

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

In the matter of an application for Special  
Leave to Appeal under Article 128 (2) of the  
Constitution of the Democratic Socialist  
Republic of Sri Lanka

S.C. Appeal No. 46/2011

V. I. D. J. Perera

673 D, Kandewatta Road

Battaramulla

**Petitioner**

S.C. (Spl) LA Application

No. 91/2010

**Vs.**

C.A. (Writ) Application

No. 1682/2006

1. University of Colombo

Kumaratunge Munidasa Mawatha

Colombo 03

2. Prof. Tilak Hettiarachchy, Vice Chancellor

& Chairman of the Council of the

University of Colombo.

Kumaratunge Munidasa

Mawatha, Colombo 03

3. Mr. W. N. Wilson

4. Prof. Lakshman Dissanayake

5. Prof. R. L. C. Wijesundara

6. Mr. N. Selvakumaran
7. Prof. Dulita Mendis
8. Dr. P. S. M. Gunaratne
9. Prof. S. M. P. Senanayake
10. Prof. Lalitha Mendis
11. Prof. H. D. Gunawardane
12. Mrs. Malani Peiris
13. Mr. Nalin Attygale
14. Mr. Rajan Asirwarthan
15. Dr. Tressie Leitan
16. Mrs. Ramani Amarasuriya
17. Dr. N. R. de Silva
18. Mrs. A. M. M. Hussein
19. Dr. Y. C. H. Yakandawala
20. Dr. Kingsley Wickramasuriya
21. Mr. K. Kanag-Ishwaran P.C.
22. Prof. Raja Gunawardena  
All Members of the Council of the  
University of Colombo Kumaratunge  
Munidasa Mawatha, Colombo 03
23. Prof. Hirimburegama, Director, Institute of  
Human Resource Advancement (formerly  
known as the 'Institute of Workers'  
Education') University of Colombo  
257, Bauddhaloka Mawatha  
Colombo 07

24. University Services Appeals Board  
20, Ward Place, Colombo 07
25. Justice G. W. Edirisuriya  
Chairman University Services Appeals  
Board, 20, Ward Place, Colombo 07
26. Mr. E. M. G. Edirisinghe, Vice Chairman  
University Services Appeals Board  
20. Ward Place, Colombo 07
27. Mr. Anton Alfred, Member,  
University Services Appeals Board  
20, Ward Place, Colombo 07

**Respondents**

**AND NOW BETWEEN**

University of Colombo Kumaratunge  
Munidasa Mawatha, Colombo 03.

**1st Respondent- Petitioner**

**Vs.**

1. V. I. D. J. Perera  
673 D, Kandewatta Road  
Battaramulla

**Petitioner ~ Respondent**

2. Prof. Tilak Hettiarachchy  
Vice Chancellor & Chairman of the  
Council of the University of Colombo  
Kumaratunge Munidasa Mawatha  
Colombo 03
3. Mr. W. N. Wilson
4. Prof. Lakshman Dissanayake
5. Prof. R. L. C. Wijesundara
6. Mr. N. Selvakumaran

7. Prof. Dulita Mendis
8. Dr. P. S. M. Gunaratne
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(formerly known as the 'Institute of  
Workers' Education') University of  
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Colombo 07

24. University Services Appeals Board 20,  
Ward Place, Colombo 07

25. Justice G. W. Edirisuriya Chairman  
University Services Appeals Board 20,  
Ward Place, Colombo.07

26. Mr. E. M. G. Edirisinghe  
Vice Chairman University Service Appeals  
Boards 20, Ward Place, Colombo 07.

27. Mr. Anton Alferd  
Member, University Service Appeals  
Boards  
20, Ward Place, Colombo 07.

**Respondents-Respondents**

**BEFORE :**

Chandra Ekanayake J  
Priyasath Dep PC. J  
B. Aluwihare PC. J

**Counsel:**

M.A. Sumanthiran with Riad Ameen  
for the 1<sup>st</sup> Respondent-Petitioner

Senani Dayarathne with Eshanthi  
Mendis for the Petitioner-Respondent

**ARGUED ON:**

02.09. 2014

**DECIDED ON:**

07.10. 2015

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## ALUWIHARE PC. J

This matter relates to an application for Special Leave by the Petitioner–Respondent-Appellant (hereinafter referred to as the Appellant) challenging the decision of the Court of Appeal of the order dated 26 April 2011 quashing the decision of the University Services Appeals board (hereinafter referred to as USAB) dated 2nd May 2006.

Having heard the learned Counsel in support of this application as well as the learned Counsel for the Petitioner- Respondent (hereinafter referred to as the Respondent) Special Leave to Appeal was granted by this Court on 29.04.2011 on the questions of law enumerated in Paragraph 22 (a) to (g) of the Petition (of the Appellant) dated 04.06.2010 which are reproduced below.

- a) Having concluded that the Petitioner-Respondent left the Island pending disciplinary proceedings without obtaining the concurrence of the disciplinary authority, contrary to Paragraph 20:1 of Chapter XXII of the Establishment Code, did the Court of Appeal err and/or misdirect itself in law in construing the requirement in Paragraph 20:1 as mere technicality and did not involve a consideration of the merits?
- b) Did the Court of Appeal err and/or misdirect itself in law by failing to appreciate that the reason for not granting approval for the application for sabbatical leave for the second time unlike in the previous instance was because disciplinary proceedings were pending against the Petitioner-Respondent and the Council of the Petitioner-University was carefully deliberating upon the imposition of an appropriate punishment?
- c) Did the Court of Appeal err and/or misdirect itself in law by condoning the conduct of the Petitioner-Respondent in leaving the Island without the aforesaid concurrence on the ground that the Petitioner-University had not responded to the application for sabbatical leave at a time when it was deliberating upon the appropriate punishment that should be imposed on the Petitioner-Respondent?
- d) Did the Court of Appeal err/or misdirect itself in law by failing to appreciate that condoning the conduct of an employee who submits an application for sabbatical leave and leaves the Island without receiving approval would set an undesirable precedent in the public service

whereby an employee could simply not report for duties after submitting his/her application for leave without awaiting approval for such leave?

- e) Did the Court of Appeal err/or misdirect in law by concluding that the Petitioner-Respondent did not have the requisite *animus revertendi* to vacate his post when the Petitioner-Respondent left the Island in August 2004 without the concurrence of the Petitioner-University and intentionally remained overseas, even thereafter for several months notwithstanding a written communication by the Petitioner-University to the Petitioner-Respondent requesting him to report for duties?
- f) Having decided to direct the Universities Appeals Board to go into the merits of the case of the Petitioner-Respondent, did the Court of Appeal err and/or misdirect itself in law by expressing opinions on the matters that the Court of Appeal regarded as being the merits of the case?
- g) Did the Court of Appeal err and/or misdirect in law by the identification of several matters regarded as being the merits of the case that are not relevant for the determination by the Universities Services Appeals Board that would result in the Board acting *ultra vires* by taking irrelevant matters into consideration?

When this matter was supported for leave, the Learned Counsel for the Respondent raised two questions of law for the consideration of this court.

- h) Given the findings set out in the judgment of the Court of Appeal dated 26.04.2010 has the Court of Appeal erred in not granting the relief sought by the Respondent in prayers 'C' and 'D' of the Petition dated 17.11.2006 filed in the Court of Appeal?
- i) If the above issue is answered in the affirmative by this Court, whether the Respondent is entitled to get those reliefs from the Supreme Court?

In view of the two questions referred to above (i.e (h) and (i)) raised by the learned Counsel for the Respondent and accepted by the Court, learned Counsel for the Appellant suggested the following additional question of law.

- j) Whether the Petitioner-Respondent without filing a proper Petition of Appeal against the Judgment of the Court of Appeal, is entitled in law to seek the relief set out in the two questions suggested.

I wish to deal with the facts at length in view of the two questions of law, namely (h) and (i) above raised by the Respondent and the fact that the principle of proportionality may have to be considered in the instant case.

Facts pertinent to this Appeal are as follows:

The Respondent, a senior lecturer grade 1 at the time, of the University of Colombo, applied for sabbatical leave on 05.07.2001 for a period of one year by his application dated 19.06.2001 marked as 'P9'. In the said application, sabbatical leave was requested by the Respondent on a staggered basis, in accordance with Clause 9 of the University Grants Commission Circular No.408 dated 20.10.1989 'P8'.

Sabbatical leave was applied for, for the purpose of engaging in comparative study on the *'Impact of Mechanization on Labour Relations in Sea Ports'* at the Ports of New Castle-United Kingdom, Colombo and Kashima-Japan. This was approved both by the relevant Ministry (Annexure 4 P10) and the then Vice Chancellor of the University by the letter of the Vice Chancellor dated 22<sup>nd</sup> June 2001 (Annexure 3 of P10). Consequently the Respondent departed to United Kingdom in July 2001 to commence his studies. After utilising two months of the approved sabbatical leave of twelve months, the Respondent returned to Sri Lanka in September 2001 and resumed duties in his substantive post at the University on 13.09.2001. In the midst of carrying out his duties as a lecturer, the Respondent asserts that he proceeded with the proposed second limb of his study at the Port of Colombo. During this period, disciplinary proceedings (For misconduct- not obeying the orders of his superiors) were held against the Respondent and as a result the Respondent was placed on compulsory leave with full pay by letter of the 2<sup>nd</sup> Respondent (Vice Chancellor of the Appellant University) dated 06.05.2003 ( P13).

During the period of the disciplinary inquiry which dragged on for a period of 21 months, the Respondent was awarded a fellowship for post-graduate research under the 'Japan Foundation Fellowship Programme 2004-2005' for a period of one year(P20). The Respondent was required to confirm the acceptance or declination of the offer within 30 days. The Respondent, desirous of making use of the said Fellowship, which afforded him the opportunity to conduct a 22 month study in Japan, by letter dated 25.06.2004 ('P21') sought to combine the ten months sabbatical leave that had already been granted to him, but which he had not utilised with a further one year's sabbatical leave which he was entitled to, by virtue of having completed nearly 14 years' of service by that time.



However, there had not been any response or acknowledgement by the Appellant or the 2<sup>nd</sup> Respondent (V.C), regarding the aforesaid request made by the Respondent in spite of having sent two reminders dated 13.07.2004 (P22a) and 26.07.2004 (P22b), channelled through the Director of the Institute of Workers Education to the Appellant. In the absence of a response from the Appellant or any other authority under the Appellant, the Respondent left for Japan on 10.08.2004 on the sabbatical leave that the University had already granted him in 2001 which still remained unutilised. Although this may not have a direct bearing on the issues that are to be determined by this court, to appreciate the perspective in which the leave application of the Respondent was dealt with, the document “P25” is very instructive and is worthy of reference. Particularly so, considering the reason given for treating the Respondent as an employee who has vacated his post.

“P25” is a letter addressed to the 2<sup>nd</sup> Respondent (Vice Chancellor) by the deputy registrar of the Appellant University dealing with the issue of the Respondent leaving the island without obtaining the required approval. The Deputy Registrar acknowledges in P25 that the application for sabbatical leave (in fact the application for leave was for the utilisation of the balance instalment of the Respondent’s sabbatical leave which had been granted by the former Vice Chancellor Dr.Savithri Goonesekara) was submitted by the Respondent on 25<sup>th</sup> of June 2004 and forwarded to the Appellant (University) by the Director of Institute of Worker Education on the 6<sup>th</sup> of July 2004. Deputy Registrar also acknowledges receipt of two reminders dated 13<sup>th</sup> and 27<sup>th</sup> July 2004 sent by the Respondent with regard to his application. The Deputy Registrar in the same letter refers to the failure on the part of the administration to place the Respondent’s application for consideration. The application has only been placed before the Council on the 11<sup>th</sup> of August 2004, which is six weeks after the submission of the leave application. This is in spite of the letter P20 stating the fellowship commences on the 31<sup>st</sup> July 2004. It may be mentioned, that quite in contrast, when the Respondent obtained sabbatical leave by his letter dated 18<sup>th</sup> June 2001, the then Vice Chancellor Prof Savithri Goonesekara not only sought approval from the relevant ministry within 3 days (22-June 2001) but also made a specific request to the education authorities to have the leave approved without delay to enable the Respondent to proceed overseas on his sabbatical leave as scheduled. (Annexure 3 of P10). In the instant situation the Respondent asserts that there was no response either to his application for leave or to the reminders. In January 2005 however, which was almost six months later, he was requested to report back to work. The Respondent by “P27” had brought to the attention of the 2<sup>nd</sup> Respondent, that he had commenced his

research and had renewed his request for sabbatical leave up to mid-August to complete the research he has commenced.

The Vice Chancellor (2<sup>nd</sup> Respondent) having remained silent for nearly 10 months, by letter dated 5<sup>th</sup> April 2005 (P29) through the acting Vice Chancellor, called for an explanation from the Respondent for leaving the country without obtaining the necessary approval from the University, to which the Respondent replied by “P30” setting out the reasons and the circumstances under which he had to live abroad. Subsequently, by letter dated 19<sup>th</sup> –May-2005 (P31) the 2<sup>nd</sup> Respondent (V.C), has informed the Respondent that the Council of the Appellant University, which he chaired, has decided to treat the Respondent as having vacated his post with effect from 5<sup>th</sup> January 2005.

It is ironic that the decision of Inquiry Officer was made known the day following the Respondent’s departure to Japan, i.e,11.08.2004. The Respondent was found guilty and the Council (of the Appellant) decided that he would not be considered for any administrative position for 3 years with the University as a punishment.

The Respondent was informed of this on 05.01.2005 and he was requested to report for duty at the Institute of Workers’ Education (IWE) with immediate effect by the letter marked ‘P26’. In response the Respondent by letter dated 19.01.2005 (‘P27’) explained the reasons for his departure and his readiness to report for duty by mid-August 2005. However, the Council of Appellant at its 365<sup>th</sup> meeting held on 11.05.2005 decided to treat the Respondent as having vacated the post and he was notified to that effect by the letter dated 19.05.2005.(‘P31’).

Being aggrieved by the above decision of the Council of the 1<sup>st</sup> Appellant, Respondent appealed to the University Services Appeals Board (herein after referred to as USAB) by letter dated 10.06. 2005 (‘P32’). The USAB dismissed the appeal by its order dated 02.05.2006 (Annexure to ‘P37’).

The Chairman USAB, without going into the merits of the matter, stated that he is interested in examining “*one crucial point which goes to the root of the appellant's case*” and appeared to have dismissed the Appeal of the Respondent, relying purely on Paragraph 20:1 of the Establishment Code of the University Grants Commission (UGC).

Paragraph 20:1 states thus;

*“a person against whom disciplinary proceedings are pending or contemplated should not be granted permission to leave the Island without the concurrence of the disciplinary authority”*

The Respondent then filed a writ application against the order of the USAB before the Court of Appeal and the Court of Appeal in exercising writ jurisdiction, quashed the order of the University Services Appeal Board (USAB) decision dated 2<sup>nd</sup> May 2006 (P37) by its order dated 26.04.2010 directing the USAB to go into the merits of the case and to make an appropriate order.

This appeal is against the said decision of the Court of Appeal.

The main issue that has to be decided is whether the Respondent acted contrary to the Paragraph 20:1 of the Establishment Code of the UGC, when he left the country without obtaining the concurrence of the disciplinary authority. This court is of the view that the act of the Respondent leaving the country ought not to be considered in isolation, but should be considered in the backdrop of the series of events that were referred to earlier which I wish to summarise here.

As far as the disciplinary action against the Respondent was concerned, the directive of the Council was to have the disciplinary inquiry against the Respondent concluded in 3 months but it dragged on for an inordinately long period of 13 months. The Report of the Inquiry Officer (P19) is dated 16<sup>th</sup> June 2004. The inquiry officer having considered the evidence placed before him, had made his findings regarding each of the charges preferred against the Respondent. Hence the disciplinary proceedings, technically, had been concluded by mid June. Thus, it would be reasonable to infer that the said report was available to the Appellant, at the time the Respondent informed Appellant of his intention to utilise his already approved sabbatical leave on 04.07.2001 (Annexure 4 of P10). This letter was followed by two reminders dated 13<sup>th</sup> and 27 July 2004 (P22 (a)) & (P22 (b)) which stand acknowledged by an officer of the Appellant. At the very least the Appellant and the 2<sup>nd</sup> Respondent (V.C) had a duty to consider the request of the Respondent.

The learned Counsel on behalf of the Appellant University, strenuously argued that the Court of Appeal erred in treating non-compliance on the part of the Respondent, a mere “technicality”. The learned Counsel contended that the entire public service operates on a set of rules and regulations contained in the Establishment Code that governs numerous aspects of employment, including overseas leave. The learned Counsel stressed that these rules in the

Establishment Code cannot be treated as a mere technicality, but as having the force of written law, and has been considered as such in a number of decisions of this court. I am certainly in agreement with the submission made by the learned Counsel.

It was also submitted on behalf of the Appellant that the Court of Appeal erred by failing to consider that the Council of the Appellant was not in a position to consider the application submitted by the respondent, (seeking permission to utilise his sabbatical leave) as the Council was deliberating on an appropriate punishment that should be imposed on the Respondent in view of the report of the Inquiry Officer.

However the decision of the Respondent to leave the country, however, must be viewed in the backdrop of a number of factors I have referred to earlier.

Firstly, by 16 June 2004, technically, the disciplinary proceedings were over and the findings were tabled before the Council of the Appellant on 14 June 2004. This was one week after the respondent sought permission to make use of his balance sabbatical leave. The officials of the Appellant university admittedly did not respond to either the application or the reminders sent by the Respondent, who had to commence his research before 31<sup>st</sup> -07-2004, in terms of the grant. It appears that the officials of the Appellant university had either by design or by remise avoided responding to the communications by the Respondent. The manner in which the officials of the appellant had acted in this instance cannot be condoned by any measure. As to sabbatical leave this court in the case of *Prof. J.W. Wickramasinghe vs. The University of Sri Jayawardenapura, et al.* (2004) 1 SLR 321 held that, sabbatical leave which has already been granted, gives rise to a legitimate expectation that such leave can be fully availed of, notwithstanding an attempt by the relevant University to curtail or truncate the same.

Sec: 20:1 of the Chapter XXII of the Establishment Code of the University Grants Commission, which deals with the disciplinary procedure, casts a burden on the administration and not on the applicant.

Sec: 20:1 reads thus *“A person against whom disciplinary proceedings are pending or contemplated, should not be granted permission to leave the island without the concurrence of the Disciplinary Authority.”* (emphasis added)

- (1) It is clear from the above provision of the Establishment Code, a duty is cast on the officials who are vested with the authority to consider the leave application of an employee, to seek the concurrence of the disciplinary authority, when leave is sought by an employee. This certainly is not a case where the Respondent left the country, keeping the administration in the dark
- (2) Here is an employee (the Respondent) whose sabbatical leave that had been approved on a split basis, as permitted by virtue of clause 9 the University Grants Commission circular number 408 dated 20. 10. 1989 was seeking to enjoy the balance period of his un utilised leave.
- (3) The Appellant Council was put on notice that the disciplinary inquiry had been concluded and its findings had been placed before the said Council.
- (4) There is no material before this court that the Council had taken steps to inform the respondent that the matter is being deliberated and for that reason he should refrain from leaving the Island.
- (5) The Appellant Council dragged its feet for nearly 4 months to reach a decision with regard to the punishment that is to be imposed on the respondent (1R 14)
- (6) The Court of Appeal correctly observed that the Respondent left with a Hobson's choice; when there was no response from the authorities with regard to either to his application for leave or the reminders thereof.

The USAB if it were to arrive at a just and rational decision, ought to have considered all the matters placed before it, prior to arriving at a decision.

I hold the Court of Appeal did not err with regard to the questions of law in paragraphs (a) to paragraph (d) and (f) referred to above.

The appellant also has raised the issue in paragraph (e) as to whether the Court of Appeal has misdirected itself in law by concluding that the Respondent did not have the *animus revertendi*, when he left the Island without obtaining the concurrence of the disciplinary authority and intentionally remaining overseas in spite of communications requesting him to return. Their Lordships of the Court of Appeal have considered the efforts taken by the Respondent to obtain a response from the Appellant. By the letter addressed to the Second Respondent (V.C) dated 19 -01- 2005 (P27) the Respondent has clearly expressed his desire to report back for duty in mid August 2005 and by a similar letter dated 18- 04 -2005 (P 30) the Respondent has stated that he would not have left the Island in the manner in which he did, had the Appellant duly informed him that the

2<sup>nd</sup> Respondent (V.C) cannot consider his the application in view of the pending disciplinary inquiry.

The conduct on the part of the Respondent clearly demonstrates that he had had no intention of abandoning his post and he had the *animus revertendi*. Thus, I am of the view that the Court of Appeal had not erred, with regard to the said issue as well.

Before I deal with the two questions of law raised by the Respondent, this court needs to answer the additional question of law raised by the appellant to the effect, whether the Respondent without filing a proper petition of appeal, is entitled in law to seek the relief set out in the additional questions suggested on behalf of the Respondent, i.e. issues (h) and (i)

It was argued on behalf of the appellant that the Respondent could have filed an application for special leave to appeal against the judgement of the Court of Appeal if the Respondent was aggrieved by their Lordships' judgement. The learned Counsel submitted that it is not open to the Respondent at this stage to seek additional relief which had not been granted by the Court of Appeal, in these proceedings. The attention of this court was drawn to the fact that the Rules of this court do not permit such a course of action either.

The contention of the learned Counsel on behalf of the Appellant was, that the application by the Respondent before the Court of Appeal was an application for a writ, consequent to a decision of the USAB, whereby the Court of Appeal was expected to perform a review function and not to exercise an appellate jurisdiction. It was further argued that the Court of Appeal in view of its role as a court of review could have only quashed the decision of the USAB and directed it to re-hear the matter. I have considered the decisions in the cases of *Julian vs. Sirisena Cooray* (1993) 1SLR 238 and *Perera vs. Fernando* (1999) 3 SLR 259 where the Supreme Court was not inclined to grant relief due to the absence of a cross appeal. In answering the question of law raised by the Appellant in paragraph (j), I hold that the Respondent is not entitled in law to seek the relief as set out in questions of law raised under paragraphs (h) and (I). Thus answering the said questions of law does not arise.

For the reasons set out above, I affirm the order of the Court of Appeal dated 26 - 10 -2010 and dismiss this appeal.

This Court observes that the Respondent has been out of employment with the Appellant University since 2005 which is more than 10 years.

In the interest of justice this court directs the 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup>, and 27<sup>th</sup> Respondents or their successors to comply with the order of the Court of Appeal within three months from today.

The Respondent Petitioner is entitled to costs of Rs. 50,000

Appeal dismissed.

Judge of the Supreme Court

Chandra Ekanayake. J

I agree

Judge of the Supreme Court

Priyasath Dep PC. J

I agree

Judge of the Supreme Court

