LIYANAGE AND OTHERS
v
COMMISSIONER OF LABOUR AND OTHERS

COURT OF APPEAL
AMARATUNGA, J.
C.A. 1194/98
AUGUST 5, 2003

Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, as amended by Act, No. 4 of 1976 and Act, No. 51 of 1988, sections 11(2) and 12 – Commissioner to hold inquiry – Delegation of powers – Duty to give reasons, – Computation of compensation.

The petitioners sought to quash the decision of the Commissioner of Labour given after an inquiry held under the Termination of Employment (Special Provisions) Act, awarding compensation challenging the basis on which compensation was awarded. The petitioners also challenged the order on the basis that the inquiry was not held by the Commissioner and that no reasons were given in the order.

Held:

I) The Commissioner has the power to delegate the function of holding an inquiry to an Assistant Commissioner of Labour, as in terms of section 11(2) the Commissioner is empowered to delegate any power function or duty imposed or conferred on him to any officer of the Labour Department.

ii) There is no requirement under the Act for the Commissioner to give reasons for his decision, but the present judicial trend is that natural justice requires him to give reasons.

iii) If the report submitted to him by the officer who conducted the inquiry contains the reasons for the finding and the recommendation and if the Commissioner agrees with the findings and conditions there is no necessity for him to give separate reasons. He by his approval of the Report may "adopt" the reasons contained therein.

iv) In computing the compensation payable, the Commissioner has taken into account the reasons for the termination of services, the period of service of each petitioner, and the age, their present employment and the fact that they remained unemployed and computed the amount payable.

APPLICATION for a writ of *certiorari.*

Geoffrey Alagaratnam with *T. Dharmakeerthi* for petitioners
A. Gnanathansan, Deputy Solicitor-General for 1st and 2nd respondents
Romesh de Silva, P.C., with *Hiran de Alwis* for 3rd respondent.

Cur.adv.vult

August 5, 2003

GAMINI AMARATUNGA, J.

This is an application for a mandate in the nature of a writ of *certiorari* to quash the decision of the Commissioner of Labour given after an inquiry held under the Termination of Employment (Special Provisions) Act, No. 45 of 1971 as subsequently amended by Acts of No. 4 of 1976 and 51 of 1988 in respect of the termination of services of the petitioners by the 3rd respondent KLM Royal Dutch Airlines (hereinafter referred to as KLM). The termination was sequel to the stoppage of the Airline's flights *via* Colombo and the closure of its branch office in Sri Lanka.

The petitioners challenge the basis on which compensation awarded to them was computed and the quantum of compensation. The facts relevant to each petitioner is relevant in considering the decision of the 1st respondent Commissioner of Labour.

(1) *Petitioner Padma Liyanage*

This petitioner has served in the KLM office in the Sultanate of Oman. The appointment was from March 1983. The appointment was made on a specific letter of appointment marked 1A1. His services abroad has come to an end in 1995. As final settlement for his service abroad he has been paid by KLM a sum of Oman Riyal 9850/-. With effect from 26/4/1995 he has been appointed Station Manager KLM Colombo by letter of appointment (1A2) which sets out his terms and conditions of service. This is a letter of appointment to specific post. It is not a letter of transfer or a promotion. The petitioner's employment which commenced with the letter of appointment 1A2 was terminated from 1/4/1997 due

to the suspension of KLM Air Services to and from Colombo. Thus his service with KLM on the letter of appointment 1A2 ended with the termination effected on 1/4/1997.

(2) *Petitioner Piyatillaka*

She has stated that from September 1982 to September 1995 she was in the service of the KLM on a formal letter of appointment issued by the Carsons Cumberbatch Company and later by the Carsons Airline Services Limited which functioned as the General Sales Agent for the KLM in Sri Lanka. Business carried on by Carson Cumberbatch Company was transferred to Carsons Airline Services Limited in 1993 and the joint letter issued by the said two companies to this petitioner, dated 10/11/1993, (2A2) states that, she is transferred from the former company to the new company which will offer employment to her on the same terms and conditions and that the new company would recognize her past services with the former company. The petitioner has accepted employment under the new company on the terms and conditions set out in 2A2. Thereafter KLM has offered employment to this petitioner as customer service supervisor from 1/10/1995 on the terms and conditions set out in letter of appointment marked 2A5. The petitioner has accepted the offer of employment made by the KLM. This petitioner has tendered her resignation from the post she held at Carsons Airlines Services Limited (2A6). Her services were terminated by the KLM from1/5/1997.

(3) *Petitioner Abeywardana*

Her case is similar to the case of petitioner Piyatillaka. Abeywardana has served the Carson Company from 23/1/1989. In October 1995 she has accepted employment under the KLM. Her letter of appointment issued by the KLM is marked 3A5. Her services were terminated with effect from 1/5/1997 due to the suspension of KLM flights to and from Colombo.

(4) *Petitioner Kumudini Fernando*

She has joined the Carsons Company in July 1988. In her affidavit she has stated that in 1995 when Carson Airline

Services Limited attempted to terminate her services, she made an application to the Labour Tribunal for relief and the KLM and Carsons company paid Rs. 100,000/- to her in settlement of this case. Document 4A5 indicates that in addition to this payment the KLM offered employment to her and she has accepted employment under the KLM with effect from 18th March 1995 on the terms and conditions setout in the letter of appointment 4A6. Her services had been terminated with effect from 1/5/1997 due to the suspension of KLM Air Services to Colombo.

(5) *Petitioner Maussawa*

He was employed by the Carsons Company from September 1984. His case is similar to the cases of the others and he has accepted employment under the KLM with effect from 1/10/1995. His services were terminated with effect from 5/1/1997 for the same reason given in the case of the others.

(6) *Petitioner Harold Fernando*

He has accepted employment under the KLM with effect from 20.3.1996. Unlike the others he had no connections with the Carsons Company prior to his appointment to the service of the KLM. His services too were terminated with effect from 1/5/1997 due to the suspension of KLM Air Services to and from Colombo.

Against the termination of his services, petitioner Liyanage has complained to the Commissioner of Labour and the others have also made separate complaints. Their complaints were inquired into together by the Assistant Commissioner of Labour, Saranatissa, the 2nd respondent and his report to the Commissioner of Labour has been marked and produced in these proceedings as 1R3 by the 1st respondent. According to the recommendations made by the 2nd respondent he has proceeded on the basis that the petitioners' services with the KLM has commenced from the dates specified in the letters of appointment. He has made recommendations for the payment of compensation having taken into account whether they have subsequently found employment or not. The Commissioner of Labour having considered the report of the recommendations has approved the 2nd respondent's recommendations and made his order accordingly.

One of the complaints of the petitioners is that the decision of the 1st respondent violates the principle that 'he who decides must hear'. In this case the full report of the 2nd respondent to the 1st respondent has been produced before this Court. In his report the 2nd respondent has dealt with the arguments made on behalf of the petitioners that their services with the 'formal' appointments issued by the Carsons Company was also a period of service in the service of the KLM, the 3rd respondent. Under section 12 of the Termination of Employment of Workmen Act (Termination Act) the Commissioner has the power to hold an inquiry necessary for the purposes of the Act. Termination of employment contrary to the provisions of the Act is one matter in respect of which the Commissioner is empowered to hold an inquiry. In terms of section 11 (2) of the Act, the Commissioner is empowered to delegate any power, function or duty imposed or conferred on him to any officer of the Labour Department. Thus he has the power to delegate the function of holding an inquiry to an Assistant Commissioner of Labour. The petitioners have, without any objection participated in the inquiry held by the 2nd respondent.

The copy of the report submitted by the 2nd respondent to the Commissioner contains the 2nd respondents recommendation with his reasons for such recommendations. The endorsements made by the Commissioner in the report in respect of the case of each petitioner indicates that he has addressed his mind to the facts, reasons and recommendations set out in the report. It is not a requirement that the Commissioner should himself conduct an inquiry under the Act. He is competent to delegate that task to an officer of the Labour Department. In fact considering the number of complaints that may be received by the Commissioner under the Act at any particular time it may not be possible for the Commissioner to hold an inquiry in respect of each complaint. It is therefore competent for him to get one of his officers to inquiry into the matter. What is important is that in making his order he should consider the report presented by such officer.

There is no requirement under the Act for the Commissioner to give reasons for his decision. But the present judicial trend is that natural justice requires him to give reasons. *Karunadasa* v *Unique Gem Stones Limited and others (1997) 1 LR 256.* If the report submitted to him by the officer who conducted the inquiry contains the

reasons for the findings and the recommendation and if the Commissioner agrees with the findings and recommendations there is no necessity for him to give separate reasons. He, by his approval of the report, may 'adopt' the reasons contained therein. It is sufficient compliance with the duty to give reasons. In this case the Commissioner has placed before Court the report of the 2nd respondent. His order has been made on the acceptance of the findings of the 2nd respondent. Therefore his order cannot be assailed on the basis that 'he who decides must hear'.

In this application the cases of the 1st petitioner Liyanage and the 6th petitioner Harold Fernando are different from the cases of the other petitioners. 1st petitioner's first appointment was by the KLM in 1983 at Oman. That was a time during which the KLM did not have a branch in Sri Lanka. Thus it was a contract with a foreign company in a foreign country. The Commissioner has rightly stated that the 1st petitioner's contract of employment for KLM in Oman is like any other contract of a local employee abroad for services abroad which was duly terminated in that country with the payment of terminal benefits. Therefore his employment in Oman cannot be treated as employment in Sri Lanka for the purposes of the Termination Act. His employment in Sri Lanka cannot be treated as a continuation of his employment commenced in Oman. His appointment (1A2) is a separate appointment and for the purposes of the Termination Act, his employment in Sri Lanka has commenced only in April 1995. Having taken into consideration that he has obtained employment after the termination of his services by the KLM the Commissioner has awarded as compensation four months salary to him for his service of one year and eleven months with the KLM.

The 6th petitioner's employment with the KLM has commenced only in March 1996. The Commissioner, having taken into account that the 6th petitioner has obtained employment in 1996 has awarded him three months salary as compensation for his 13 months service.

The cases of the other petitioners were that though their initial appointments were under 'formal' letters of appointment issued by Carsons Company, they were in fact the employees of the KLM. In support of this contention they have urged the following grounds.

1. The KLM issuing its identity cards to them when they were in the service of the Carson Company.
2. Training given to them by the KLM and the certificates issued for satisfactory services.
3. Bonus payments to them by the KLM.
4. Certificates issued to them on the basis that they have been in the service of the KLM for the periods set out in those certificates.

The letters of appointment very clearly indicate that the 2nd to 5th petitioners have been employed by the Carsons companies. Their salaries were paid by those companies. The petitioners were members of the Carsons Administrative Officers Provident Fund Scheme. Employers contribution to the Provident Fund was paid by those companies. On this material it is clear that the power to terminate the services of the petitioners was also with those companies. Thus the Carsons Cumberbatch Company in the first stage and Carsons Airline Services Limited at a later stage was the employer of the petitioners (2-6)in fact and in law.

There is no doubt that the 2nd to 5th petitioners have been performing the services connected to the airline services of the KLM. They have performed those duties as employees of the General Sales Agent for the KLM. They have been given training by the KLM as they were handling the work connected with the air services of the KLM. Therefore the certificates and other testimonials issued by the KLM are not items of evidence which indicate that the petitioners were employed by the KLM. The bonus payment too cannot be regarded as payments made in the discharge of an employer's obligation to its employees. A bonus is an *ex gratia* payment. As already stated the petitioners as employees of the KLM's General Sales Agent have performed duties connected with the KLM Airline Services, a bonus payment in appreciation of the services of the petitioners cannot be regarded as a payment made in terms of a contractual obligation.

The KLM has issued their identity cards to the petitioners while they were the employees of Carsons companies. It is true that usually an identity card is issued by the employer. In this instance all other evidence indicate that the petitioners were the employees of

the Carson companies. The petitioners, being persons handling matters relating to airline services necessarily have to have dealings with airports which are usually restricted areas. The possession of an identity cards issued by the KLM is an indication that they are persons engaged in the services connected to the KLM. Therefore the identity card is a means of identifying them with the services of the KLM. Thus the documentary evidence such as the letters of appointment issued by Carsons Cumberbatch Limited and Carsons Air Services Limited, payment of salaries and the employers contributions to the provident fund unmistakably point to the fact the petitioners were the employees of those companies. Letters of resignation tendered to the Carsons Air Lines Services (such as 2A6) before the petitioners joined the KLM very clearly indicate that before they joined the KLM in 1995, they themselves accepted the position that they were the employees of the Carsons companies. According to the evidence placed before the Inquiry Officer the 2nd to 5th petitioners have become employees of the KLM only from 1995 and the KLM became their employer within the meaning of the Termination Act only after it issued the letters of appointment to them in 1995.

In deciding whether a particular person is an employer within the meaning of the Termination Act, the Commissioner of Labour is bound by the contract of employment. The Act contains a statutory limitation of the employer's right to terminate the services of the employee. In view of the special restrictions imposed by the Act with regard to the termination of services, an employer's right to terminate the services in accordance with the terms of the contract of employment is statutorily modified to that extent. Whatever may be the contractual terms with regard to the termination of services, the Commissioner of Labour has the power to grant relief if the termination is in violation of the provisions of the Termination Act. But in other respects such as for example for the determination whether a person is an employer within the meaning of the Termination Act the Commissioner of Labour is bound by the terms of the contract of employment. His power to grant relief notwithstanding anything to the contrary in any agreement is limited to situations where termination has been effected contrary to the provisions of the Act although such termination is within the power available to an employer under the contract of employment.

In this instance, the Commissioner has acted within his powers, has taken all relevant matters into consideration and has come to the correct conclusion that for the purposes of the Termination Act, the 3rd respondent KLM became the employer of the petitioners only after the KLM directly employed them on letters of appointment issued in 1995 (in the case of the 6th petitioner from 1996).

In computing the compensation payable to the petitioners, the Commissioner has taken into account the reason for the termination of services, the period of service of each petitioner and the age, their present employment or the fact that they remained unemployed and computed the amount payable to each petitioner as compensation. The petitioners have not established any reason to interfere with the conclusions and recommendations given by the 2nd respondent and the decision of the Commissioner. Accordingly I dismiss the application of the petitioners. In view of the unfortunate situations in which the petitioners were placed due to reasons beyond their control I make no order for costs.

Application dismissed.