My No. : T23/CO/69/2002.

THE INDUSTRIAL DISPUTES ACT, CHAPTER 131

THE award transmitted to me by the Arbitrator to whom the Industrial Dispute which has arisen between Mr. Neela Thimbiripola, No. 16/2, Hampden Lane, Colombo 06 and Electroteks Network Services (Pte) Ltd., No. 424 - D, Galle Road, Ratmalana was referred by order dated 08th November, 2002 made under Section 3 (1) (*d*) of the Industrial Disputes Act, Chapter 131, (as amended) for settelement by arbitration is hereby published in terms of Section 18 (1) of the said Act.

MAHINDA MADIHAHEWA,
Commissioner-General of Labour.

Department of Labour,
Colombo 05.
26th August, 2005.

In the matter of an Industrial Dispute

between

Neela Thimbiripola,
No. 16/2, Hampden Lane,
Colombo 06.

Case No. A / 2959.

and

Electroteks Network Services (Pte) Ltd.,
No. 424 - D, Galle Road,
Ratmalana.

THE AWARD

The Commissioner of Labour by virutue of the powers vested in him by Section 3 (1) (*d*) of the Industrial Disputes Act (Chapter 131) as amended by Industrial Distputes (Amendment) Act Nos. 14 and 62 of 1957, 4 of 1962 and 39 of 1968 (read with Industrial Distputes (Special Provisions) Act, No. 37 of 1968 appointed me as Arbitrator by his order dated 08th November, 2002 and referred the said aforesaid dispute for settlement by arbitration.

2. The matters in dispute between the aforesaid parties are –

(i) Whether Mr. Neela Thimbiripola who was in the service of Electroteks Network Services (Pte.) Ltd., as a Senior Sales Engineer from 01st January, 1994, to 30th September, 2001 is entitled to receive an annual salary increment at the rate of Rupees Five Hundred (Rs. 500) for the period of his service in terms of the condition three (03) of the letter of appointment dated 25.10.1993 issued to him by the said Company is justified and if not, to what relief he is entitled ;

and

(ii) Whether Mr. Neela Timbiripola is entitled to receive Rs. 12,500 per month as vehicle hiring charges and Rs. 4,500 per month as fuel charges for the period of 01.10.1996 to 30.09.2001 in terms of the "Condition Seven (07)" of the letter of appointment dated 25.10.1993 issued to him by Electroteks Network Services (Pte.) Ltd., and if not, to what relief he is entitled.

Appearances : Mr. K. B. Saman Priyalal, Attorney-at-Law appeared for the Respondent Company initially.

Thereafter Mr. Lahiroo Senaratne, Attorney-at-Law appeared for the Respondent Company.

Mr. S. Thalayasingham, Attorney-at-Law appeared for Mr. Neela Thimbiripola.

3. Neela Thimbiripola commenced the case and gave evidence. He marked documents A1 to A28 (*b*). B. A. Chandraratne Abeywardane, Managing Director of the Respondent Company gave evidence and marked documents R1 to R15. Both sides have tendered written submissions. The Respondent Company has not tendered the documents marked in evidence along with the written submissions. To a question posed by me to the Registrar Industrial Court as to whether the Respondent Company had tendered the marked documents, he checked and confirmed that the documents have not been tendered. Neela Thimbiripola has tendered the marked documents along with the written submissions.

4. The evidence-in-Chief of Neela Thimbiripola was recorded on 17.06.2003. He was cross-examined on 14.10.2003. When cross-examination was pending, the Learned Counsel for the Respondent Company raised a preliminary legal objection stating that the Arbitrator has no jurisdiction to go ahead with the matters referred to him for the following reasons –

(i) The workman had been paid a sum of Rs. 600,000 (Six Hundred Thousand only) in the Labour Tribunal Colombo on 02.08.2002 (Case No. 8/1385/01) in full and final settlement of all claims including gratuity.

(ii) According to the Labour Tribunal Order the workman can claim only "other statutory entitlements".

(iii) The matters in dispute referred for arbitration do not fall within "other statutory entitlements".

The legal objection was overruled by me stating that there is consent between both parties for the reference of the industrial dispute. My order on the preliminary legal objection is available at pages 110 - 112.

5. The position taken up by Neela Thimbiripola was *inter alia* that –

(i) He was not granted the increments for the entire period of his employment. *i.e.* 01.01.1994 to 30.09.2001.

(ii) He was not paid Rs. 12,500 per month as Vehicle Hiring Allowance and Rs. 4,500 as fuel charges for the period 01.10.1996 to 30.09.2001.

(iii) He was entitled to the payment of increment and vehicle hiring charges and fuel charges in accordance with the letter of appointment marked as A1 by him. He has referred to clause (3) titled "Salary" and clause (07) titled "Vehicle" in his letter of appointment marked as A (1) D and A (1) E respectively.

(iv) The claims made by him in the arbitration are part and parcel of the terms stipulated in the contract of employment and hence *ipso facto* Statutory Dues and they do not form part of the applicant's prayer in the Labour Tribunal case.

6. The position taken up in the written submissions by the Respondent Company was *inter alia* that –

(i) The workman filed an application to the Labour Tribunal for relief regarding termination of employment and the case was settled with a payment of Rs. 600,000 (Six Hundred Thousand only) including gratuity. The payment of Rs. 600,000 was accepted in full and final settlement of the case. According to the settlement, he had the right to proceed only for "statutory dues".

(ii) The Labour Tribunal case and the inquiry in the Labour Depatment related to the same matters concerning alleged violations of the terms and conditions of employment (salary increment and vehicle) Section 31B (*c*) specifies that any matter for relief in respect of terms and conditions of employment has to be applied to Labour Tribunal.

(iii) According to Section 31 B (5) of the Industrial Disputes Act, No. 43 of 1950 this workman who has applied to Labour Tribunal and proceedings thereon are taken and concluded shall not thereafter be entitled to any other legal remedy.

(iv) The Minister of Labour is not empowered by Section 4 (1) of the Industrial Disputes Act to initiate a further inquiry to a matter already concluded in a proceeding before a Labour Tribunal. The action of the Minister is totally illegal. The inquiry conducted by the Arbitrator is not valid in law.

(v) The workman is not entitled to salary increment as he has not performed his duties satisfactorily. He was warned for Bad Performance.

(vi) The workman did not complain to authorities for 81 months regarding non-payment of increment.

(vii) The workman could hire a vehicle if no vehicle is available at the company with the approval of the Managing Director of the company. The Managing Director has not given approval to the workman.

7. I have examined the evidence and written submissions of both parties. I wish to do an analysis of the many and varied positions taken up by both sides. I do not agree with the position of the workman that the claims made by him in the arbitration are *ipso facto* statutory dues. It has to be borne in mind that statutory dues are enforceable and the Commissioner of Labour is the enforcing authority and that statutory matters cannot be the subject of reference to arbitration. The matters in dispute have been referred to arbitration for the only reason that they are not legal dues, which could be enforced.

8. The position taken by the company that the Labour Tribunal case and the inquiry in the Labour Department related to the same matters concerning alleged violations of terms and conditions of employment (salary increment and vehicle) and that relief has to be sought from the Labour Tribunal in respect of terms and conditions of employment is not correct. The jurisdiction of Labour Tribunal is *inter alia* in relation to termination of employment by the employer Section 31 B (1) (*d*) of the Industrial Disputes Act refers to such other matters relating to the terms and conditions of employment or conditions of labour of a workman AS MAY BE PRESCRIBED. The key word is "PRESCRIBED". This word is not defend in the Industrial Disputes Act Section 31 B (1) (*d*) has been condisdered by Abeysekara in his book Industrial Law and Adjudication, Vol. 1 page 216. He states as follows :

"No such matters have yet been prescribed by the legislature and it would not be necessary to make any comment on the subject. It would be open to the legislature to prescribe any specific matters if it is considered that the ambit of the Labour Tribunal in respect of direct applications should be broadened".

In the case of United Engineering Workers' Union *Vs*. Devanayagam (1967) 72 CLLW 35, it has been stated that the power to prescribe matters relating to employment and

conditions of labour in relation to which an application can be made has not been exercised.

Sharvananda J in National Union of Workers *Vs.* Scottish Ceylon Tea Co. Ltd. (1976) 78 NLR 133 at 170 has stated that "since the power to prescribe other matters relating to employment and conditions of labour in lelation to which an application can be made under Sec. 31 B(1) (*d*) has not been exercised the application that can be entertained by a Labour Tribunal must relate to TERMINATION OF SERVICES only and the liabilities arising therefrom".

Sec. 31 B (5) of the Industrial Dispute Act cannot be applied in this instance as it refers to ANY OTHER LEGAL REMEDY. In this case seeking relief from Labour Tribunal and reference to arbitration fall under one Act of Parliament *i.e.* Industrial Disputes Act. There is no other legal remedy. The Respondent Company refers to the power of the Minister under Sec. 4 (1) of the Industrial Disputes Act. In this instance, the Minister has not exercise his power under Sec. 4 (1) but the Commissioner of Labour has made reference under Sec. 3 (1) (*d*) as both parties have CONSENTED to a reference. The comments regarding the Minister in para. 14 of the written submissions of the company (page 331 of the record) are inappropriate. I notice that in the written submissions of the workman too it is stated that the Hon. Minister has referred the matter to arbitration. Page 251 of the Record. This statement too is not correct.

9. Now that I have dealt with the positions taken up by both sides, I switch on to the matters in dispute. Issue No. 1 relates to non-payment of increment of Rs. 500 for the entire period of service of the workman *i.e.* 01.01.1994 to 30.09.2001 in accordance with Clause (03) of the letter of appointment. Clause (03) of the letter of appointment reads as follows –

"The salary shall be Rs. 23,750 – 500 x 12 – Rs. 29,750 (all inclusive) per month". This position is marked as A1D by the workman. Page 264 of the Record.

Clasue (03) stipulates salary on a time-scale. In other words the commencing salary is Rs. 23,750 with an increase of twelve steps going up to a maximum of Rs. 29,750 These steps are commonly referred to as increments. The letter of appointment simply stipulates a time-scale but it does not specify the criteria for payment of increment. Increment is not paid as a matter of routine. It has to be earned. It is strange that the workman credited with more than 07 years of service has not made representations to the authorities when not even a single increment was paid to him. The respondent company has stated in written submissions that the workman did not make representations to the authorities regarding increments for a period of 81 months page 332. The first communication to the company from the workman regarding non-payment of increments was on 05.04.1996. This is marked as A2–page 262. The second communication to company was on August 08, 1997 marked as A3 - page 263. In A3, the subject is "salary increments" but he has asked for salary enhancement in commensurate with his qualifications and wide experience due to continued escalation of cost of living. A3 cannot be taken as a request for increment in accordance with the letter of appointment A1. By letter dated 03.09.1997 marked as A4 titled "salary increments" addressed to the workman by the company, it is stated *inter alia* as follows :

(i) According to our records your work has been extremely unsatisfactory during your entire period of service.

(ii) From January 1997 to date, I have not been informed of any work carried out by you for this organization.

(iii) Please forward a complete report of your sales work within a week during the following periods to consider your request :

1. January to December 1995
2. January to December 1996
3. January to 31st August 1997 – page 268.

The workman sent a reply on 18.09.1997 marked as A5 pages 269 and 270. In response to this, the company has sent a letter on 22.10.1997 to workman marked as A6 – Page 272. In this letter titled "Sales Report – Salary Increments" it has been stated *inter alia* as follows –

(i) Refernce earlier letters and reply received after several reminders.

(ii) According to our records, you have hardly done any work during 1996 and absolutely nothing during 1997.

(iii) This was the result even after giving you a cellular phone and increased allowances for petrol to improve sales.

(iv) Your performance during 1993/94 and 1994/95 has been below the standard of a much junior and lower paid employee.

(v) Though suspended due to bad performance the company has decided to give you increments for the years 1995 and 1996 commencing from November, 1994 and from November, 1995 to encourage you without considering your past performance. You will receive it in a lump sum within next three months.

(vi) You have to work hard within the next three months to bring a maximum of Rs. 150,000 additional income per month.

(vii) Under the target is achieved, we have no option other than terminating your service after 90 days from this letter as so many earlier warnings were not responded.

The workman does not appear to have replied this letter A6 which was marked by him. This letter contains information in detail regarding the workman's poor work perfomance. It can be taken as supportive evidence for not granting increments to him. In these circumstancs it can be taken that the workman has not qualified to earn the increments. However, according to A6 dated 22.10.1997 sent to the workman by the Managing Director of the company, the company has decided to give him increments for the years 1995 and 1996. This portion is marked as A6 (*a*) page 272. This decision according to the workman has not been implemented. A7 D page 270. I hold that the workman is due this payment which works out to Rs. 12,000 (Rupees Twelve Thousand only) 24 months multiplied by Rs. 500.

11. In relation to issue No. 2 *i.e.* Vehicle Hiring Charges of Rs. 12,500 a month and fuel charges of Rs. 4,500 per month for the period 01.10.1996 to 30.09.2001, the position is as follows –

The position of the workman is that he was paid these two allowances from 01.01.1994 to 30.09.1996 and that it was not paid from 01.10.1996 to 30.09.2001 – the date of termination of his employment. A question was posed to the workman by me as to whether he made any protest or refused to work. His answer was "when I asked he said he would pay" Page 143. He has also said in evidence that there was really no loss as he was using his own vehicle. Page 158. This explanation does not appear to be meaningful and acceptable as use of his own vehicle would also result in expenses being incurred. The Managing Director in his evidence has stated that he had not given approval to the workman to use his (workman's vehicle) Page 184. The workman did not produce any document to support his position that he was allowed to use his vehicle. To questions posed by me to the Managing Director he had answered as follows –

Q. You have any document in respect of vehicle hiring charges for the period 01.10.1996 to 30.09.2001.

A. Nothing. I do not have either the request for vehicle hiring charges or any other document.

Q. You say there was no vehicle hiring charges because there was no request.

A. Yes. Page 179.

Clause 07 of letter of appointment A (1) states *inter alia* as follows –

(i) The company will provide you a vehicle for official duties. Fuel will also be provided by the company subject to the limits approved by the company from time to time.

(ii) Instead you could have a vehicle the company will pay the hiring charges up to Rs. 12,500 a month and fuel (200 lits. of diesel or equivalent).

The evidence of the Managing Director was that "he was absolutely not doing any work and not using the vehicle. Then I stopped payment. Thereafter for one month he made a request. I asked him to forward details of his travelling. I did not get anything". There is no evidence to state that the workman was provided a vehicle by the company. The workman does not appear to have hired a vehicle and claimed payment. He cannot therefore complain of non-payment of vehicle hiring charges.

Be it as it may, the company's position is that the Labour Tribunal case was settled with a payment of Rs. 600,000 (Six Hundred Thousand only) in full and final settlement of all claims including gratuity but he was given the right to pursue statutory matters. The make up of the sum of Rs. 600,000 is not given in the Labour Tribunal order. The position of the company was that the Vehicle Hiring Charges and fuel charges are included in the Labour Tribunal case. In para. 06 of the Labour Tribunal application it is stated that he was in receipt of an all inclusive remuneration package of Rs. 40,750 monthly inclusive of vehicle hiring charges, fuel allowances and several other benefits such as commission on sales. Page 103. As the vehicle hiring charges and fuel allowances are included in the Labour Tribunal application the settlement would have been done reckoning vehicle charges and fuel allowances. Out of the sum Rs. 600,000 the amount due as gratuity is Rs. 83,125 and the balance sum paid as compensation is Rs. 516,875 which works out to three months salary for each year of service (total service is 07 years). The quantum of compensation would appear to be fair and reasonable. Taking into consideration the totality of the evidence, I hold that the workman is not entitled to vehicle hiring charges and fuel allowance for the period 01.10.1996 to 30.09.2001.

12. I have given my findings on each issue referred to me. I wish to make my Award as follows –

(i) Neela Thimbiripola be paid Rs. 12,000 (Twleve Thousand only) as salary increments for the years 1995 and 1996 in accordance with the decision made by the company.

(ii) Neela Thimbiripola is not entitled to vehicle hiring charges and fuel allowances for the period 01.10.1996 to 30.09.2001.

I make order that the sum of Rs. 12,000 (Twelve Thouand only) be deposited by Electroteks Networks Services (Pte.) Ltd., No. 429 - D, Galle Road, Ratmalana with the Assistant Commissioner of Labour, Colombo South, 4th Floor, Labour Secretariat, Colombo 05 within (30) thirty days of the publication of the Award in the Government *Gazette* of the Democratic Socialist Republic of Sri Lanka. I consider this Award just and equitable. Neela thimbiripola is free to withdraw the sum of Rs. 12,000 once the deposit is made by the company.

V. VIMALARAJAH,
Arbitrator.

12th August, 2005.

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My No. : CI/688/2004.

THE INDUSTRIAL DISPUTES ACT, CHAPTER 131

NOTICE of repudiation received by me from Dirctor on behalf of Maliban Biscuit Manufactories Ltd., under section 20 (1) of the Industrial Disputes Act (Chapter 131), the Memorandum of Settlement under Section 12 (1) dated 23.03.2004 binding on Seemasahitha Maliban Viskothu Karmanthashala Sewaka Samithiya and Maliban Biscuit Manufactories Ltd., and published in the *Gazette of the Democratic Socialist Republic of Sri Lanka* 1343/09 of 01.06.2004 is hereby published in terms of Section 15 (2) (*b*) of the said Act.

In terms of Section 15 (2) (*a*) of the Industrial Disputes Act (Chapter 131), it is hereby declared that the aforesaid award shall cease to have effect on and after 30th September, 2005.

MAHINDA MADIHAHEWA,
Commissioner-General of Labour.

Department of Labour,
Colombo 05.
26th August, 2005.

Industrial Disputes Act, No. 43 of 1950

Regulation 3 Form A.

Notice of Repudiation of Memorandum of Settlement under Section 12 (1)

Name and Address : Maliban Biscuit Manufactories Ltd., No. 389, Galle Road, Ratmalana.

Date : 09.08.2005.

To : Commissioner of Labour,
Department of Labour,
Colombo 05.

Notice is hereby given of the repudiation of the Memorandum of Settlement under Section 12 (1) dated 23.03.2004 binding on Seemasahitha Maliban Viskothu Karmanthashala Sevaka Samithiya and Maliban Biscuit Manufactories Ltd., published in Government *Gazette* No. 1343/9 of 01.06.2004.

……,
Director.

Maliban Biscuit Manufactories Ltd.,
No. 389, Galle Road,
Ratmalana.

Copy : –

Seemasahitha Maliban Viskothu Karmanthashala
Sewaka Samithiya,

No. 389, Galle Road,
Ratamalana.

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