

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

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

K.A. Gunasena  
No. 18/6A,  
Nikape Road,  
Dehiwala

PETITIONER

SC APPLICATION NO.

SC (FR) 303/2013

Vs.

1. Public Service Commission

No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

2. Justice Sathyaa Hettige, PC,

Chairman,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

2A. Mr. Dharmasena Dissanayaka,

Chairman,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

3. Mrs. Kanthi Wijetunge,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

3A. Mr. A. Salam Abdul Waid,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05

3B. Prof. Hussain Ismail,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

4. Mr. Sunil S Sirisena,  
Member,  
Public Service Commission,

No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

4A. Ms. D. Shirantha Wijayatilaka,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

4B. Mrs. Sudharma Karnarathna,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

5. Mr. S.C. Mannapperuma,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

5A. Dr. Prathap Ramanujm,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,

Colombo 05

6. Ananda Seneviratne,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

6A. Mrs. V. Jegarasasingam,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

7. N.H. Pathirana,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

7A. Mr. Santi Nihal Seneviratne,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

7B. Mr. G.S.A. de Silva PC,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

8. S. Thillinadarajah,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Colombo 05.

8A. Mr. S. Ranugge  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Colombo 05.

9. Dr. I.M. Zoyza Gunasekara,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Colombo 05.

9A. Mr. D. L. Mendis  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Colombo 05.

10. A. Mohamed Nahiya,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Colombo 05.

10A. Mr. Sarath Jayathilaka,  
Member,  
Public Service Commission,  
No. 177, Nawala Road,  
Colombo 05.

11. Dr. B. M. S Batagoda,  
Deputy Secretary of the Treasury,  
Ministry of Finance and Planning,  
The Secretariat,  
Colombo 01.

11A. Ms. G. D. C. Ekanayake  
Deputy Secretary of the Treasury,  
Ministry of Finance and Planning,  
The Secretariat,  
Colombo 01.

11B. Mr. A.R. Desapriya  
Deputy Secretary of the Treasury,  
Ministry of Finance and Planning,  
The Secretariat,  
Colombo 01.

12. Hon. The Attorney General,  
Attorney General's Department,  
Colombo 12.

**RESPONDENTS**

**Before:** Buwaneka Aluwihare, PC, J.  
L.T.B. Dehideniya J.  
Murdu N. B. Fernando, PC, J.

**Counsel:** Ranil Samarasooriya with Shashirenga Sooriyabatabendi for the  
Petitioner.  
Rajiv Goonetillake, Senior State Counsel for the Respondents

**Argued on:** 04. 09. 2020

**Decided on:** 18.11.2022

**JUDGEMENT**

**Aluwihare PC J,**

The Petitioner has come before this Court alleging that the 1<sup>st</sup> to 11<sup>th</sup> Respondents have violated the Petitioner's fundamental rights guaranteed under Article 12 (1) of the Constitution.

At the outset, it must be noted that the Petitioners in SC (FR) Application No. 295/2013, SC (FR) Application No. 305/2013, SC (FR) Application No.

332/2013, and SC (FR) Application No. 333/2013, agreed to abide by the judgement of this application.

The Petitioner in addition to a declaration that his fundamental rights guaranteed to him under Article 12 (1) had been violated, had also prayed for the quashing of the letter of the 11<sup>th</sup> Respondent dated 2<sup>nd</sup> July 2013 ('P23') and the decision of the Public Service Commission (1<sup>st</sup> Respondent) contained therein. The Petitioner had further prayed for a direction to the Public Service Commission [1<sup>st</sup> Respondent] to give effect to the decision of the Administrative Appeals Tribunal (AAT) contained in 'P17' and to grant the Petitioner a promotion to Class I, on a supernumerary basis.

The Petitioner, was a public servant attached to the Sri Lanka Accountants' Service, whose services were terminated by the State due to the Petitioner's participation in the general strike of July 1980 [hereinafter '1980 July strike'].

Subsequently, all punishments imposed on the employees who participated in the said strike were withdrawn by virtue of the Public Administration Circular No. 32/89 and the Petitioner was reinstated. In view of the fact, however, that he had passed the relevant examinations, he had been placed in Class II Grade II of the Sri Lanka Accountants' Service with effect from 17<sup>th</sup> August 1992.

Thereafter, by letter [A/3/2/152] dated 27<sup>th</sup> January 1999 [P4], the Secretary to the Public Service Commission informed the Petitioner that the Cabinet of Ministers by a decision taken on 22<sup>nd</sup> April 1998, had **antedated the Petitioner's appointment to Class II Grade II of the Sri Lanka Accountant's Service to 20<sup>th</sup> May 1984 from 17<sup>th</sup> August 1992**, without back wages however.

#### **Promotion to Class II Grade I in the Sri Lanka Accountants' Service**

In terms of Clause 4 (1) of the Minutes of the Sri Lanka Accountants' Service published in the Gazette Extraordinary No. 509/7 dated 7<sup>th</sup> June 1988, an Officer confirmed in **Class II Grade II**, who has completed 10 years of satisfactory service in the Sri Lanka Accountants' Service as at 27<sup>th</sup> July 1987 or on the date he becomes eligible for promotion to **Class II Grade I** of the said service, may be promoted, provided the officer has satisfied the following requirements;



- (a) has passed or been exempted from the 1<sup>st</sup> and 2<sup>nd</sup> Efficiency Bar examination on the due date;
- (b) has passed or been exempted from the Second Language requirement.
- (c) in the case of such an officer only who is appointed to the service on or after 2<sup>nd</sup> June 1986 and successfully completed the Training Course in Accountancy conducted by the Sri Lanka Institute of Development Administration.
- (d) has earned on the due dates all the increments during the period of five years prior to his becoming eligible for promotion.
- (e) has not been subjected to disciplinary punishment for any offence committed during the period of five years immediately preceding the day on which he becomes eligible for promotion;

The Petitioner had requested that in terms of the Minute referred to above, he be promoted to Class II Grade I on the expiry of a period of ten years from the date to which his appointment to Class II Grade II was antedated i.e., he is entitled to be promoted with effect from 20<sup>th</sup> May 1994.

The Public Service Commission (1<sup>st</sup> Respondent), however, refused to grant the Petitioner the promotion to Class II Grade I on the ground that the Petitioner's appointment to Class II Grade II was antedated with a condition, that he would not be paid arrears of salary and therefore his period of active service would commence from 1992, the effective date of his reappointment. Therefore, his satisfactory service would commence from 1992. (*vide* the letter dated 17<sup>th</sup> May 2002 of the Ministry of Finance marked as 'P7', and the letter dated 18<sup>th</sup> July 2002 of the Secretary to the Public Service Commission marked as 'P8').

Being aggrieved by the aforesaid decision, the Petitioner tendered an appeal to the Parliamentary Commissioner for Administration (Ombudsman) who following an inquiry recommended that the Petitioner be promoted to Grade II Class I of the Accountants' Service with effect from 20<sup>th</sup> May 1994. However, the 1<sup>st</sup> Respondent did not comply with this recommendation.

The Petitioner appealed to the Administrative Appeals Tribunal on 22<sup>nd</sup> June 2007. The Administrative Appeals Tribunal delivering its Order [on 18<sup>th</sup> November 2011 ('P15') as amended on 22<sup>nd</sup> November 2011 ('P17')] directed the Public Service Commission (1<sup>st</sup> Respondent) to grant the Petitioner the promotion to Class II Grade I with effect from 20<sup>th</sup> May 1994.

Consequent to the said order of the AAT ['P17'], the Petitioner's promotion to Class II Grade I was granted with effect from the said date. (P18- dated 16.02.2012)

In a further development, by a letter dated 2nd July 2013 ('P23') the 11<sup>th</sup> Respondent i.e., the Deputy Secretary to the Treasury of the Ministry of Finance and Planning, communicated to the Petitioner the fact that the PSC [1<sup>st</sup> Respondent] had annulled the antedating of the promotion of the Petitioner to Class II Grade I, which had been granted consequent to the decision of the Administrative Appeals Tribunal ('P17').

The basis set out in the above mentioned letter ('P23') was that the Petitioner was appointed to Class II Grade II by virtue of a Cabinet decision on the 17.08.1992, subject to the condition that he would not receive back wages and that, only his period of 'active service' would be taken into account, when calculating the requisite number of years of service for his promotion to Class II Grade I. As such he was not eligible to have his promotion antedated.

The Petitioner argues that the letter marked 'P23' and the decision of the 1<sup>st</sup> Respondent to annul the Petitioner's antedated promotion to Class II Grade I is bad in law for one or more of the following reasons;

1. The antedating of the Petitioner's promotion was made consequent to a decision made by the Administrative Appeals Tribunal that sat in appeal on the decision made by the PSC [1<sup>st</sup> Respondent] refusing to grant the said promotion.
2. The 1<sup>st</sup> Respondent was represented in the appeal proceedings thus making the Order made by the Tribunal on 18<sup>th</sup> October 2011 and the amended Order on 22<sup>nd</sup> November 2011, binding on the 1<sup>st</sup> Respondent Commission and its members.

3. If the 1<sup>st</sup> Respondent Commission was aggrieved by the said decision the order should have been appealed against, which course of action the 1<sup>st</sup> Respondent Commission, however, did not pursue..
4. Since no appeal was made, the said decision of the Administrative Appeals Tribunal is still in force and is binding on the PSC [1<sup>st</sup> Respondent] and its members.

### The Respondents' position

The Respondents' position was that there were two schemes under which the 1980 July strikers were given relief. The first was, the relief granted in terms of the Public Administration Circular 32/89 as amended by PA Circular 39/18(v) dated 10<sup>th</sup> March 1992, by which those who were deemed to have vacated their posts were reinstated **with back wages** and they were given time to sit for their relevant promotional examinations.

The second scheme was a Cabinet decision dated 22<sup>nd</sup> April 1998 by which reappointments were back dated **without back wages** on the recommendations of the Political Victimization Committee. As a result, , the Petitioner's reappointment on 17.08.1992 was back dated to 20.05.1984, but without back wages.

The Respondents further argue that since the Petitioner fell into the latter category and was reinstated without back wages as opposed to others who were appointed with back wages [ paragraph 5 of the affidavit of the 2<sup>nd</sup> Respondent], his promotion to Class II Grade I would have to be considered by only taking into account his active period of service, and as such he was not eligible to have his promotion antedated. Therefore, the Petitioner's promotion to Class II Grade I should be with effect from 17<sup>th</sup> August 2002 which is 10 years from 17<sup>th</sup> August 1992, the actual date of Petitioner's re-appointment to Class II Grade II.

It was submitted on behalf of the Respondents, that the PSC [1<sup>st</sup> Respondent] had overlooked the fact that the Petitioner had been reinstated without back wages sequel to a Cabinet decision as opposed to, reinstatements with back wages as per the Circular 32/89 and therefore mistakenly given effect to the Administrative

Appeals Tribunal's decision which ordered the promotion of the Petitioner on the basis of the Public Administration Circular 32/89(V). From the foregoing, it appears that the PSC [1<sup>st</sup> Respondent] treated the two groups of strikers differently.

### **The Administrative Appeals Tribunal [AAT] and its decision**

The AAT was established under Article 59(1) of the Constitution and in terms of Article 59(2), has the power to alter, vary or rescind any order or decision made by the Public Service Commission.

According to Section 3 (a) of the Administrative Appeals Tribunal Act No. 4 of 2002 the Tribunal has the power to hear and determine any appeal preferred to it from any order or decision made by the Public Service Commission in the exercise of powers under Chapter IX of the Constitution. Furthermore, Section 8 (2) provides that a decision made by the tribunal shall be final and conclusive and shall not be called in question in any suit or proceedings in a court of law.

Commenting on Section 8 (2) of the Act, Gooneratne J. in **W.J. Fernando and Others vs. Priyanatha Perera and Others** SCFR 383/2008 SC Minutes 28.02.2017 observed that;

*“The preclusive clause has been included in the said Act with regard to challenging the decision of the AAT and the legislature has done so to ensure that a decision of the AAT must have finality. As such PSC will be bound to abide by a decision of the AAT.”* (at page 11).

It was also observed that;

*“It is not incorrect to state that the Administrative Appeals Tribunal (AAT) is the Appellate Body and the PSC will be bound to abide by a decision of the AAT.”*

It was further held in the aforesaid case that the Public Service Commission would have to comply with the order of the Administrative Appeals Tribunal if the Commission had failed to canvass the order in a court of competent jurisdiction.

In the instant case the PSC [1<sup>st</sup> Respondent] informed the Deputy Secretary to the Treasury as well as the Administrative Appeals Tribunal of the reasons for the

reversal of the order ('P17') by letters dated 6<sup>th</sup> June 2013 marked as 'R1' and 'R2' respectively. The PSC, however, did not canvass the AAT decision before a court of competent jurisdiction. The Respondents, with reference to the case of **W.J. Fernando and Others vs. Priyantha Perera and Others** (supra) conceded that the 1<sup>st</sup> Respondent Commission ought to have canvassed the decision of the Administrative Appeals Tribunal ('P17') instead of writing to the said Tribunal (R2). The Respondents, in their written submissions had pointed out that the documents R1 and R2 setting out the reasons behind the PSC's decision as to why it cannot concur with the AAT decision, were anterior to the judgement of this court in **W.J Fernando and others** (supra) which had decided the very legal issue that had arisen in this case.

**The Promotion of the Petitioner to Class I on a supernumerary basis and the payment of arrears of salary.** [ Relief sought by the Petitioner by prayer (f) ]

Prior to the cancellation of the Petitioner's antedated promotion to Class II Grade I, the Petitioner also sought a promotion under and in terms of the Accountant's Service Board Circular No. 5 dated 14<sup>th</sup> March 2003, ('P19'), which incorporates a decision by the Cabinet of Ministers, together with arrears of salary. According to this Circular, a Class II Grade I Officer who has completed 18 years of service was entitled to be promoted to Class I, on a supernumerary basis. The said request, however, was turned down by the 1<sup>st</sup> Respondent.

As per the order of the Administrative Appeals Tribunal ['P17'] the Petitioner's promotion to Class II Grade I must come into effect from 20<sup>th</sup> May 1994. Therefore, the number of years of service for the purpose of calculating the 18 years required for his promotion to Grade I, should be calculated from 20<sup>th</sup> May 1994. Accordingly,[in terms of the aforesaid circular] the Petitioner's promotion to Class I on a supernumerary basis should come into effect from 20<sup>th</sup> May 2012.

**Violation of the Petitioner's fundamental right enshrined in Article 12(1)**

As referred to earlier, the PSC [1st Respondent] appears to have treated, the employees who lost their employment due to the 1980 July strike and who got their employment back, differently, based on whether their reinstatements were **with back wages or without back wages**. This resulted due to the difference of the terms

of the schemes under which the two groups of workers were reinstated. The fact remains, however, that all these employees lost their employment as a result of taking part in the 1980 July strike. **Neither group had served in their posts** until they were reinstated. Thus, all these workers were similarly circumstanced and the fact that some of them did not receive back wages cannot be considered as an intelligible criterion to treat them differently, when it came to granting of promotions, in particular the computation of the period of 'active service'.

Furthermore, the Petitioner's appointment to Sri Lanka Accountants' Service Class II Grade II was antedated to 20<sup>th</sup> May 1984 subject to the condition that he would be placed on a salary point granting incremental credit for the period and that he would not be paid back wages. This was done by virtue of the aforementioned Cabinet decision dated 22<sup>nd</sup> April 1998 (*Vide* the letter dated 27<sup>th</sup> January 1999 marked 'P4')

### **The violation of Article 12 (1)**

In the totality of the circumstances enumerated, it is argued on behalf of the Petitioner that the actions of the 1<sup>st</sup> to 11<sup>th</sup> Respondents are arbitrary, capricious, unreasonable and unfair resulting in the Petitioner being singled out for discriminatory action which has resulted in the violation of the Petitioner's fundamental right to equality and equal protection of the law as guaranteed by Article 12 (1) of the Constitution.

Article 12 (1) requires the law to be applied equally among similarly circumstanced persons without any form of discrimination. However, differential treatment is **not always regarded as discrimination**. Such form of treatment can be sustained if it is reasonable and not arbitrary.

In the case of **Probhudas Morarjee Rajkotia and Others v. Union of India and Others** (1966) S.C. 1044 it was observed that,

*"To make out a case of denial of the equal protection a plea of differential treatment is by itself not sufficient. The petitioner... must make out that not only had he been treated differently from others, but that he has been so treated from persons*

*similarly circumstanced without any reasonable basis and such differential treatment is unjustifiably made.”*

When inquiring as to whether the Petitioner’s fundamental rights under Article 12 (1) have been violated the following criteria should be borne in mind;

*“In order to sustain the plea of discrimination based upon Article 12 (1) a party will have to satisfy the court about two things, namely (1) that he has been treated differently from others, and (2) that he has been differently treated from persons similarly circumstanced without any reasonable basis.”* (C.W. Mackie and Co. Ltd v. Hugh Molagoda, Commissioner General of Inland Revenue and Others (1986) 1 SLR 300 at page 308).

The public servants who participated in the General Strike of July 1980 were consequently regarded by the State as having vacated their posts. Therefore, they constitute a group which was similarly circumstanced. It appears, however, that they had not been reinstated together. Whilst, one group received antedated appointments by virtue of the Public Administration Circular No. 32/89 (V) with back wages, the other group to which the Petitioner belongs, received antedated appointments by virtue of a Cabinet decision without back wages.

The fact of the matter is that none of the reinstated employees in fact was in active service from the date to which their appointments were antedated. From the tenor of the 1<sup>st</sup> Respondent’s objections, it appears that the Public Service Commission (1<sup>st</sup> Respondent) has treated the reinstated employees who received back wages as being in active service from the date to which their appointments were antedated and the reinstated employees including the Petitioner who did not receive back wages as not being in active service from the date to which their appointments were antedated. Thus, the PSC has treated these group of employees *differently* when granting of promotions came into issue. This satisfies the first limb of the criteria referred to in the case of **C.W. Mackie and Co. Ltd** (supra), that the Petitioner was treated differently from others.

In view of Article 12 (1), if a group that is similarly circumstanced, is to be treated differently, it must be on the basis of an intelligible, distinguishable and rational criteria. When examining whether the Petitioner has been treated differently from

similarly circumstanced persons without a reasonable basis as per the second limb, it must be noted that in this instance, the criteria adopted to make decisions regarding promotions, relate to the factor of back wages. This gives rise to the question of whether this amounts to a rational, intelligible criteria on which the Public Service Commission should base its decisions regarding promotions.

None of the individuals who was reinstated had ‘active service’ from the date to which their appointments were antedated. Therefore, it is unreasonable to treat as some of them have been in active service purely on the ground that they received back wages. It is clear that the criterion adopted by the Public Service Commission in calculating the period of active service for the purpose of promoting the Petitioner was arbitrary and therefore the second limb of the criteria in *C.W. Mackie and Co Ltd (supra)* is satisfied.

It is also apt in this instance to highlight the fact that it is sound law that the violation of Article 12 (1) is not restricted to positive acts of unequal treatment and encompasses the arbitrary and mala fide exercise of power. The evolution of the scope of Article 12 (1) was expounded in the case of **Sampanthan v. Attorney General** (SC Minutes of 13<sup>th</sup> December 2018) where the Court cited Justice Kulatunga’s commentary in “Right to Equality – National Application of Human Rights” BALJ, Vol. VIII, Part I, page 8;

*“ [...] notwithstanding the Full bench in Elmore Perera’s case, the Supreme Court has abandoned the classification theory in granting relief for infringement of right to equality. Relief is now freely granted in respect of arbitrary, and mala fide executive action in the exercise of the Court’s jurisdiction under Article 126 of the Constitution.”* (Hon. Justice Kulatunga PC., [1999])

The Court in **Sampanthan v. Attorney General** (supra) also noted that Article 12 (1) *“offers all person’s protection against arbitrary and mala fide exercise of power...”*.

Considering the facts of the instant case, what can be observed is that the conduct of the 1<sup>st</sup> to 11<sup>th</sup> Respondents not only amount to discriminatory treatment but can also be regarded as arbitrary and irrational. Therefore, it can be held the



Petitioner's fundamental rights guaranteed in terms of Article 12 (1) of the Constitution have been violated by the 1<sup>st</sup> to 11<sup>th</sup> Respondents.

**The relief prayed for, by the Petitioner.**

The Petitioner's position is that under and by virtue of the provisions contained in the Public Administration Circular No. 32/89 (V), he is entitled to back wages. In terms of Paragraphs 7 and 8 of the said circular, the Petitioner would have to be considered as having passed the examinations and interviews held during the period he was not in service and if from the relevant date he has his seniority restored, then arrears of salary, salary increments etc. have to be granted along with promotions. The Respondents' however, argue that the Petitioner is not entitled to back wages as that is the condition subject to which his date of appointment was antedated under the aforementioned Cabinet decision. I am of the view that the payment of back wages claimed by the Petitioner under the Public Administration Circular 32/89V cannot be considered, at this point by this court.

**Petitioners' promotion to Class II Grade I**

The Respondents' unwavering position is evident in the letter of the Ministry of Finance and Planning dated 12<sup>th</sup> June 2012 ('P20') sent with regard to the enforcement of the Order of the Administrative Appeals Tribunal ('P17'). It is stated in the letter that since the Tribunal had only ordered that the Petitioner's promotion be antedated and that he be entitled to incremental credit, hence the 1<sup>st</sup> Respondent would not be able to pay back wages in accordance with that order.

In response to this letter the Petitioner by letter dated 1<sup>st</sup> July 2012 (marked as 'P21') submitted that the Administrative Appeals Tribunal's order did not explicitly rule out the payment of back wages and in order to highlight the discrimination levelled against him, the Petitioner has given the names of five officers who had also participated in the General strike of July 1980, and had received antedated appointments and subsequently antedated promotions to Class II Grade I including back wages.

The Petitioner in this case had sat for the examination for recruitment to Class II Grade II of the Sri Lanka Accountants' Service. However, on account of his

participation in the July 1980 strike, he was not appointed, but those who had not participated were given appointments with effect from 1<sup>st</sup> March 1985. By virtue of the Public Administration letter dated 27.01.1999 [P4], Petitioner's reappointment to Class II Grade II of the Sri Lanka Accountants' Service was backdated to the 20<sup>th</sup> May 1984 and the Petitioner was considered to have been on no pay leave from 20<sup>th</sup> May 1984 to 17<sup>th</sup> August 1992, which was the day on which he had accepted the appointment.

The Petitioner's contention was that having completed 10 years of satisfactory service since 20<sup>th</sup> May 1984, he was entitled to be promoted to Class II Grade I with effect from 20<sup>th</sup> May 1994. However, the Public Service Commission's position was that the Petitioner's period of no pay leave could not be taken into consideration when recommending him for promotion to Class II Grade I in terms of the Establishment Code and that the Petitioner would complete 10 years of service in Class II Grade II only on 17<sup>th</sup> August 2002.

The Petitioner complained that his fundamental rights under Article 12 (1) had been infringed by the failure to give him a promotion to Class II Grade I of the Sri Lanka Accountant's Service together with incremental credit and sought an order that his 10-year period of service necessary for his promotion to Class II Grade I be reckoned from the date to which his appointment to Class II Grade II was antedated.

The Petitioner has also made reference to the case of *J. Dharmasiri de Silva vs. The Secretary, PSC and 11 others* in SC Application No.87/2001 [SC Minutes 04.07.2001]

In the above case, the Court had rejected the claim of the Public Service Commission that the appointment of the Petitioner in that case was prospective and not retrospective and allowed Petitioner's application to have his period of service of 10 years in Class II Grade II be calculated from the day to which his appointment was antedated and ordered for him to be granted incremental credit.

The Petitioner in the instant case argues that the order made by the Administrative Appeals Tribunal in respect of him is similar to the order made by the Supreme

Court in the aforementioned case. However, unlike, the Petitioner in that case, he has been discriminated against by being denied back wages.

For the reasons set out above, we conclude that the Petitioner had established a violation of his fundamental right guaranteed under Article 12(1).

Accordingly, the 1st Respondent Commission is hereby directed to give effect the decision of the Administrative Appeals Tribunal dated 22.11.2011 [P17] forthwith. The 1st Respondent is further directed to act in terms of the Accountant's Service Board Circular No. 5 dated 14<sup>th</sup> March 2003 [P19] and place the Petitioner on class I on a supernumerary basis, adhering to the terms of the said Circular.

*Application allowed*

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE MURDU FERNANDO PC

I agree

JUDGE OF THE SUPREME COURT