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PART I : SECTION (I) — GENERAL

Government Notifications

My No. : IR/15/04/2011. *Case No.* A 3440

Ref No. : IR/15/04/2011.

THE INDUSTRIAL DISPUTES ACT (CHAPTER 131)

In the matter of an Industrial Dispute

THE award transmitted to me by the Arbitrator to whom the Industrial Dispute which has arisen between Samastha Lanka Eksath Sevaka Sangamaya, No. 103, P. S. Perera Mawatha, Mampe, Piliyandala (for the employees Deepika Kumari Ranasinghe and M. M. Thusitha Harshapriya) of the one part and Mahaweli Authority of Sri Lanka, No. 500, T. B. Jaya Mawatha, Colombo 10 of the other part was referred by order dated 28.02.2012 made under Section 4(1) of the Industrial Disputed Act, Chapter 131, (as amended) and published in the Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary No. 1750/5 dated 19.03.2012 for settlement by arbitration is hereby published in terms of Section 18(1) of the said Act.

Between

Samastha Lanka Eksath
Sevaka Sangamaya,
No. 103, P. S. Perera Mawatha,
Mampe, Piliyandala

..... *of the one part.*

on behalf of employees
Deepika Kumari Ranasinghe
and M. M. Thushitha
Harshapriya

and

Mahaweli Authority of Sri
Lanka,
No. 500, T. B. Jaya Mawatha,
Colombo 10.

..... *of the other part*

HERATH YAPA,
Commissioner of Labour.

Department of Labour,
Labour Secretariat,
Colombo 05,
03rd November, 2014.



AWARD

The Hon. Minister of Labour and Labour Relations, by virtue of the powers vested in him by Section 4(1) of the Industrial Disputes Act, No. 43 of 1950, as amended appointed me as arbitrator by his order dated 28.02.2012 and referred the dispute between the aforesaid parties to me for settlement by arbitration.

The matters in dispute between the aforesaid parties are as follows :-

“Whether any injustice has been caused to Deepika Kumari Ranasinghe and M. M. Thusitha Harsha Priya, the complainants by

- i. Being recruited to the post of labourers of Mahaweli Authority of Sri Lanka and being assigned duties pertaining to clerical posts from the date of recruitment.
- ii. Not being considered or recommended in giving promotions to clerical grade iii although they had sat for the written examination and had the skill and service experience required and
- iii. The inability to get the relevant promotion even in future as a result of the decision taken to make the G. C. E. A/Level as the basic requirement for recruitment to clerical grade iii and if so to what relief they are entitled.”

2. Appearance . Mr. Hugo Antony attorney at law appeared for the union, Mr. P. L. S. Perera secretary of the union was present.

Initially Mrs. Disna Fernando from Attorney General's Department appeared for the respondent company with Mrs. Asha Hettiarachi, Legal Officer of the respondent company. Later Ramya Rajapaksha Attorney at Law, Director (Law) of the respondent company appeared for the respondent company.

3. Background facts

It is common ground that

- (i) The two employees were appointed as casual labourers on the dates given against their names - Mrs. Deepika Kumari Ranasinghe - 01.06.1994
Mr. S. R. Thushitha Harsha Priya - 15.05.1991
- (ii) Both were made permanent on 15.11.2001. (The Union has in its first statement of 02.08.2012 given

the date as 15.11.2001. This date is wrong in view of Thushitha Harsha Priya's evidence under cross examinations as 15.11.2001. The respondent company too has in its first statement given the date as 15.11.2001)

- (iii) Both were attending to clerical work although they were appointed as labourers.

Evidence-in-Chief was given by way of affidavit by

- (i) By Thusitha Harsha Priya with supporting documents - pages 74-80 English version pages 67-73.
- (ii) Deepika Kumari Ranasinghe reiterated the averments contained in the affidavit of Thushitha Harsha Priya.
- (iii) Mr. Saranachchi Patabandige Ranjith A. O. of the respondent company with documents x (1) - x(5) - pages 144-146 English version, pages 147-149 Sinhala version.

Cross examination was done on the affidavits and after re-examination the case was concluded by both parties. Written submission were thereafter tendered by both parties, The Union has annexed 22 documents to the evidence in chief of Thushitha Harsha Priya and the respondent company has not raised any objections in relation to any document although in the affidavit it is stated *inter alia* as follows.

- (i) The employer is estopped in law in denying the contents of the letters which have originated from it - Para 7 of the affidavit
- (ii) Two letters from the union protesting against the written exam, marking scheme and final results - Para 12 of the affidavit
- (iii) The documents 'B' is a fictitious document and the persons selected do not have the qualifications given in document 'A' - Para 13 of the affidavit.

4. Issues to be determined

- (i) Whether the two employees - Thushitha Harsha Priya and Deepika Kumari Ranasinghe did clerical

work with consent or on the directions of the respondent ?

(ii) Whether they did possess the educational qualifications skill and experience to be appointed to Grade III clerk ?

(iii) Whether the denial of appointment of the two employees to clerical Grade III based on the results of the written examination which they sat is justified ?

(iv) Whether the two employees are denied promotions in future as a result of the decision of the respondent company to have the G. C. E. A/Level as the basic requirement for recruitment to clerical Grade III.

(v) Are the two employees entitled to relief and if so what ?

5. Analysis of evidence with particular reference to the issues to be determined

I wish to deal with the issues one by one by analyzing the evidence, in relation to issue No. 1 it is agreed by both parties that the two employees did clerical work from the date of commencement of their employment although they were recruited as labourers. The position of the respondent company is that they consented to do clerical work but the position of the employees is that they did clerical work on the direction of their employer. The letters marked as "X", "W", "V", "U", "T", "R", "Q", "O", "N", "M", "K" and "J" annexed to the affidavit of Thushitha Harsha Priya are ample proof that they did clerical work on the direction of the employer. These letters were not contested by the respondent.

Under cross examination Thushitha Harsha Priya has stated as follows :

Q: Before you were made permanent what were your duties ?

A: I did work such as human resources attendance leave and clerical work - Page 133 under re-examination he has referred to the letters annexed to his affidavit as proof of direction given by the employer to do clerical work. The letters annexed to the affidavit are given in the preceding paragraph - Page 141. He was not cross examined on the letters annexed to his affidavit. I have

examined the letters annexed to his affidavit and I am satisfied that the employer has given directions to do clerical work. In these circumstances my determination to issue No. 1 is that the two employees did clerical work on the directions of their employer.

In relation to issue No. 2 paragraph 16 of the affidavit of Thushitha Harsha Priya confirms the educational qualifications, computer competence and work experience of both the employees. Documents have been annexed to the affidavit in support of the qualifications, computer competence *etc.* My answer to issue No. 2 based on evidence before me is in the affirmative.

In relation to issue No. 3 regarding the denial of promotion to clerical grade III based on the result of the written examination the employees had sat, the position of the respondent is given in paragraphs 7 and 8 of the affidavit of the company witness Mr. Saranachchi Patabandige Administrative Officer. He has stated in his affidavit that a lot of employees who scored more marks than the two employees referred to in this arbitration have not been selected. He has annexed a results sheet as X(1) to his affidavit. Under cross examination he has given contradictory evidence which is given below :

Q: Shown last page of X(1) what is the name of the person who has signed this document ?

A: It has been signed by someone - Page 163

Q: I suggest to you that there is no signature

A: This is the signature of Director Personnel and Administration Executive Director of Personnel Administration.

Q: When was the exam reflected in document marked X(1) held ?

A: on 07.09.2007

Q: When were the results published ?

A: Usually exam results are not published ?

Q: Did you read the affidavit given by the two workmen ?

A: Yes

Q: What was there about the examination results ?

A: I did not read the affidavit

Q: Shown para 11 of the affidavit of the workman ?

A: Para 11 read - Page 164

Q: The workman had said in their affidavit that the results were published four years later
What do you say :

A: The results are not published. That is the policy of the Mahaweli Authority

Q: Is there a marking scheme for the document marked X(1) ?

A: There is no marking Scheme because this is a competitive examination. I do not know anything about marking Scheme - Page 165

There is no consistency even in the inconsistencies of the evidence of the company witness. My determination on this issue is that two employees have been denied appointment to clerical grade III based on the results of the written examination which has not been properly conducted.

In relation to issue No. 4, the position of the employees is that by letter dated 11.07.2007 signed by T. V. D. D. S. Karunaratne, Executive Director Administration and Finance, Advanced Level Qualifications is made a requirement for recruitment to clerical grade III - Page 187. This letter is annexed to this affidavit of Thushitha Harsha Priya para 19 of the affidavit - Page 95.

He was not cross examined in this regard. My determination therefore is that as a result of the decision of the respondent to have G. C. E. A/Level as a requirement for clerical grade III these two employees are denied appointment to clerical grade III in future too.

The next issue is regarding relief. This is issue No. 5, Viewed in the light of determination of mine in relation to issues 1-4, I hold that the two employees are entitled to relief. The union has prayed that they are appointed to the post of clerk grade III from the dates they commenced employment and also arrears of wages. The union has failed to state in evidence what their wages were which is absolutely necessary for me to compute arrears of wages if any as prayed for by it. It is considered appropriate in this context to quote from the landmark judgment of justice Amarasinghe in Jayasuriya vs State Plantations Corporation 1995 - 2SLR 379.

“The burden is on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss”. He has in his judgment cited the observation made in Adda International Ltd vs Curio which reads as follows :

“The Tribunal must have something to bite and if an applicant produces nothing to bite he will have only himself to blame if he gets no compensation”. Justice Amarasinghe has also stated that “the assessment of compensation should be done based on solid facts submitted by parties.” Taking into consideration the totality of the evidence and the circumstances surrounding this case I have decided to award relief to the two employees. The Deputy Commissioner of

labour who conducted the inquiry prior to the reference of the dispute to me for arbitration has in his letter dated 11.07.2011 “Z” addressed to respondent company recommended the appointment of the two employees to clerical grade III from the year 1994. Page 96, In the English translation of this letter the words “from 1994” have been omitted. Page 203, This is a serious omission which is to the detriment of the employees. In the document “O” annexed to the affidavit of Thushitha Harsha Priya titled “Certificate of Service” issued by the company to Deepika Kumari Ranasinghe it has been stated that she had worked as a clerk from 01.06.1994 and from 15.10.2007 she was attached to business center human and institutional development section as a clerk - Page 108 - English version 217. The documents “O” and “Z” were not contested by the respondent.

Based on the evidence led before me I make AWARD as follows :

1. The two employees - Deepika Kumari Ranasinghe and Thushitha Harsha Priya should be appointed to clerical grade III effective from 15.11.2001- The date they were made permanent, together with arrears of wages from 15.11.2001 onwards.
2. The respondent company is directed to deposit with Assistant Commissioner of Labour Colombo central 6th floor, Labour Secretariat Colombo 5 within 30 days of the date of publication of this AWARD in the government gazette the total amount due to the employees as arrears from 15.11.2001 to date of publication of this AWARD in the Government Gazette - Difference between the wages due for clerical grade III and wages already drawn by them in their posts as labourers for the period 15.11.2001 to date of publication of this AWARD in the Government Gazette will have to be paid.
3. The two employees are free to withdraw the monies due to them from the Labour Department after the deposits it made by the respondent company.

I declare that this AWARD is just and equitable.

V. VIMALARAJAH,
Arbitrator.

20th October 2014.

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