# ELPITIYA PLANTATIONS LTD
# v
# CEYLON ESTATES STAFF UNION (ON BEHALF OF V.I. GEORGE) AND OTHERS

SUPREME COURT
BANDARANAYAKE, J.
EDUSSURIYA, J. AND
YAPA, J.
SC APPEAL NO. 70/2002
H.C. A.LT. NO. 3/98 KANDY
LT. NO. LT 9/TK 1241/95
SEPTEMBER 23 AND OCTOBER 01 2003

*Industrial Dispute – Retirement of workman at 55 years of age – Grant of extensions up to 60 years – Discretion of the employer.*

The respondent Union acting on behalf of the workman George complained to the Labour Tribunal that the appellant (the employer) had unjustly terminated the workman's services at 55 years of age. The Labour Tribunal dismissed the application by order dated 19.12.1997.

The workman had been a driver employed in 1992. Prior to his retirement his services had been terminated for misconduct, *viz.*, driving under the influence of liqour. The Labour Tribunal reinstated him without back wages.

Having regard to his unsatisfactory services, the employer retired the workman at 55 years.

On an appeal by the Union against the retirement, the High Court by its order dated 26.2.2002 held that the termination of services was unjust and ordered his reinstatement from 1.11.94 with back wages. At the time of the High Court decision the workman was 63 years of age.

**Held:**

1. The optional age of retirement with the employer was 55 years, subject to annual extensions until 60 year which is the compulsory age of retirement.

2. Whether extensions of services may be given is a discretion on the part of the employer.

3. The termination of the workman's services at 55 was not unjust or inequitable.

**Cases referred to:**

1. *Maskeliya Plantations Ltd* v *Arulananthan* – CA Application No. 248/95 of 2.10.1995
2. *Shanmugam* v *Maskeliya Plantations Ltd.* – (1996) 1Sri LR 208

**APPEAL** from the order of the High Court of Kandy

*Gomin Dayasiri* with *Manori Jinadasa* for appellant

*Geoffrey Alagaratnam* with *M. Sithambaram* for respondent

*Cur.adv.vult*

January 29, 2004

**HECTOR YAPA, J.**

The applicant-appellant-respondent-respondent (hereinafter referred to as the 1st respondent) made an application to the Labour Tribunal against the respondent-respondent-petitioner-appellant (hereinafter referred to as the appellant) and 2nd and 3rd respondents-respondents-respondents-respondents (hereinafter referred to as the 2nd and 3rd respondents) alleging that the services of one of its members V.I.George (hereinafter referred to as the "the workman") had been unjustly terminated and sought reinstatement with backwages or compensation in lieu of reinstatement.

The appellant filed answer denying the termination of the services of the workman and stated that the workman was retired from service on his reaching the age of retirement, namely 55 years. It was further averred by the appellant that the workman's past record of service was unsatisfactory. Thereupon the 1st respondent filed replication stating that even though the workman had reached the age of 55 years, he was entitled to work till 60 years of age. After inquiry, learned President of the Labour Tribunal by his order dated 19.12.1997, held that the workman had been duly retired by the appellant and was therefore not entitled to any relief.

The 1st respondent appealed against the said order of the Labour Tribunal to the High Court of Kandy. The learned High Court Judge after hearing the parties by his order dated 26.02.2002, held

that the retirement of the workman on his reaching 55 years of age was unjust and inequitable and therefore directed the appellant to reinstate the workman from 01.11.1994 with back wages. Aggrieved by this order of the High Court, the appellant made an application for leave to appeal to the Supreme Court and on 04.09.2002 the Supreme Court granted leave to appeal on the following questions of law.

(i) Is the order of reinstatement with backwages justifiable in respect of a workman who is almost 63 years of age, when the 1st respondent claims that the compulsory age of retirement is 60 years and the petitioner (appellant) claims that the retiring age is 55 years.

(ii) Has the High Court Judge failed to consider that the oral and documentary evidence presented, which established that the retiring age was 55 years, and has he thereby misdirected himself?

At the hearing of this appeal learned counsel for the appellant submitted that the retiring age of the employees in the Plantation Sector has been 55 years and the compulsory age of retirement has been 60 years. Further, the practice has been to retire such employees at the age of 55 years and to consider the grant of extensions on an yearly basis up to 60 years at the discretion of the employer. In the absence of any material governing the age of retirement, learned counsel referred to the document 'A' which has been considered in this case to show that the practice was to retire the Plantation employees at 55 years of age and that the compulsory age of retirement remained at 60 years. However, learned counsel submitted that the document 'A' did not apply to this case for the reason that the appellant was now a privatized company. The document 'A' dated 03.08.1994 has been issued by the Secretary, Ministry of Plantation Industries and it reads as follows.

> Retirement of employees over 55 years of age
>
> As retirement of employees over 55 years in the Plantation Sector is before the judiciary, it has been decided to suspend retirement of employees after 55 years of age, till a decision is made on this matter by the judiciary. However compulsory retirement age of 60 years remains unchanged.

Learned counsel for the appellant contended that, even though the document 'A' has no application to this case, it would show that the practice in the Plantation Sector was to retire employees at 55 years and the compulsory age of retirement was 60 years. Further, counsel submitted that, if the retirement age of the Plantation employees prior to document 'A' was not 55 years, the decision to suspend the retirement of employees at 55 years would not arise. Therefore, counsel sought to argue that the document 'A' clearly demonstrates the position that previously in the Plantation Sector the employees were retired at 55 years, and the compulsory age of retirement remained at 60 years. Hence, he submitted that, at the time the workman was given employment in the year 1992, the practice was to retire employees at 55 years of age and any extension of service was at the discretion of the management to be considered annually up to 60 years which was the compulsory age of retirement. However, due to privatization when the appellant became a non governmental entity, namely a limited liability company, it took over the contracts of employment of the employees on the same terms and conditions that were in existence at the time of the take over. The Gazette notification dated 22.06.1992 marked 'Z' makes this position clear. Learned counsel therefore submitted that the appellant presently is an independent legal entity with no nexus to a Public Corporation or Statutory body of the State. The employees of the appellant from the date of the Gazette notification were employees of the private sector and not of the public sector. As such the decision made by the Ministry of Plantation Industries to suspend the retiring age of 55 years of the employees of the plantation sector is not binding on the appellant. Learned counsel therefore argued that the extension of service of the workman after 55 years was at the discretion of the appellant and in this case having regard to the unsatisfactory service record of the workman there was no question of granting an extension. Hence, he submitted that the decision of the appellant to retire the workman at 55 years was just and proper.

Without conceding the fact that document 'A' applied in this case, Counsel further submitted that, even if document 'A' which suspended the policy to retire employees after 55 years of age till a decision was made by the judiciary was applied, the position

would remain the same. In this regard counsel referred to the case of *Maskeliya Plantations Ltd.* v *K. Arulananthan*(1) decided on 29.10.1995 and the case of *Shanmugam* v *Maskeliya Plantations Ltd* (2), where it has been clearly acknowledged the position that, in the case of employees in the Plantation Sector the optional age of retirement is 55 years and any extension of service until 60 years is at the discretion of the employer. Hence in the case of *Maskeliya Plantations Ltd.* v *Arulanathan* the Court observed as follows. "Even if one were to give a beneficial interpretation to relevant circulars of the S.L.S.P.C., Circular No. 55, No. 170 and No. 329 all these circulars gave the optional age of retirement as 55. Thereafter, the extension was at the discretion of the management. In my view the petitioner was aware that the extension was at the discretion of the management and as a matter of right he was not entitled to get an extension so he was not and could not expect to work till he reached the 60th year."

The counsel submitted that in the circumstances even if decisions of Court are taken into consideration it is clear that the optional age of retirement of all grades of employees of the Sri Lanka State Plantation Corporation or in the Plantation Sector was at 55 years and any extensions till 60 years was at the discretion of the management on an yearly basis.

The workman in this case was a lorry driver who was previously dismissed from service for driving a lorry under the influence of liquor and reinstated in service by the Labour Tribunal without back wages, since his conduct was considered by the President of the Labour Tribunal as blameworthy. Even after reinstatement, the workman was not given regular duties but was paid his salary and kept as a relief driver. Under the circumstances, having regard to the unsatisfactory record of his service the appellant had exercised its discretion not to grant any extension of service but to retire him at 55 years. Therefore, learned counsel for the appellant submitted that the Labour Tribunal was correct when it held that the retirement of the workman was just and equitable. He further submitted that the learned High Court Judge was in serious error when he decided to reinstate the workman with back wages.

Learned counsel for the 1st respondent on the other hand sought to justify the order of the learned High Court Judge dated 26.02.2002. He submitted that the High Court Judge's order was based on a correct assessment of the documents marked A, & B annexed to the replication of the 1st respondent. Document 'A' referred to above was addressed to the Chief Executive Officer of all the Regional Plantation Companies and it suspended the retirement of employees on reaching 55 years, till a decision was made on the matter by the judiciary. Document 'B' stated that where retiring policy is stipulated in a collective agreement, document 'A' will not be applicable. Therefore where there is a collective agreement relating to retirement rules of the collective agreement will apply and not document 'A'. However, according to Counsel for the 1st respondent, there was no collective agreement applicable to the drivers and therefore it was the document 'A' which suspended the retirement of employees after 55 years that was applicable to this case. Hence, counsel submitted that the learned High Court Judge was correct when he held that in the absence of proof that there was a collective agreement applicable to a driver, the workman was governed by document 'A' and therefore the retirement of the workman on his reaching 55 years of age was unjust and inequitable.

In view of the submissions made by counsel in this case, one matter to be decided here would be the applicability or non applicability of document 'A'. According to counsel for the appellant, since the appellant is presently a private company, document 'A' has no application. Consequent to privatization the appellant took over the contracts of employment of the employees in the plantation sector on the same terms and conditions that were in the existence at the time of the take over. (Vide gazette marked Z). The earlier practice in the Plantation Sector was to retire the employees after 55 years and any extension of service up to 60 years on an yearly basis was at the discretion of the management. This position is clear from the document 'A' which sought to suspend the retirement of employees in the Plantation Sector after 55 years of age. If one were to hold as submitted by counsel for the appellant that, the appellant is a private concern, and therefore document 'A' did not apply, then this case has to be decided by applying the practice that prevailed prior to the issue of document 'A' seeking to suspend the retirement of

employees in the Plantation Sector after 55 years. In which event the workmen could be retired after 55 years and any extension was at the discretion of the appellant.

If on the other hand the submission of learned counsel for the 1st respondent is accepted that document 'A' which suspended the retirement of employees over 55 years in the Plantation Sector applied to this case, then it is seen from the two cases referred to above that the judiciary has clearly accepted the position that the optional age of retirement of employees in the Plantation Sector as 55 years and that any extension of service was at the discretion of the employer or the management. Therefore, as a matter of right a workman was not entitled to get an extension. Regard to these cases learned counsel for the 1st respondent sought to argue that the said cases do not concern drivers but related to officers such as Superintendents and therefore these judgments will not apply to this case. It is to be noted that document 'A' is of general application to employees of the Plantation Sector and therefore such a distinction as suggested by counsel will not be permissible. Since document 'A' is of general application, it is seen that the judiciary has decided that any extension of service after 55 years is at the sole discretion of the employer. What is important here is that the discretion should be exercised in a reasonable and equitable manner. Therefore irrespective of whether document 'A' applies or not, the optional age of retirement of the workman was 55 years. Any extension of service of the workman after 55 years was at the discretion of the management. Hence the decision of the appellant to retire the workman from service on his reaching 55 years without extending his services has been due to his unsatisfactory service record. Such a decision cannot be held to be unjust and inequitable.

In this case learned High Court Judge has concluded that in terms of document 'A' the compulsory age of retirement of the workman was 60 years and therefore the retirement of the workman at 55 years was unjust and inequitable. However as seen from the material referred to above, irrespective of whether document 'A' applied or not, the optional age of retirement of the workman was 55 years and any extension of service was at the discretion of the management. Hence the workman was not entitled to any extension as a matter of right. Therefore, one cannot blame the appellant

for not extending the services of the workman after 55 years having regard to his unsatisfactory service record.

For the aforesaid reasons first question of law is answered in the negative and the second question of law is answered in the affirmative. Accordingly, the judgment of the High Court dated 26.02.2002 is set aside and the appeal is allowed with costs fixed at Rs. 2,100/-

**BANDARANAYAKE, J.** - I agree.

**EDUSSURIYA, J.** - I agree.

*Appeal allowed*