1975 *Present :* **Tennekoon, C.J., Wijayatilake, J., and Ismail, J.**

THE CEYLON ELECTRICITY BOARD, Petitioner, and W. E. DE ABREW and another, Respondents

S. C. 890/73—In the matter of an Application for a Mandate in the nature of a Writ of Certiorari and Prohibition

Removal from Office of the General Manager, Ceylon Electricity Board—Application to the Labour Tribunal for relief by the General Manager—Jurisdiction of Labour Tribunal—General Manager a "workman" within the meaning of the Industrial Disputes Act—The Electricity Board Act No. 17 of 1969 Sections 5, 11, 12, 13, 31—Industrial Disputes Act Sections 31 B (1), 31 B (4), 48, 49—Local Government Service Act No. 18 of 1969 Section 13(2).

The General Manager of the Ceylon Electricity Board constituted under The Electricity Board Act, No. 17 of 1969 was removed from office by the Board of Directors. Thereupon the General Manager made application to the Labour Tribunal for relief or redress by way of reinstatement or compensation and for gratuity.

In his application he alleged that the "purported termination" of his employment was "unlawful, unjustified, illegal, malafide, and prompted by extraneous considerations". It was contended on behalf of the Board that the Labour Tribunal had no jurisdiction to entertain the application inasmuch as (*a*) the application to the Labour Tribunal was an invitation by the Tribunal to exercise supervisory powers which are not an attribute of Labour Tribunals ; (b) that the General Manager is not a "workman" within the meaning of the Industrial Disputes Act.

Held, (1) that the application that has been made is sufficient to invoke the Labour Tribunal's jurisdiction to grant relief or redress in the shape of reinstatement or compensation on the ground that the termination of services was unjustified and for gratuity on the ground that the contract of employment has been brought to an end ;

(2) that the General Manager of the Electricity Board is a "workman" within the meaning of the Industrial Disputes Act.

"It is clear that the General Manager has a contract of employment with the Board ; although some parts of the contract may be controlled by the statutory provisions contained in the Act, the relation between the Board and the General Manager cannot be explained on any other hypothesis than on a contractual one."

APPLICATION for a writ of certiorari and prohibition.

Nimal Senanayake, with *Bala Nadarajah, Miss S. M. Senaratne* and *Rohan Perera,* for the Petitioner.

H. L. de Silva, with *E. B. Mendis,* for the 2nd Respondent.

Cur. adv. vult.

May 8, 1975. TENNEKOON, C.J.—

The petitioner in this application for Mandates in the nature of Writs of Certiorari and Prohibition, is The Ceylon Electricity Board constituted under The Electricity Board Act No. 17 of

of 1969 ; the 2nd respondent, W. E de Abrew, was functioning as the General Manager of the Board from the 15th of September, 1970, until he was removed from office by the Board of Directors by its letter dated 17th January, 1972.

The 2nd respondent made application to the Labour Tribunal for relief or redress by way of reinstatement or compensation and for gratuity. The applicant alleged that the " purported termination " of his employment was " unlawful, unjustified, illegal, mala-fide, and prompted by extraneous considerations ".

The petitioner submitted to the Labour Tribunal that it had no jurisdiction to entertain the application of the 2nd respondent because:

(*a*) the 2nd respondent was a State Officer in that, although employed by the Board, the Board was merely an agency of the State ;

(*b*) that the Labour Tribunal had no jurisdiction to enter upon or decide the question as to whether the removal of the 2nd respondent was a nullity ; and

(*c*) that the 2nd respondent was not a workman within the meaning of the Industrial Disputes Act.

The President of the Labour Tribunal having inquired into these objections, made an interim order on the 21st of September, 1973, rejecting the objections and holding that the 2nd respondent was a workman within the meaning of the Industrial Disputes Act, and that the Tribunal had jurisdiction to entertain the application of the 2nd respondent. The present petition is for an order quashing that decision of the President of the Labour Tribunal and for a further order prohibiting him from dealing with the application further.

Counsel appearing in support of this application before us stated that he was not now contending that the General Manager of The Ceylon Electricity Board was a servant of the State, and that he would present his argument on the basis that the General Manager was an officer of the Board appointed in terms of the Act.

However, Counsel submitted:

(*a*) that the application to the labour Tribunal was an invitation to the Tribunal to exercise supervisory powers which are not an attribute of Labour Tribunals ; as such it is not an application within the meaning of Section 31B (1) of the Industrial Disputes Act.

(*b*) that the General Manager is not a workman within the meaning of the Industrial Disputes Act, in that the relationship of master and servant did not subsist between the Board and the person appointed to be the General Manager.

I shall now consider each of these submissions:

(*a*) *Is the application made by the 2nd respondent to the Labour Tribunal one which invites the Tribunal to exercise supervisory powers :*

I think it can be safely assumed that a Labour Tribunal has no jurisdiction to exercise the kind of supervisory jurisdiction which the Supreme Court enjoys.

This particular objection to the jurisdiction of the Labour Tribunal stems from the averment in the 2nd respondent's application to the Labour Tribunal that the " purported termination of his services was unlawful, unjustified, illegal, mala-fide and prompted by extraneous considerations ".

Counsel is no doubt right in his contention that the use of the expressions, " unlawful ", " illegal ", " mala-fide ", and " prompted by extraneous considerations " in relation to an order of termination made under a Statute can be regarded as an invitation to the Tribunal before whom such allegations are made to exercise powers similar to those exercised by the Courts in the exercise of supervisory jurisdiction.

" Supervisory jurisdiction " has been broadly described as one that has been entrusted to the Supreme Court in order to see that inferior Tribunals and administrative Tribunals act within their jurisdictions and on a proper understanding of the law. Failure to so act or to observe conditions precedent to the exercise of its powers renders the decisions of an inferior Tribunal a nullity.

This kind of jurisdiction, of course, a Labour Tribunal cannot exercise ; but there is before the Labour Tribunal also a claim by the 2nd respondent for relief or redress of the kind which it is within the power of a Labour Tribunal to grant on the ground that the termination of the services was *unjustified.* This certainly is a matter within the jurisdiction of the Labour Tribunal and there is therefore a sufficient matter before the Labour Tribunal which is within its jurisdiction.

Our attention has been drawn to the fact that the 2nd respondent has in his application to the Labour Tribunal described his removal from office as a " purported " termination of his employment. However, the application while alleging that the termination of the employment was unjustified, prays for orders for

reinstatement, for compensation, and for gratuity. All the reliefs or remedies asked for can only be granted on the basis that any contractual bond which existed between the 2nd respondent and the petitioner had been severed.

There is no allegation in the application that the removal from office is a nullity, nor is there any request for a declaration that the 2nd respondent still holds the office of General Manager, despite the Board's letter of removal dated 17.1.1972. It is submitted for the petitioner that the application to the Labour Tribunal contains an allegation that the petitioner had failed to give the 2nd respondent a fair opportunity of being heard before making its order of removal. Assuming that the principle of "*audi alteram partem*" is applicable in cases of this nature, that would not necessarily imply that if that principle had not been complied with, the removal of the 2nd respondent is a nullity. It would be open in such circumstances to the 2nd respondent to accept the act of termination, in the sense that the purported act of termination had the legal effect of bringing contractual relationship to an end. It seems to me that it is open to the Labour Tribunal to proceed upon that basis (i.e., that the letter of 17.1.1972 brought to an end the relationship of employer and employee that existed between the petitioner and the 2nd respondent) and to proceed to inquiry only on the question whether there were circumstances justifying the termination by the petitioner of the services of the 2nd respondent. While it is true that a Labour Tribunal cannot grant relief on the basis of a finding that there has been no legally effective termination of a contract of employment, the application that has been made by the 2nd respondent is sufficient to invoke the Labour Tribunal's jurisdiction to grant relief or redress in the shape of reinstatement or compensation on the ground that the termination of his services was unjustified, and for a gratuity on the ground that his contract of employment has been brought to an end in circumstances in which it would be just and equitable to order payment of any gratuity considered to be " due ".

The order made by the President of the Labour Tribunal makes it clear that he does not propose to enter upon any question other than whether the termination of the services of the 2nd respondent was or was not justified in the circumstances, and into the question of what relief should be granted on the basis that the services of the 2nd respondent with the petitioner have been terminated.

(b) *Is the General Manager of the Electricity Board a 'workman' within the meaning of the Industrial Disputes Act ?*

Reliance is placed for this contention on the provision contained in Section 5 of the Act. Sub-sections (2), (3), and (5) of that Section read as follows:—

> " (2) The General Manager shall, subject to the general direction of the Board on matters of policy, be charged with the direction of the business of the Board, the organization and execution of the powers, functions and duties of the Board, and the administrative control of the employees of the Board.
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> (3) The General Manager may, with the approval of the Board, delegate to any other employee of the Board such of his powers, functions or duties as he may from time to time consider necessary, and any employee to whom any such powers, functions or duties are so delegated shall exercise them subject to the general or special directions of the General Manager.
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> (5) The General Manager may not be removed from office except for good and sufficient cause and without the prior approval of the Minister. "

Counsel for the applicant submits that these provisions indicate that the General Manager is the executive arm of the Electricity Board. It is to be noted that sub-section (2) does not vest in the General Manager powers, functions and duties of the Board which are set out in Sections 11, 12, and 31 and in many other Sections of the Act. Upon a person being appointed General Manager he is charged by the statute with the execution of the powers, functions and duties of the Board subject only to the general directions of the Board on matters of policy. It is to be observed that the Legislature when contemplating the possibility of any other person exercising any part of those powers, functions, or duties, has made that possible only if the General Manager so wishes, and he may delegate any of his executive functions with the approval of the Board.

It seems to me that the Board itself cannot relieve the General Manager of the executive functions with which he is charged by the statute itself. For instance, the Board cannot decide that the Chairman or one of its other members will be charged with certain executive functions, and thus become a kind of " executive member " or " managing member " of the Board. If the Board does so, it would be acting contrary to sub-section (2) of Section 5. Under sub-section (3) while the General Manager may with the approval of the Board delegate some of his powers, functions or duties, the Board itself cannot designate any other employee of the Board to discharge and exercise any of the powers, functions and duties of the Manager. There seems to be

in these provisions a very deliberate legislative policy, namely, that the Board should not concern itself with the details of purely executive functions and that the General Manager should not be subjected to directions from the Board in the form of special directions in matters of detail. On the other hand sub-section (1) of Section 11 provides—

> " It shall be the duty of the Board, with effect from the date of the transfer to the Board of the Government Electrical Undertakings under Section 18, to develop and maintain an efficient, co-ordinated and economical system of electricity supply for the whole of Ceylon other than the area of authority of the Anuradhapura Preservation Board. "

For the purpose of discharge of this duty, the Board is enjoined with certain duties (Section 11 (2)) and vested with certain powers (Sections 12, 13, 31 etc.). How would it be possible for the Board to discharge this duty, if it did not have sufficient powers of controlling and directing the General Manager in the execution of his powers, functions and duties? It seems that the Board itself would not be in a position to do its overall duty unless it is in a position not only to make decisions on matters of policy, but also to give directions of a general nature to the General Manager in regard to the performance of his executive functions. It seems to me that when the Legislature imposed certain duties on the Board, and vested certain powers and at the same time charged the General Manager with the execution of the duties and powers, the intention was that the execution of those powers and duties by the General Manager should also be subject to the control of the Board. It would be absurd to hold that it is an implication of sub-section (2) of Section 5 that the Board has to stand by and hold its hands even if it thinks the General Manager is executing his duties inefficiently or corruptly. It is a clear implication of the law that administrative and disciplinary control of the General Manager is vested in the Board.

Even assuming that the General Manager is the executive organ of the Board, that circumstance does not prevent a contract of service coming into existence between the General Manager and the Board. The Board and the person for the time being holding the office of General Manager are two distinct legal persons. As mentioned earlier the General Manager is not a member of the Board. If that was the situation, the question as to whether a member of the body which constitutes the " employer " can also be an " employee " of that same body can well arise. However, in the field of Company Law where one frequently sees a director performing executive functions or

even holding office under the Company, the general position in law is summed up by Palmer in his book on Company Law, 21st Ed. pages 521-522. He says:

> " A director can hold a salaried employment or an office in addition to that of his directorship which may for those purposes make him an employee or servant and in such a case he would enjoy any rights given to employees as such ; but his directorship and his rights through that directorship are quite separate from his rights as employee. "

In the case of *Lee v. Lee's Air Farming Ltd., 1960 (3) AER 420* a question arose whether Lee was a workman within the meaning of the New Zealand Workers Compensation Act which applies only to persons who have entered into a contract of service with an employer. In this case the deceased was the sole governing director and principal shareholder of a ' one-man company '. He entered into a contract with the Company as sole pilot of the Company and died when the aeroplane he was flying crashed. Lord Morris said at page 425:

> " It is well established that the mere fact that someone is a director of a Company is no impediment to his entering into a contract to serve the Company..... Nor in Their Lordships' view were any contractual obligations invalidated by the circumstance that the deceased was sole governing director in whom was vested the full government and control of the respondent Company. "

In the case of *Anderson v. James Sutherland* 1941, S.C. 203, referred to by Palmer and also S. R. de Silva in his book " Legal Framework of Industrial Relations " page 234, Lord Normand states:—

> " In my opinion, therefore, the Managing Director has two functions and two capacities. Qua Managing Director he is a party to a contract with the Company, and this contract is a contract of employment ; more specifically I am of opinion that it is a contract of service and not a contract for services. There is nothing anomalous in this ; indeed it is a commonplace of law that the same individual may have two or more capacities, each including special rights and duties in relation to the same thing or matter or in relation to the same persons. "

One finds a similar approach in *Re Beeton & Co.* (1913) Ch. 279 where Neville, J. said:

> " It has been argued with some force that qua director she certainly cannot be a servant of the Company. Authority to that effect has been cited, and it is a conclusion which is fairly obvious. But it seems to me that in the present case

the constitution of the Company allows of employment of directors for special purposes and that she is a director does not prevent her also being a servant within the meaning of the Act. "

I think that there can be no doubt that the General Manager is a person who works under a contract of service with the Electricity Board. The word ' workman ' is defined in the Industrial Disputes Act as follows:—

> ' workman ' means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and, for the purpose of any proceedings under this Act in relation to any industrial dispute, includes any person whose services have been terminated. "

It is to be noted that, that Section contemplates work " in any capacity ". That the nature of the work allotted to a person under a contract of service is of a superior character to that given to persons who serve in lesser capacities would make no difference. Then again the term " employer " is defined as follows:—

> " ' employer ' means any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation or trade union) and any person who on behalf of any other person employs any workman. "

It is clear that the General Manager has a contract of employment with the Board ; although some parts of the contract may be controlled by the statutory provisions contained in the Act the relation between the Board and the General Manager cannot be explained on any other hypothesis than on a contractual one.

A further aspect of Counsel's submissions was that under Section 5 of the Electricity Board Act, the General Manager is appointed to an office and the power given under sub-sections (4) and (5) is for " *removal* " from an office and not for termination of services. I think this is a highly technical argument consisting

of nothing more than a play upon words. In this country we are used to the concept of persons "holding office" as "a servant of the Crown" (see definition of "public officer" in Section 3 of the Ceylon Constitution and Independence Orders-in-Council 1946 and 1947), or as a servant of the Republic (see the definition of "State Officer" contained in Section 105 of the present Constitution of Sri Lanka, where a State Officer is referred to as any person "holding a paid office as a servant of the Republic.")

Where a Statute creates an office, the holder of the office may be in the Service of the State, or of the Institution in which the office exists. While a Statute may create the office and prescribe some of the terms and conditions pertaining to the office, there is nothing to prevent a contract of service coming into existence between the State or the Institution on the one side, and the person appointed on the other. For instance, the Statute may prescribe that the office shall be held at pleasure, or it may prescribe that the holder of the office shall not be removed or dismissed except for cause. In the State services there are many persons holding appointments, whose relationship to the State is of a sufficiently contractual nature to enable them to sue for salary earned in respect of services rendered as a servant of the State. *Kodeswaran v. The Attorney-General, 72 N.L.R. 337.* It is not unusual to find even in a private contract of employment, that the employee may not be removed or dismissed except for cause. In such a case, although it is the employer who in the first instance decides whether or not there is sufficient cause for dismissal, the Court is free in an action for wrongful dismissal, to examine the question of the existence of sufficient cause. Section 5 (5) of the Electricity Board Act states: "The General Manager may not be removed from office except for good and sufficient cause and without the prior approval of the Minister."

It should be noted in the first instance that this sub-section is expressed in the form of a limitation on the power of the Board. Secondly, that it does not take the form, which is sometimes the case, of making the Board the final arbiter of the question of whether there is good and sufficient cause; nor is it a provision which makes it obligatory on the Board to remove the General Manager upon the happening of a certain event.

It seems to be perfectly clear that a General Manager who has been removed from office could institute action for wrongful dismissal in the regular Courts on the ground that there was no good and sufficient cause for his removal just as much as an employee under a private employer whose contract contained a term to the effect that he could be dismissed only for cause could institute a similar action in the Courts.

The Electricity Board Act does not spell out all the terms and conditions subject to which a General Manager may be appointed. All these terms will have to be negotiated with the person to be appointed and will undoubtedly form part of the terms of his contract with the Board.

In regard to the conditions for removal, Section 5 (5) makes it statutorily a necessary term of every contract that every successive General Manager appointed by the Board be not dismissed except for good and sufficient cause, and without the prior approval of the Minister. This term is not negotiable with every prospective appointee. Any term introduced into any particular contract with a General Manager contrary to Section 5 (5) will be inoperative, and the condition contained in Section 5 must necessarily take its place.

Similarly, there is nothing in the Industrial Disputes Act which prevents a workman whose contract contained a clause forbidding dismissal except for cause, from making an application in respect of the termination of his employment by his employer under Section 31B (1) (*a*) or (*b*). Where the Legislature intended to exclude any workmen from the operation of the Industrial Disputes Act by reason of their being employed under a particular employer it has done so in express terms. For example Section 49 of the Industrial Disputes Act excludes employees of the Government from the operation of the Act. Again we find a similar exclusion of members of the Local Government Service excluded from the application of the Industrial Disputes Act in Section 13 (2) of the Local Government Service Act No. 18 of 1969, a law which was enacted immediately after the Electricity Board Act No. 17 of 1969.

Another contention advanced by Counsel for the petitioner was that Section 5 (5) of the Electricity Board Act contemplates " removal " of a General Manager from office and not a termination of his employment. By whatever name called the act of the Board removing a General Manager brings his employment to an end and there can be no doubt that there is in such circumstances a " termination of the services " of the General Manager within the meaning of Section 31B (1) of the Industrial Disputes Act.

Counsel's further submission under Section 5 (5) of the Electricity Board Act was that the requirement of the Minister's prior approval for removal was to render it illegal for any Tribunal to order re-instatement. It is sufficient in this regard to repeat the words which Chief Justice H. N. G. Fernando used when a similar submission was made in the case of *Air Ceylon v. Rasanayagam, 71 N.L.R. 271.*

> " Counsel for the petitioner also referred to the fact that, under the proviso of s. 14 (1) of the Air Ceylon Act, the General Manager can only be dismissed or re-instated with the approval of the Minister. He pointed out that if in the present case the Labour Tribunal orders re-instatement of the 2nd respondent, the Corporation may be unable to carry out the order because the Minister may not give his approval for re-instatement. It was urged on this ground that the nature of the particular employment was such that the Industrial Disputes Act does not contemplate that the termination of the 2nd respondent can be the subject of an application to a Labour Tribunal.
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> I do not propose here to express any opinion on the question whether or not a Labour Tribunal may or will order re-instatement in such a situation. It suffices to observe for the present that relief other than re-instatement is available upon an application under s. 31B, and that the difficulties to which Counsel has referred, if substantial, are matters of which the Tribunal will take account in the exercise of its power to make a just and equitable order. "

The President of the Labour Tribunal will no doubt bear in mind that although under Section 31B (4) a Labour Tribunal is empowered to grant any relief or redress notwithstanding anything to the contrary in any contract of service between the workman and the employer, the Tribunal cannot ignore any statutory provision which has the effect of curtailing the extent of the Tribunal's powers in granting relief.

For the reasons stated, I am of opinion that the General Manager of the Electricity Board is a workman within the meaning of the Industrial Disputes Act and that the Labour Tribunal has jurisdiction to inquire into his application.

A submission was also made to the effect that the Labour Tribunal should not hear the General Manager's application as an inquiry would in this particular case involve the disclosure of some matters relating to public security. As Counsel for the respondent submitted, if questions of national security preclude

a disclosure in public of the reasons for the termination of the services of the 2nd respondent as General Manager, the hearing in regard to such matters could be held in camera in the interests of public security.

The application for Writs of Certiorari and Prohibition is dismissed ; the 2nd respondent will be entitled to costs which I would fix at Rs. 350.

WIJAYATILAKE, J.—I agree.

ISMAIL, J.—I agree.

Application dismissed.