why not for fundamental mistake? After all the resulting harm may be no greater in the one case than the other. Here, without there being any suggestion of bad faith on either side, unknown to either party there was accommodation available at the date of the original decision. Once the true position became known why in commonsense and justice should the local authority be held to a duty to provide accommodation which the applicant does not need and which could be made available in another more deserving case?"*

In **Fajemisin v The General Dental Council**,[14] it was held that:

> *"it would be surprising if the original decision could not be changed even though it had resulted from "a fundamental mistake of fact." If the original decision could be changed if it had been brought about by fraud, such as the deliberate non-disclosure of relevant facts, why not for fundamental mistake? **If "fraud unravels all", why should fundamental mistake not do so as well? The resulting harm would be no greater in one case than the other.**"*

Accordingly, it was held that the authority had been entitled to withdraw its earlier decision. Although Mantell LJ did not refer to **Akewushola** in his judgment (presumably because it was not cited to the court), **Porteous** is authority for the

[14] Supra.

proposition that, in addition to cases in which a public body can re-visit a previous decision under the equivalent of the slip rule, a public body can re-visit a decision which was made in ignorance of the true facts when the factual basis on which it had proceeded amounted to a fundamental mistake of fact. This would then be the fourth exception to the rule.

Having identified the exceptions to the rule, I must state that a party who wishes to bring a decision under any of the above exceptions have a high threshold to satisfy, and that the public authority must exercise caution in resorting to the said exceptions.

I shall now consider if the decision in '**P10**' falls under any of the above exceptions.

There is no doubt that it was the Commissioner General of Labour and his Officers who had been named as Respondents to this application who were in the best position to justify '**P10**'. Although the 1st – 3rd Respondents moved for time to file its Statement of Objections,[15] a Statement of Objections explaining the circumstances in which the Department of Labour decided to reconsider '**P7a**' - '**P7c**' was not filed. The 1st – 3rd Respondents therefore have failed to avail themselves of the opportunity to tender the documents referred to in '**P10**' that are said to have been submitted by the 4th and 5th Respondents, and/or explain the circumstances which led to a change in the decision contained in '**P7a**' - '**P7c**'.

By a motion filed on 23rd January 2019, the Attorney-at-Law for the 1st Respondent had informed that the 1st Respondent is *agreeable to hold a fresh inquiry into this matter with the participation of the Petitioners and the 4th and 5th Respondents and make a decision based on the findings of such inquiry.* The Petitioners however were not agreeable to the said proposal of the 1st Respondent.

By a further motion filed on 28th March 2019, the Attorney-at-Law for the 1st Respondent had submitted that *the 1st Respondent has no objection to (the) issuance of a Writ of Mandamus to implement the decisions marked as P7(a), P7(b) and P7(c) to the petition.* It is therefore clear that the Commissioner General of Labour is not supporting its decision contained in '**P10**', nor is the Commissioner General of Labour

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[15] Vide motion filed on 24th December 2018 by the Attorney-at-Law for the 1st – 3rd Respondents.

resisting this application. Although I would have found it useful had the Commissioner General of Labour adduced reasons for the above decision conveyed by the said motion, the decision of the Commissioner General of Labour conveyed to this Court by the final motion is nonetheless clear.

Thus, even though the decision of the 2nd Respondent could have been explained in the light of the above legal position that I have discussed, in the absence of any explanation and/or the reasons and/or the circumstances that prompted the 2nd Respondent to issue '**P10**', the decision in '**P7a**' – '**P7c**' are final. I am therefore of the view that the 2nd Respondent was *functus* and that the decision contained in '**P10**' is liable to be quashed by a Writ of Certiorari.

The failure on the part of the Commissioner General of Labour to explain the circumstances that led to the issuance of '**P10**' leaves the 4th and 5th Respondents in a precarious position. Therefore, I shall now consider the material placed by the 4th and 5th Respondents before this Court.

The 4th and 5th Respondents have annexed to their Statement of Objections, payment vouchers marked '**4R1A**', '**4R2A**' and '**4R3A**' for the payment of the aforesaid sums of Rs. 123,500/, Rs. 237,500 and Rs. 315,000 to the 1st, 2nd and 3rd Petitioners, respectively. The Petitioners have acknowledged the receipt of the said sums of money by the documents marked '**4R1B**', '**4R2B**' and '**4R3B**'. These vouchers together with the receipts were marked by the 4th and 5th Respondents before the Labour Tribunal to support its position that the said sums of money were paid to the Petitioners on account of the gratuity payable to each of them. The position of the 4th and 5th Respondents that the above sums of money reflect the payment of gratuity is in fact supported by the breakdown of the said sums of money, as well as by the admission by each of the Petitioners before the Labour Tribunal that the said sums of money were paid as gratuity.

The issue that I am faced with, as already discussed, is that the Labour Tribunal has proceeded on the basis that the said sums of money have been paid as compensation. Thus, the position of the 4th and 5th Respondents that they have paid gratuity to the Petitioners has either been rejected by the Labour Tribunal, or the Labour Tribunal misdirected itself on this issue. Either way, the Labour Tribunal was of the view that the Petitioners should be compensated for the loss of employment, at the rate of two months salary for each year of service. Thus, I am not in a position to conclude whether the Labour Tribunal would have ordered more than two months salary as compensation, had it been conscious of the fact that the above sums of money had been paid on account of gratuity. These are matters that should have been addressed by the 4th and 5th Respondents in their appeal to the High Court, which unfortunately has not happened.

Furthermore, there is no material before this Court that the documents '**4R1A**', '**4R2A**', '**4R3A**', '**4R1B**', '**4R2B**' and '**4R3B**' were placed before the 2nd Respondent and/or 3rd Respondent, or whether the decision in '**P10**' was as a result of these documents, or whether these documents, not having been presented before the Department of Labour are being presented before this Court for the purpose of resisting this application. Either way, the 4th and 5th Respondents have not established that the decision in '**P10**' can be brought under one or more of the above exceptions.

Taking into consideration all of the above factors, I am of the view that the 2nd Respondent acted *ultra vires* his powers when he issued '**P10**'. I accordingly issue a Writ of Certiorari quashing the decision contained in '**P10**'. The necessity to consider the issuance of a Writ of Mandamus is premature, and will arise only if the 4th and 5th Respondents do not comply with '**P7a**' – '**P7c**', and the Department of Labour refuses to implement the directives given by '**P7a**' – '**P7c**'. I make no order with regard to costs.

Judge of the Court of Appeal

Mahinda Samayawardhena, J

I agree

Judge of the Court of Appeal