

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

In the matter of an application under and
in terms of Articles 17 and 126 of the
Constitution of the Republic of Sri Lanka.

Gayani Amitha Wickramasekara,
“Dhampalle Gedara”
Welpitiya,
Weligama.

Petitioner

SC(FR) Application No:257/16

Vs.

1. Dharmasena Dissanayake,
Chairman,
Public Service Commission.
2. Salam Abdul Waid,
Member,
Public Service Commission.
3. D. Shiranthi Wijayatilaka,
Member,
Public Service Commission.
4. Dr. Prathap Ramanujam,
Member,
Public Service Commission.
5. V. Jegarasasingam,
Member,
Public Service Commission.
6. Santi Nihal Seneviratne,
Member,
Public Service Commission.
7. S.Ranugge,
Member,
Public Service Commission.

8. D.L. Mendis,
Member,
Public Service Commission.
9. Sarath Jayathilaka,
Member,
Public Service Commission.
10. H.M.G. Senevirathne,
Secretary,
Public Service Commission.

1st to 10th Respondents are of
No:177, Nawala Road,
Narahenpita, Colombo 05.

11. Mr. J.J. Ratnasiri,
Secretary,
Ministry of Public Administration
And Management,
Independence Square,
Colombo 07.
12. Ms. K.V.P.M.J. Gamage,
Director General of Combined
Services,
Ministry of Public Administration
And Management,
Independence Square,
Colombo 07.
13. Hon. Attorney General,
Attorney General's Department,
Hulftsdorp,
Colombo 12.

Respondents

Before: Jayantha Jayasuriya PC CJ.,
Murdu N.B. Fernando, PC J. and
S. Thurairaja, PC J.

Counsel: Chandana Prematilake for the Petitioner
Rajiv Goonetilleke Senior State Counsel for the Respondents

Argued on: 13.01.2020

Decided on: 05.11.2021

Murdu N.B. Fernando, PC J.

The Petitioner came before this Court in August 2016, alleging that the Respondents have violated and are continuously violating the Petitioner's fundamental right to equality before the law and the equal protection of the law enshrined in Article 12(1) of the Constitution and the fundamental right to freedom of occupation encompassed in Article 14(1) (g) of the Constitution.

The Petitioner's main grievance was the non-appointment of the Petitioner to supra grade of the Public Management Assistants Service and the failure of the Respondents to act in accordance with the relevant rules and regulations.

This Court in October 2016, granted the Petitioner leave to proceed on the alleged violation of Article 12(1) of the Constitution.

At the time of institution of the instant application, the Petitioner was a grade I officer of the Public Management Assistants Service ("PMAS") which was established encompassing clerical and other allied services in the public sector.

Public Management Assistants Service, is governed by a service minute and in terms of the said service minute, the promotions to supra grade of PMAS is based upon two avenues, a limited competitive examination and a merit based promotion scheme.

The Petitioner's grievance before this Court is in respect of the **Limited Competitive Examination of 2013** and more specifically with regard to the non-appointment of the Petitioner to the supra grade of PMAS, when admittedly vacancies exist in the supra grade.

The learned Senior State Counsel, representing the Respondents, did not deny the existence of vacancies, consequent to the finalization of the limited competitive examination of 2013.

The matter in dispute between the parties is the specific number of vacancies or the unfilled cadre vacancies existing in the supra grade at a given time.

The Petitioner's contention is that there were twelve vacancies to be filled at the time the appointments were made, whereas the Respondents position is that there were only six positions and a considered decision was made by the Public Service Commission not to fill the said six approved cadre positions, from the results of the limited competition examination of 2013.

Prior to examining the submissions of the parties pertaining to the vacancies and the requirement of filling the said cadre positions, I wish to advert to certain facts, which I consider important to understand the issue before us for determination.

In terms of the service minute of PMAS, appointments to the supra grade is made on the results of a limited competitive examination. The candidates who satisfy the basic qualifications are appointed to the posts available or to the approved posts, consequent to been successful at a written test and verification of their qualifications by an interview board.

Thus, there is a written test conducted by the department of examinations and an interview process to examine the certification.

The number of approved posts belonging to the respective grades of PMAS is referred to in the service minute. The time frame of holding of the examination would depend on the existing vacancies.

In the instant matter, applications were called by the Public Service Commission for the **limited competitive examination of 2013** for promotions to the supra grade of PMAS, in terms of the service minute, by a gazette notification published in October 2013.

Though applications for the said examination were called in the year 2013, and the Petitioner tendered an application for the aforesaid examination, the first component of the selection process, the written test was held only on 15th March, 2015.

At the written test [consisting of five papers], the Petitioner obtained 305 marks from a total of 500 marks.

Based upon the existing vacancies in the Public Management Assistants Service, **100 posts of the supra grade** were to be filled on the results of the aforesaid competitive examination.

Thus, the first hundred candidates who had scored the highest marks at the written test were to be called for the interview at which only verification of documents were to take place.

Based upon the above criteria the department of examinations had to forward a list comprising of 100 names. Since there were multiple candidates who had obtained the cut-off mark, all the candidates who obtained the cut-off mark 306, were included in the list of names. Thus, a list of 101 names were tendered by the department of examinations of candidates who obtained the highest marks at the written test.

The Petitioner and eight others who obtained 305 marks, [the next best mark at the written test] were not included in the aforesaid list of 101 names and the Petitioner had no qualms with regard to the said selection. Hence, the 1st component of the limited competitive examination is not challenged before this Court.

The next component of the selection process was the interview and the aforesaid 101 candidates were called for the interview. It was held in December 2015, and out of the 101 candidates called, only 94 candidates presented themselves at the interview and the said 94 candidates were promoted to supra grade with effect from the date of the written test, 15th March 2015.

Thus, from the 101 approved vacancies ear-marked to be filled, 94 posts were filled. Seven posts were not filled. Hence, seven vacancies of the supra grade were left unfilled.

This decision of the Public Service Commission brought in many appeals and representations by unsuccessful candidates requesting filling of the said vacancies.

Thus, the Public Service Commission, by letter dated 08th June, 2016 [document tendered to this Court, by the Respondent together with the motion dated 14th August, 2017] made order to permit one candidate [who was on maternity leave] to face the interview. The Public Service Commission also made a direction not to fill the remaining six posts, since there were nine candidates, [including the Petitioner] who had obtained 305 marks, [the next best mark at the written test] vying for the said six posts. These vacancies were to be filled, when the limited competitive examination was next held was the order made by the Public Service Commission.

The Petitioner does not challenge this position either. However, the contention of the Petitioner is that there were twelve vacancies. i.e., the six vacancies the Public Service Commission left unfilled plus another six vacancies (“additional six vacancies”), that arose consequent to the resignation of six other candidates. Hence, the Petitioner argues, the Petitioner who obtained 305 marks is entitled to one such vacancy in the supra grade.

The submission of the Petitioner with regard to the said additional six vacancies is that six out of the 94 candidates promoted to supra grade, subsequently tendered their resignation from the PMAS and joined Sri Lanka Administrative Service which resulted in an additional six vacancies being opened-up in the supra grade.

It is observed, that parallel to the aforementioned *limited competitive examination for promotions to the supra grade of PMAS* in the year 2013, applications were also called for another *limited competitive examination to recruit applicants for grade III of the Sri Lanka Administrative Service (“SLAS”)*. Some of the candidates applied for both posts and were successful at both examinations.

The contention of the Petitioner is that the appointments to SLAS was with effect from 09th November, 2015 a date prior to the day in which interviews for supra grade of PMAS was held, in the month of December 2015. The Petitioner further submits, that out of the persons who applied for both posts and were recruited to SLAS, two did not present themselves at the PMAS supra grade interview, whereas six others faced the interview and were successful and appointed to supra grade of the PMAS as well.

Thus, the Petitioner puts forwards an argument that since the six candidates who were appointed to the supra grade, have now tendered their resignation from PMAS, that the said six posts should also be opened to be filled by the unsuccessful candidates who faced the limited competitive examination for promotions to supra grade of PMAS.

In order to substantiate its argument, the Petitioner mainly relies upon **Clause 14** of the gazette notice calling for applications to the supra grade.

Clause 14 reads as follows:

“Appointment of any candidate shall be cancelled, if he/she refuses to assume duties at the respective office. At such

occasions vacancies will be filled by calling other candidates in the order of marks.” (emphasis added)

Hence, the learned Counsel for the Petitioner submits, in view of the resignation of the candidates [upon being recruited to SLAS] cancellation of such appointments in the supra grade of PMAS took place and hence, the said situation falls within the four corners of the aforesaid Clause 14. Therefore, it was contended, that such vacancies should be filled by calling the candidates in the order of marks. Further, it was contended since the Petitioner obtained 305 marks at the written test, one mark below the cut off mark 306, that the Petitioner should be appointed to the supra grade and the said appointment should also be back dated to fall in line with the other 94 candidates, i.e., with effect from 15th March, 2015.

I have considered the above submission pertaining to Cause 14 and am not inclined to accept the argument put forward by the learned Counsel for the Petitioner, for the below mentioned reasons.

Firstly,

Clause 14 speaks of **candidates failing to assume duties at the respective office which would create a vacancy**. In the instant matter, vacancies were only created when the said six candidates having accepted office with effect from 15th March, 2015 tendered their resignation effective from 09th November, 2015. Therefore, it is quite clear, that the said six candidates accepted the appointments and hence, there were no vacancies as at that date i.e., 15th March, 2015 as contended by the Petitioner. Moreover, the said six candidates in my view, *did not refuse to assume duties at the respective office*, and as such the situation contemplated in Clause 14 does not kick-in with regard to the instant application. Accepting the appointment and then resigning on a subsequent date cannot be equated to *refusing to take up an appointment as referred to in Clause 14*. Hence, Clause 14 has no applicability to the matter in issue.

Secondly,

The post was advertised and applications for supra grade were called in **October 2013, based upon the vacancies existing as at that date in the PMAS**. The vacancies the Petitioner relies upon admittedly took place on 09th November, 2015.

Thus, in my view, the vacancies that arose subsequent to the day of the gazette in October 2013, will not get caught up under this gazette notification. Hence, Clause 14 which speaks of filling of vacancies by calling other candidates in the order of merit has no applicability to the instant situation.

It is also observed, that there is no document produced by the Petitioner to substantiate the exact date of appointment of the six persons to the SLAS. Is it by letter dated 09th November, 2015 to be effective from 09th November, 2015? Were the appointments made on a subsequent date and backdated to the said date? If so, can the Petitioner justify the contention with regard to the effective date of the six vacancies, on the material and documents produced before Court?

In my view, on the said ground too, the Petitioner's argument fails. The inability of the Petitioner to produce evidence pertaining to the exact date on which the appointments to the SLAS was made, resulted in paucity of material before Court to determine the veracity of the Petitioner's assertion. This fact becomes more significant in view of Petitioner's own document produced as P13A. By the said document its amply clear, that the appointments to the supra grade of PMAS, was communicated by a letter dated 29th April, 2016 whereas, the said appointment was back dated approximately by one year i.e., to 15th March,2015 the day on which the written test was held.

The Petitioner finally contended, that by back dating the appointments, the six candidates were able to receive the arrears of salary in the supra grade for a period of six months from March 2015 till November 2015 and further argued that such conduct is irregular and illegal and would amount to obtaining a monetary gain at the expense of the State.

In my view the said contention too, does not stand to reason as the Establishment Code, permits backdating of promotions subject to certain conditions.

Chapter II of the Establishment Code regulates the recruitment procedure and appointment of public officers. Section 1:9 refers to the date of the appointment to be either the date of appointment referred to in the letter of appointment or the date of assuming of duties in accordance with the provisions therein. Section 1:10 states ante-dating of an appointment should not take place without the approval of the relevant authority and

Section 1:10:2 indicates, for ante-dating an appointment, there should be a substantial vacancy in the relevant post. However, in view of Section 1:11:2 a post cannot be ante-dated to a date prior to the competitive examination. In the instant matter the appointments were ante-dated to the date of the written exam being the 1st component of the competitive examination. Hence, in my view ante-dating of the appointments or backdating of promotion have taken place in accordance with the provisions laid down in the Establishment Code.

Section 6 of Chapter II, refers to conditions to be satisfied when an appointment or a promotion is to be made. Having financial provision for such appointment is one such pre-condition. Similarity backdating of promotions would entail payment of arrears among other benefits, unless otherwise directed. In the instant matter, the successful candidates, without exception were entitled to the arrears of salary, stemming from such backdating. Hence payment of arrears of salary was also in accordance with the provisions of the Establishment Code.

The Petitioners grievance appears to be in the event a public officer who belong on one *joins another service in the public sector he should not be given a back dated promotion in the service to which he belonged nor paid arrears of salary from the date of the back dated appointment.* However, it is observed that the Establishment Code makes provision for an officer who is entitled to a due promotion, to be granted such promotion even in instances in which such a person is not in service, retired or deceased as provided for in Section 6:2 of Chapter. It of the Establishment Code, the provided promotion is a grade to grade promotion. In the instant matter, promotes are still in service. They have neither retired nor deceased six of the promotees only joined the Sri Lanka Administrative Service of the public sector.

Further the impugned promotion is a grade to grade promotion [i.e., grade I to supra grade in the PMAS] and the promotions are with regard to substantial vacancies in the PMAS.

Hence, I am of the view that the Establishment Code provides for back dating of appointments, which would intern entitle appointees to receive a financial benefit, by way of arrears of salary, and acceptance of such arrears of salary, is not irregular or illegal as contended by the Petitioner.

Moreover, in the instant application, the promotions granted were grade to grade promotions and falls clearly within the purview and provisions of the Establishment Code as discussed earlier. The Establishment Code has statutory flavor and force.

This Court, in the and mark judgement of **Abeywickrama v Pathirana and others [1986]1 Sri LR 120** and in **Public Service United Nurses Union v Minister of Public Administration and others [1988] 1 Sri LR 229**, analysed in depth the provisions of the present and past Constitutions and held that the Establishment Code has statutory force.

This ratio has been endorsed and followed in many judgments of this Court. In a recent judgement of this Court, it was re-echoed that it is trite law that the Establishment Code by virtue of its constitutional origin acquires statutory force, subject however to the reservation that it is not inconsistent with any other provision of the Constitution. [see. **Locomotive Assistants Union v Abeywickrama SC/FR 29/2018 SC minutes dated 16-07-2020**]

As discussed earlier, the limited competitive examination for promotions to supra grade in PMAS and recruitment to grade III of SLAS were called in the year 2013. However, in both instances the process of selection was finalized only in 2015/2016. The delay in the selection process cannot be attributable to the recipients of the promotion and as laid down in the Establishment Code, the selectees should enjoy the fruits of their promotion.

Thus, backdating of the impugned appointment with regard to the 94 recipients, including the six candidates, based upon the provisions of the Establishment Code, in my view cannot be deemed unjust or unlawful as contended by the Petitioner. Moreover, payment of arrears of salary to the said promotees, including the six promotees who joined SCAS at a subsequent date will not amount to the said appointees enjoying a monetary gain at the expense of the State either, as vehemently argued by the Petitioner.

Therefore, I see no reason to deprive the said six candidates of the promotion they received to supra grade of the PMAS with effect from 15th March, 2015 based upon the arguments formulated by the Petitioner.

Further, I see no merit in the contention of the Petitioner, with regard to Clause 14 of the gazette notification and or to declare the afore discussed six posts to be considered

as *additional vacancies* and or that there were twelve vacancies in the offing and not six as submitted by the Respondents. Furthermore, I see no reason or justification to direct that one such vacancy be filled by the Petitioner who obtained 305 marks at the written test.

In any event, the said six candidates whose promotions the Petitioner moves to deprive have not been brought before Court by the Petitioner. The conduct of the Petitioner in not bringing the necessary parties before Court should also be considered in determining this application.

I would pause at this juncture, to consider the submissions made on behalf of the Respondents.

The learned Senior State Counsel re-iterated that there were only six vacancies and submitted to Court that the decision by the Public Service Commission to leave the six posts of the supra grade **unfilled**, in view of the candidates not presenting themselves at the interview, was a well-considered and a reasonable decision. The learned Counsel also submitted that the said decision to leave the said vacancies as it is, is neither irrational or arbitrary, especially in the context, where nine persons with equal marks, were vying for the said six posts. Further, it was submitted that in any event, Clause 16 of the gazette notification calling for applications for the supra grade permitted such a course of action.

Clause 16 reads as follows:

“The Public Service Commission reserves the right to refrain from filling some or all of the vacancies and also to decide on matters not provided for in respect of these regulations.”

I have considered the said submissions in the context of the service minute and observe that according to the said minute of the PMAS, the total approved posts of supra grade stands at 782. The recruitment to the said grade is twofold. Limited category and open category and the ratio is 30% for limited category and 70% for open category. The methodology of recruitment to the supra grade is laid down by way of rules and regulations and is administered under the direction of the Public Service Commission by the Ministry of Public Administration, all of whom are Respondents to this application. It is also observed that the limited competitive examination as the word denotes, is a competitive

examination limited to the officers of the particular service and is not open to the public at large.

Thus, I am of the view that the decision of the Public Service Commission not to fill the six vacancies is a reasonable and a *bonafide* decision and made well within its ambit and power.

I would also wish to consider, whether such decision of the Public Service Commission is arbitrary, irrational or unwarranted, as contended by the Petitioner.

This Court in the case of **Karunathilaka and another v Jayalath de Silva and others [2003] 1 Sri LR 35** observed as follows:

“The basic principle governing the concept of equality is to remove unfairness and arbitrariness. It profoundly forbids actions, which deny equality and thereby becomes discriminative. The hallmark of the concept of equality is to ensure that fairness is meted out. Article 12(1) of the Constitution, which governs the principles of equality, approves actions which has a reasonable basis for the decision and this Court has not been hesitant to accept those as purely valid decisions.” (pages 41 and 42)
(emphasis added)

Similarly, in the case of **Wickramasinghe v Ceylon Petroleum Corporation and others [2001] 2 Sri LR 409** having discussed the positive connotation reasonableness as opposed to the negative connotation arbitrariness, this Court observed, that if the actions of the Respondents are reasonable, then such decision would not amount to be an arbitrary decision.

In the instant application the decision of the 1st to 9th Respondents, i.e., the Public Service Commission, not to fill six posts of the supra grade, based upon the results of the 2013 examination, I consider to be a reasonable decision arrived at, taking into consideration the facts and circumstances of the matter in issue. It does not offend the principles of reasonableness and fair play and is not procedurally flawed. Hence, it cannot be termed arbitrary and/or unwarranted and/or manifestly irrational as contended by the Petitioner.

Similarly, I see no merit in the argument of the Petitioner, that there are twelve vacancies and that the Petitioner is entitled to be appointed to one such vacancy. Thus, I reject the argument of the Petitioner pertaining to the *six additional vacancies*. Further, I determine that the six posts left unfilled upon the direction of the Public Service Commission, is a reasonable and a *bonafide* decision made for good, valid and justifiable reasons.

Hence, I hold that the Petitioner has not been discriminated by the Respondents in any manner whatsoever or that similarly circumstanced persons have been treated differently by the Respondents. Thus, I see no ground or reason to appoint the Petitioner to one of the said vacant posts of the supra grade of the PMAS as prayed for by the Petitioner.

In the aforesaid circumstances and for reasons adumbrated herein, I hold that the Petitioner's fundamental right to equality before the law and equal protection of the law enshrined in Article 12(1) of the Constitution has not been infringed by the Respondents.

The application of the Petitioner is therefore dismissed. I make no order as to costs.

Application is dismissed.

Judge of the Supreme Court

Jayantha Jayasuriya PC CJ

I agree.

Chief Justice

S. Thuraiaraja PC J

I agree.

Judge of the Supreme Court