

A Critical Evaluation of the Termination of Employment of Workmen (Special Provisions) Act in light of balancing the Interests of Employers, Workmen and the State

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Extended Abstract

Background

Social security and social justice in relation to labour relations require payment of severance compensation when employments are terminated for non-disciplinary reasons such as retrenchment and closure. The Industrial Disputes Act¹⁵ has provisions relating to retrenchment,¹⁶ and termination of services.¹⁷ However, as the provisions in the Industrial Disputes Act were inadequate to protect the interests of the workmen from the wave of retrenchment in 1971, the government made an emergency regulation under the Public Security Ordinance in May 1971¹⁸ as a temporary measure to control retrenchment. It has been followed by the enactment of the Termination of Employment of Workmen (Special Provisions) Act in 1971.¹⁹

Methodology

For the purpose of this paper, salient provisions of the Termination of Employment of Workmen (Special Provisions) Act²⁰ and the principles emerged from relevant cases have been evaluated to discuss to what extent the provisions of the Termination Act and the

¹⁵ No. 43 of 1950 (as amended).

¹⁶ Sections 31E-H.

¹⁷ Section 31B(1)(a).

¹⁸ Gazette No. 14,965/12 of 06-07-1971.

¹⁹ Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971.

Termination of Employment of Workmen (Special Provisions) (Amendment) Law, No. 4 of 1976.

Termination of Employment of Workmen (Special Provisions) (Amendment) Act, No. 51 of 1988.

Termination of Employment of Workmen (Special Provisions) (Amendment) Act, No. 12 of 2003.

Termination of Employment of Workmen (Special Provisions) (Amendment) Act, No. 20 of 2008.

²⁰ Hereafter it is stated as Termination Act.

principles emerged from the cases balance the interests of employers, workmen and the State.

Salient results and recommendations

The Termination Act requires employers to obtain written consent of the workman²¹ or written approval of the Commissioner²² before termination of employment for non-disciplinary reasons.²³ The Act further provides that the Commissioner may in his absolute discretion decide to grant or refuse approval for termination of employment.²⁴ If an employer is of the view that the workmen are redundant at his workplace and it is necessary to terminate their employment in the interests of his business, the employer should have the freedom to terminate their employment subject to payment of compensation. Hence, it is suggested to amend the Act to grant discretion to the employers to terminate employment of redundant workmen subject to payment of compensation.

Termination of services of a workman for inefficiency or incompetency is not a disciplinary termination.²⁵ Hence, the employers have to follow the stringent provisions to terminate employment for inefficiency or incompetency as well. It is against the interests of employers and the objective of the Act. Therefore, it is suggested that the Act should be amended to cover the situations which strictly come under lay-off, retrenchment and closure of industry.

The Act provides that the Commissioner may order to continue to employ the workman with back wages and other benefits for illegal termination.²⁶ In some cases, the Appellate Courts were of the view that the provision does not permit the Commissioner to grant wages and benefits without making an order to continue to employ the workman.²⁷ It has the effect that the Commissioner cannot make an order for payment of compensation in lieu of reinstatement for illegal termination. If the Commissioner does not have discretion to grant compensation in lieu of reinstatement considering the circumstances such as strained relationship between the parties, conduct of the employee after termination, changes in the business environment and delay in making decision, it would affect the

²¹ Section 2(1)(a).

²² Section 2(1)(b).

²³ Section 2(4).

²⁴ Section 2(2)(b).

²⁵ *St. Anthony's Hardware Stores Ltd v. Ranjit Kumar*(1978-79) 2 Sri LR 06

²⁶ Section 6.

²⁷ *Eksath Kamkaru Samithiya v. Commissioner of Labour* (2001) 2 Sri LR 137

interests of the employers and the State, and sometimes the interests of the workmen as well. In some other cases, the appellate courts have interpreted the provision as directory to permit the Commissioner to grant wages and other benefits without reinstatement,²⁸ or pay compensation in lieu of reinstatement.²⁹ However, it is suggested to amend the Act to grant discretion to the Commissioner to award compensation in appropriate cases.

The Act expressly provides that the inquiries under the Act should be conducted in accordance with the principles of natural justice.³⁰ However, it does not expressly provide to give reasons for the decisions of the Commissioner. It has led to judicial debate and to make conflicting decisions with regard to importance of giving reasons for decisions under the Act.³¹ The recent judgments indicate that although the Commissioner does not have a mandatory obligation to give reasons for his decisions and his decisions would not be invalid *per se* for not giving reasons, the principles of natural justice require giving reasons for decisions. As it is important to make decisions that balance the interests of the parties, the decisions without reasons would make the parties unable to objectively assess whether the decisions balance the interests of the parties or not.

The Industrial Disputes (Hearing and Determination of Proceeding) (Special Provisions) Act³² provides a time limit of two months for making decisions by the Commissioner under the Termination Act.³³ However, this provision is not a mandatory provision but a mere directive provision,³⁴ and as such the decisions made after this time limit also would be valid. Hence, the question arises whether this mechanism would enable the employers to take speedy measures to make adjustments to compete with the competing industries.

There is a question whether literal interpretation to the wordings of the Termination Act would cover termination of services of probationers. Although there is a judicial pronouncement³⁵ to the effect that the terminations of probationers are not covered under

²⁸Lanka Multi Moulds (Pvt) Ltd v. Wimalasena, Commissioner of Labour (2003) 1 Sri LR 143

²⁹Samyang Lanka (Pvt) Ltd v. Mahinda Madihahewa, Commissioner of Labour C.A. No: 1837/2004

³⁰Section 17.

³¹Samalanka Ltd v. Weerakoon, Commissioner of Labour (1994) 1 Sri LR 405

Karunadasa v. Unique Gemstones Ltd (1997) 1 Sri LR 256

Ceylon Printers Ltd v. Weerakoon, Commissioner of Labour (1998) 2 Sri LR 29

Yaseen Omar v. Pakistan International Airlines Corporation (1999) 2 Sri LR 375

Kundanmala Industries Ltd v. Wimalasena, Commissioner of Labour (2001) 3 Sri LR 229

Liyanage v. Commissioner of Labour (2004) 2 Sri LR 23

C&S Lanka Pvt) Ltd v. Commissioner General of Labour C.A No: 986/2004

³²Industrial Disputes (Hearing and Determination of Proceeding) (Special Provisions) Act, No. 13 of 2003

³³Sections 11,12 and 13. See section 2(2)(c) of the Termination Act also.

³⁴See Nagalingam v. De Mel 78 NLR 231 at 239.

³⁵Brown & Co Ltd v. Commissioner of Labour 2002 [B.L.R.] 16

the Act, it is suggested to amend the Act to expressly exclude termination of probationers from the coverage of the Act.

Conclusion

As discussed above the Termination Act enacted in 1971 has provisions which do not balance the interests of the parties, but become over protective of the interests of the workmen at the expense of the interests of employers and the State. The provisions of the Act enacted in 1971 in different context during the period of closed economy have become irrelevant today. Hence, the Act should be amended as suggested above to make the provisions to balance the interests of the parties and make it relevant in today's context.

References

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