

**GUNASELVAM**  
**v**  
**COMMISSIONER OF LABOUR AND OTHERS**

COURT OF APPEAL  
WIJAYARATNE, J. AND  
SRIPAVAN, J.  
C.A. 757/2000  
July 22, 2004

*Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 sections 2, 5 and 6 – Termination within section 2 – What are the orders the Commissioner could make?*

**Held:**

- 1) When the Commissioner holds that the termination falls within the ambit of section 2, the Commissioner is obliged to make a determination in terms of section 5 and to make an order in terms of section 6.

*Per Wijeratne, J.*

“The document communicating the order does not contain such a determination or an award – it is only an award of 3 months salary *in lieu* of 3 months notice – it does not fall within the requirement of section 6.

**APPLICATION** for a writ of *certiorari* / *mandamus*.

*K. Kanag-Iswaran, P.C. with C.L. Wickremanayake, M.A. Sumanthiran and Nigel Bartholomeus for petitioner*

*A. Gnanathanasan, Deputy Solicitor-General, with Vikum de Abrew for 1st and 2nd respondents.*

*Hemasiri Wittanachchi with S.N. Vijithsingh for 3rd respondent.*

*Cur.adv.vult*

August 3, 2004

**WIJAYARATNE, J.**

The petitioner preferred this application against the three 01  
respondents named in the petition, who are the Commissioner of Labour, Assistant Commissioner of Labour (Termination) and the Company against whom he has claimed reliefs, in the nature of writ of *certiorari* to quash the order of the 2nd respondent dated 16.5.00 marked X7 and writs of mandamus as prayed for in paragraphs c, d and e of the prayer to the petition.

The application was made on the basis that the petitioner whose 10  
services as a workman in the 3rd respondent company was terminated with effect 15.3.95 by letter marked "X". The petitioner made an application to the 1st respondent in terms of the provisions of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 as amended. When the inquiry commenced before the 2nd respondent as directed by the 1st respondent a preliminary objection was raised on behalf of the 3rd respondent to the jurisdiction of the 2nd respondent to inquire into the application as the 3rd respondent urged that the petitioner was retired when the 3rd respondent ascertained that the petitioner has passed his age of retirement of 55 years. The Assistant Commissioner inquiring 20  
into the application overruled such objection by his order dated 15.09.95 marked 'X1', holding that even if the 3rd respondent company had a policy of retiring the workmen at the age of 55, the Company has not retired the petitioner who had worked after the age of 55 without any extension of service or other conditions of employment being stipulated. Accordingly the Assistant

Commissioner held that the termination of the petitioner's services attracted the provisions of section 2 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 as amended.

This order was challenged by the 3rd respondent Company in C.A. 766/95 wherein the document marked "3R3" dated 14.3.84 which constitutes the contract of employment as alleged by the 3rd respondent where the age of retirement is expressly stipulated was considered. The Court having considered the issues involved and the legality of the order of the Assistant Commissioner, by its judgment dated 02.10.96 held that there was an error of law on the face of the record and directed the 2nd respondent to commence and continue the inquiry which he started and to complete it expeditiously. This judgement is marked "X2". The 3rd respondent sought special leave to appeal from the Supreme Court against "X2" which was refused by the order dated 24.7.97 marked "X3". Thereafter the inquiry before the Assistant Commissioner continued but no order was made as Mr. K.A. Henry, the Assistant Commissioner ceased to hold office. The petitioner through his attorney-at-law made representations to the Commissioner seeking an order on the inquiry held. The 1st respondent by the document marked X7 communicated the order and the reasons and directed the 3rd respondent company to pay the petitioner three months salary in lieu of three months notice of termination. It is this order that the petitioner seeks to canvass in these proceedings.

Given notice of the application, the 1st and 2nd respondents through their Counsel informed Court on 23.03.2001 that they would not be filing any statement of objections but would abide by any Order the Court may make. The 3rd respondent company filed statement of objections refuting several statements of the petitioner and maintaining that the service contract of the petitioner constitutes a policy decision as evidenced by "3R3" and that the Commissioner's order was in accordance with the terms of the law and cannot be reviewed by this Court.

At the argument stage, Counsel for the petitioner urged that the Assistant Commissioner in rejecting the preliminary objection has held that the termination of the employment of the petitioner was contrary to the provisions of section 2 of the Termination of

Employment of Workmen (Special Provisions) Act, No. 45 of 1971 as amended. Therefore the Commissioner is obliged to make a determination and to make an order in terms of sections 5 and 6 thereof. On behalf of the 3rd respondent company Counsel sought to re-agitate the question of petitioner's appointment letter and the policy decision marked "3R3" constituting the contract of employment of the petitioner with the 3rd respondent company which had the discretion of granting the extension of service beyond 55 years of age, or to retire the workman at their discretion. He also stated that the petitioner was allowed to continue in service till 57 1/2 years of age, would mean that the 3rd respondent Company has by its conduct allowed the petitioner's extension up to that date.

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Having heard Counsel in support of their respective positions we first considered the eligibility of the 3rd respondent to re-agitate the matter that has already been adjudicated by this court in terms of the judgment marked "X2". Learned Counsel urged that it is trite law and well settled principle that an employer can embody or incorporate the terms of employment of workmen in subsequent decisions taken by the 3rd respondent Company from time to time.

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We are not inclined to examine this position in view of the fact that the same question having been raised by the 3rd respondent himself and the Court having decided the same against him with the special leave to appeal being refused, is a matter already decided by this Court.

What remains to be examined then is what should have been the order of the Commissioner at the conclusion of the proceedings before the Assistant Commissioner. When the Assistant Commissioner proceeded with the inquiry holding that the termination falls within the ambit of section 2 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 as amended, the Commissioner is obliged to make a determination in terms of section 5 and to make an order in terms of section 6 of the said Act. "X7" does not contain such a determination or an order but an award of three months salary in lieu of three months notice which does not fall within the requirement of section 6 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 as amended.

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We are satisfied that the order of the Commissioner marked "X7" is not in conformity with the requirement of the provisions of the said Act. Accordingly we allow the application and issue a writ of *certiorari* quashing the order of the Commissioner dated 16.5.2000 and direct the 1st respondent to make an appropriate order in terms of sections 5 and 6 of the provisions of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 as amended, on the basis of the proceedings already concluded before the Assistant Commissioner.

Accordingly, a writ of *mandamus* in terms of paragraphs c, d and e of the prayer to the petition is granted. 110

The petitioner is entitled to a sum of Rs. 5000/- by way of costs payable by the 3rd respondent who resisted the application.

**SRIPAVAN, J.** – I agree.

*Application allowed.*