THE PUBLIC SERVICES UNITED NURSES UNION

v.

MONTAGUE JAYEWICKREMA, MINISTER OF PUBLIC ADMINISTRATION AND OTHERS

S.C. APPLICATION No. 4/87
WANASUNDERA, J.
L. H. DE ALWIS, J. AND
SENEVIRATNE, J.
FEBRUARY 12 AND MARCH 22, 1988.

Fundamental Rights–Articles 12, 55 and 126 of the Constitution–Trade Union–Strike–Essential Services Order under Emergency (Miscellaneous Provisions and Powers) Regulations No. 3 of 1986–Settlement–Salary Increments to non-strikers–Equality–Discrimination–Classification–Government Service and Article 55.

The Public Services United Nurses Union to which the majority of the nurses in Government Hospitals belong struck work between 18th March and 16th April 1986 demanding increase in salaries. The strike became an illegal one because the service was declared an essential service by His Excellency the President's Essential Services Order made under the Emergency (Miscellaneous Provisions and Powers) Regulations No. 3 of 1986. Notices of vacation of post were served on the strikers and those of them who occupied government quarters became liable to be evicted. The strike however was settled. The notices of vacation of post were withdrawn and the striking nurses were allowed to resume work without loss of back pay. However about 2,600 nurses who were members of the 7th respondent a rival Union to the petitioner were given the special ad hoc benefit by the Government to pay two increments to the nurses who worked during the entirety of the strike period and one increment to the nurses who reported for duty at various stages before 16.4.86.

The petitioner's Union complained to the Supreme Court of discrimination and violation of the fundamental right of equality guaranteed under Article 12 of the Constitution.

Held–

(1) Although the origin of government service is contractual, once the appointment is made, the legal position of a government servant is one of status and his powers and duties are exclusively determined by law and not by agreement. Under Article 55 of the Constitution, the government can make unilateral alterations that may affect the contractual relationship of a public officer with the Government, yet there must be observance of form and procedure.

(2) The Establishment Code has been issued by Government in the exercise of the legislative power vested in the Cabinet of Ministers under Article 55(4) and has statutory force. Though ad hoc determinations may be made by the Cabinet in a few matters it is essential that provisions relating to salary increments, leave, gratuity,

pension, superannuity, promotion and every termination of employment and removal from service should be in the form of rules which are general in operation though they may be applied to a particular class of public officers. Further when existing general rules are sought to be altered this too must be done in the same manner and following the identical procedure for their formulation, namely, by enacting an amending rule.

A classification to pass muster must be based both on intelligible differentia and such differentia must have a rational relation to the object sought to be achieved.

Per Wanasundera, J.

By the impugned proposal "the authorities have as it were by a stroke of the pen, instantly rewarded particular public officers with one or two increments and have placed others at a disadvantage in relation to them. This appears to go against the grain of the existing administrative provisions and the legitimate expectations which public servants entertain based on these provisions. . . ."

"The position is infinitely worse when apart from the cumulative benefits, it also entails the accelerated grant of increments and places such an officer in a superior position over his colleagues in so many other significant matters."

(3) The Cabinet proposal granting this ad hoc incremental benefit to a very limited class of officers violates the equality provisions contained in Article 12 of the Constitution. The decision is therefore null and void.

Cases referred to:

(1) *Roshan Lal v. Union of India AIR 1967 SC 1894.*
(2) *Abeywickrema v. Pathirana [1986] I Sri LR 120.*
(3) *R. v. Secretary of State for the Home Department (1985) 1 All ER 40.*

APPLICATION under Article 126 of the Constitution for violation of the fundamental right of equality guaranteed by Article 12.

Nimal Senanayake, P.C. with *Miss. S. M. Senaratne, Mrs. A. N. Dissanayake, Miss. Shiranthie de Saram* and *Jayantha Wewelwela* for petitioners.

A. S. M. Perera, Senior State counsel for 1st to 5th respondent.
Ranjith de Silva with *George Rajapakse* for the 6th and 7th respondents.

Cur. adv. vult.

April 29, 1988.

WANASUNDERA, J.

This is an application under Article 126 of the Constitution, seeking redress for a violation of fundamental rights guaranteed by the Constitution. The 1st petitioner is a trade union called the Public Services United Nurses Union, to which a majority of nurses working in

government hospitals belong. The 2nd petitioner is a nurse and is also the Secretary of the 1st petitioner union.

The petitioners struck work between 18th March and 16th April 1986, demanding increases in salaries. On the eve of the strike, the President, acting by virtue of the powers vested in him under the Emergency Regulations, by Order declared nursing, care, treatment of patients, and hospital services to be an "essential service" within the meaning of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 3 of 1986. The effect of this order was to make the strike illegal. Apart from the criminal liabilities incurred by those violating these regulations, it also entailed the termination of the services of the officers who went on strike and their liability to be ejected from government quarters. The authorities proceeded to enforce these liabilities when these nurses defied the Order.

The strike however was settled with the notices of vacation of office being withdrawn and the striking nurses being allowed to resume their duties and to continue in office without loss of back pay. In fact these striking nurses were taken back unconditionally. Further, the Government had agreed to enter into negotiations regarding the demand for salary increase. Mr. Ranjith de Silva who appeared for the 6th respondent was constrained to admit that the strike was at the least a partial success.

The petition which runs to seventy-seven paragraphs deals in the main with the allegation that the 7th respondent, the Jathika Saukya Seva Heda Sangamaya, is a branch of the 6th respondent, the Jathika Sevaka Sangamaya, and that these two respondents, by reason of their close links with the ruling government party (the Secretary of the J.S.S. is in fact a member of the Working Committee of the ruling party), were in a position to wield and had in fact wielded enormous influence with the government to obtain favours and benefits for their own unions and had enlisted the help of the government to go against rival unions.

While admittedly there appears to be a close link between the 6th and 7th respondents *inter se* and both of them with the goverment, it is only fair to state, as explained by Mr. Ranjith de Silva, that the 7th respondent is not a branch in fact of the 6th respondent which is

legally permitted to operate only in the non-governmental sector. He however admitted that the 7th respondent union is affiliated to the P.S.N.T.U.F., which like the 6th respondent is part of the trade union structure of the ruling party. There is no doubt that these unions work in close association and have leverage with the Government.

Though Mr. Ranjith de Silva was only prepared to admit that his union like any active union was concerned with the rights of its own members, one cannot rule out the possibility that some of its activities may have been directed against rival unions like the 1st petitioner. It is well-known that in the trade union field there is usually strong competition between rival unions.

Both counsel agreed that it may be unnecessary for the Court to go into the voluminous material relating to allegation and counter allegation between the rival unions and it is possible to decide this matter only on the main issue in the case, namely the constitutional question involving the interpretation of Article 55 of the Constitution.

After the dust of the strike had settled down and the strikers had resumed work, the 7th respondent union made a proposal on 15th May 1986 to the Government that some compensation should be paid to those persons who worked during the strike. The proposal was that the Government should pay the non-strikers:

(*a*) two increments to all nursing personnel who worked during the full period of the strike,

(*b*) one increment to those nursing personnel who reported for duty at various stages before 16.04.86.

This proposal was approved by the Minister of Health and submitted to the Cabinet of Ministers. The Cabinet accepted that proposal and embodied it in a Cabinet decision. The Cabinet decision was implemented, with the result that a number of nurses were granted the above increments. The Cabinet decision did not single out the 7th respondent union as such for this benefit and in fact a few nurses who did not belong to the 7th respondent union also fell within the ambit of the proposal. The proposal however had emanated from the 7th respondent union and was clearly intended to benefit primarily its own members and it is they who actually got the benefit of it.

In paragraph 17, 18 and 19 of the petition the petitioners complain that about 2,600 nurses have scored an advantage over their colleagues by the Cabinet decision. They have been placed at an advantageous point in their salary scales, which is two steps higher than where they should be and they would consequently reach their maximum salary in that scale two years before they would normally have reached it. The petitioners further alleged that the financial benefit accruing to them would involve cumulative increases in allowances and computation of pension. It would also give these officers a decided advantage over others, who up to then were equals in respect of promotion and qualification for higher grades and posts. Mr. Senanayake in his submissions also referred to the fact that the definition of "staff grade" and "subordinate officer" in the Establishment Code and Administrative Rules is pegged to the amount of salary and since disciplinary procedures also vary, based on such distinction, the implementation of the proposal has conferred further benefit on this class of officers.

Mr. Senanayake's main submission was based on the interpretation of Article 55 of the Constitution. As a background to this and to understand Article 55 in its proper setting, Mr. Senanayake stated that the sole and only provisions relating to the fair and proper administration of the public service is now to be found in Article 55. Today a public servant is shut out from the courts or Labour Tribunals and has to look to only this provision for relief. The provisions of Article 55, he submitted, are intended to be *operated bona fide* and uniformly to ensure fair play and justice. They should not be used for the victimization of public officers or in an arbitrary fashion.

Article 55 of the Constitution reads as follows:–

"(1) Subject to the provisions of the Constitution, the appointment, transfer, dismissal and disciplinary control of public officers is hereby vested in the Cabinet of Ministers, and all public officers shall hold office at pleasure.

(2) The Cabinet of Ministers shall not delegate its powers of appointment, transfer, dismissal and disciplinary control in respect of Heads of Departments.

(3) the Cabinet of Ministers may from time to time delegate its powers of appointment, transfer, dismissal and disciplinary control of other public officers to the Public Service Commission:

Provided that the Cabinet of Ministers may, from time to time and notwithstanding any delegation under this Article, delegate to any Minister its power of transfer in respect of such categories of officers as may be specified, and upon such delegation, the Public Service Commission or any Committee thereof shall not exercise such power in respect of such categories of officers.

For the purposes of this proviso, "transfer" means the moving of a public officer from one post to another post in the same service or in the same grade of the same Ministry or Department with no change in salary.

(4) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters relating to public officers, including the formulation of schemes of recruitment and codes of conduct for public officers, the principles to be followed in making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of public officers.

(5) Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126 no court or tribunal shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question, any order or decision of the Cabinet of Ministers, a Minister, the Public Service Commission or of a public officer, in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer.

(6) For the purposes of this Article 56 to 59 (both inclusive) "public officer" does not include a member of the Army, Navy or Air Force."

In *Roshan Lal v. Union of India* (1) the Supreme Court of India, commenting on the position of a public officer, said:

"It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not

by mere agreement of the parties. The emoluments of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is true that Article 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor under Article 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned."

An examination of Article 55 of our Constitution shows that the Government in this country is also enabled to make such unilateral alterations that may affect the contractual relationship of a public officer with the Government. While there is no doubt about the authority and power to make such provisions, there still remains a question of form and procedure as to how it should be done.

In *Abeywickrema v. Pathirana,* (2) Chief Justice Sharvananda, in giving the majority judgment which is binding on us, said:

"Article 55(4) empowers the Cabinet of Ministers to make rules for all matters relating to public officers, without impinging upon the overriding powers of pleasure recognised under Article 55(1). Matters relating to 'public officer' comprehends all matters relating to employment, which are incidental to employment and form part of the terms and conditions of such employment, such as provisions as to salary, increments, leave, gratuity, pension, and of superannuity, promotion and every termination of employment and removal from service. The power conferred on the Cabinet of Ministers is a power to make rules which are general in their operation though they may be applied to a particular class of public officers. This power is a legislative power and this rule making function is for the purpose identified in Article 55(4) of the Constitution as legislative, not executive or judicial in character.

A rule made in exercise of this power by the Cabinet has all the binding force of a statute, or regulation. The relevant Establishments Code of the Democratic Socialist Republic of Sri Lanka (P6) has been issued by the Secretary to the Ministry of Public Administration under the authority and with the approval of the Cabinet of Ministers. It is in the exercise of the legislative power vested in the Cabinet of Ministers under Article 55(4), that this Code has been issued. Though the position might have been otherwise prior to the Constitution, the code relating to Public Officers acquires by virtue of its Constitutional origin, statutory force, provided of course it is not inconsistent with any provisions of the Constitution, including the articles relating to fundamental rights and Article 55(1), which enshrines the doctrine of pleasure or the provision of any statute. In a case of breach of any of the mandatory rules in the code, the aggrieved public officer has, subject to the provision of Article 55(5) of the Constitution, a remedy in a court of law. The enforceability of a service rule is a question different from that of its character as to whether it is statutory or otherwise. All statutory rules are not necessarily enforceable in a court of law. It is only the breach of a mandatory rule which is justiciable. Once a rule is held to be mandatory and not inconsistent with the Constitution, there is no reason why it should not be enforced, like any other statutory rule but should be considered to be mere administrative instructions, simply because it relates to matters relating to government service."

Although one cannot altogether rule out a few matters in which *ad hoc* determinations may be made by the Cabinet, it is however essential, as Sharvananda, C.J., states, that "provisions as to salary increments, leave, gratuity, pension and of superannuity, promotion and every termination of employment and removal from service" should be in the form of rules "which are general in operation though they may be applied to a particular class of public officers." Further, when existing general rules are sought to be altered, this too must be done in the same manner and following the identical procedure as for their formulation, namely, by enacting an amending rule. Could one say that this procedure has been followed in the present case?

When the proposal for the payment of the increments came up for consideration, two Ministers – the Minister of Finance and the Minister of Public Administration (the two Ministers most connected with this subject) – were against it. Their views are informative. The Minister of Public Administration observed:

"(i) While some recognition may be called for, for reporting for duty and doing their normal quota of work, it would not be justifiable to pay extra increments with its continuing cumulative benefit.

(ii) An ex gratia payment of an extra day's wage to each, in respect of each such day could be more appropriate."

The Minister of Finance was of the view that the proposal was wrong in principle. He stated:

"The payment of additional increments, as proposed would set a precedent which would have to be followed in future by all Government Departments and Corporations. The payment of increments would also involve additional remuneration to the officers concerned for many years until they reach the maxima of their salary scales. I would suggest that instead of paying additional increments, these nurses should be paid a once-and-for-all honorarium. The quantum of the honorarium should be determined in consultation with the Ministry of Public Administration, and the honorarium should be paid from savings in the votes of the Ministry of Health."

These perceptive comments point to the basic objections that lie in the way of such a proposal. When Article 55 of the Constitution vests authority over public affairs in the Cabinet and make it mandatory for the Cabinet to formulate schemes of recruitment, and codes of conduct for public officers, the principles to be followed in making promotions and transfers etc., the Constitution contemplated fair, and uniform provisions in the nature of general rules and regulations and not action that is arbitrary or *ad hoc* or savouring of bias or discrimination.

We were informed that these non-striking nurses were adequately compensated financially for any extra work they may have performed during the period of the strike. If ex gratia lump sums and overtime were paid to them, there were other categories of workers in hospital staff not belonging to the nursing grades, who also did extra work during that period, but they were excluded and did not benefit from this proposal. Public officers in the Ministries of Health and the Teaching Hospitals who are closely connected with the running of

hospitals were also not granted this benefit. Further, other public officers who constitute the great majority of public servants in the country who also functioned during this period have been left out. Though their devotion to duty was no different from that of the non-striking nurses, none of them however were regarded as deserving of these benefits. It is restricted to a chosen few.

Counsel for the respondents submitted that the reasons for the proposal was to reward devotion to duty and to discourage future strikes. But the reward has not been spread to all public officers similarly situated. This appears to have been done on an earlier occasion. The proposal also lacks any generality, in that it is not intended for recurrent application. It is in respect of one particular event, namely, only the nurses' strike of April 1986. Like a bus ticket valid for one day and one journey only, this proposal can be said to be in every respect *ad hoc* and arbitrary. A classification to pass muster must be based both on intelligible differentia and such differentia must have a rational relation to the object sought to be achieved.

Even in regard to the particular event with reference to which it was made, there is no dispute that the strike was settled unconditionally and the striking nurses were allowed to resume work without loss of any back pay. The differences were composed at that point of time without pre-conditions, without punishment and without rewards. There is much force in Mr. Senanayake's submission that if the question of reward and punishment had been brought up at that stage, the strike would have continued or there would have been another strike because the strikers would never have consented to a proposal of this nature. In these circumstances there is no valid basis for granting these far-reaching benefits to a very limited and narrow segment of public officers of the public service of this country, or for imposing a disability or disadvantage on the rest. The matter becomes all the more suspect when we find that the benefits of this proposal accrue primarily to officers of a particular union having affiliations with the ruling party. If the strike led to any re-thinking by the administrators in regard to the future running of hospitals, then they ought to have thought the problem out in relation to the whole public service and formulated rules of general and permanent nature which alone could have been of benefit to the service and country.

Mr. Senanayake submitted further that the effect of this proposal is to cut across the principles and policies now existing in the Establishments Code and the Administrative Regulations by the introduction of a new element which is both arbitrary and *ad hoc* and inconsistent with those provisions. An increment in the public service according to the existing rules and regulations is earned by a public officer by satisfactory work and conduct during a specified period of time, namely, one year. Again the stoppage, postponement or deprivation of an increment is in the nature of a penalty consequent on disciplinary action against a public officer. By this proposal the authorities have, as it were by a stroke of the pen, instantly rewarded particular public officers with one or two increments and have placed others at a disadvantage in relation to them. This appears to go against the grain of the existing administrative provisions and the legitimate expectations which public servants entertain based on these provisions, *R. v. Secretary of State for the Home Department* (3).

The position is infinitely worse when, apart from the cumulative benefits, it also entails the accelerated grant of increments and places such an officer in a superior position over his colleagues in so many other significant matters. The wage structure of the public service is of utmost interest both to the officers concerned and the general public and its importance is seen by the fact that revisions and alterations are made only after the most careful consideration and after a thorough hearing of the views of all categories of public officers. The usual machinery for this purpose is the setting up of a Salaries Commission.

I am therefore of the view that this Cabinet proposal granting this *ad hoc* incremental benefit to a very limited class of offices violates the equality provisions contained in Article 12 of the Constitution. This decision is therefore declared null and void. Article 55(5) vests the Supreme Court with a constitutional jurisdiction to make such a declaration even in respect of a Cabinet decision when there is a violation of a fundamental right. The application is therefore allowed with costs in a sum of Rs. 5,000 which should be paid by the State to the petitioners.

L. H. DE ALWIS, J. – I agree.

O. S. M. SENEVIRATNE, J. – I agree.